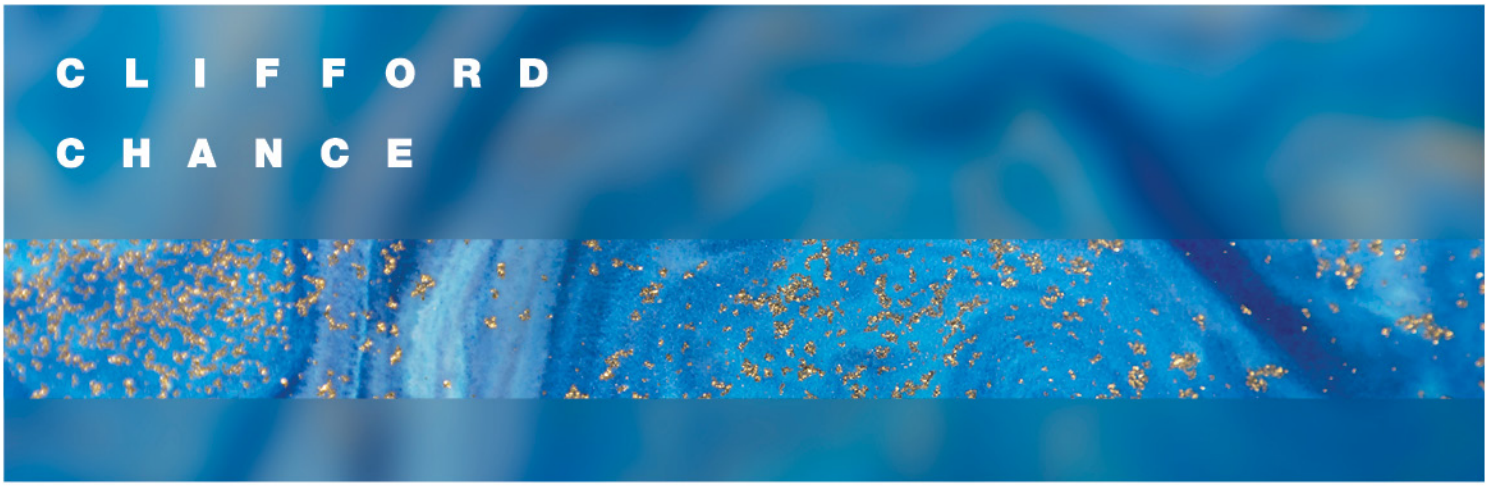


CORONAVIRUS: MANAGING YOUR COMMERCIAL CONTRACTS – THE FRENCH LAW POSITION

Whilst companies around the world assess and try to mitigate the impact of Covid-19 on their activities in these highly disrupted times, this practical note looks at some specific questions regarding the management of their contractual relationships.

The current situation has significant consequences on all commercial contracts and their performance. In this overview, we focus on French law mechanisms available to companies to (i) manage their contractual risks and liability exposure, (ii) assess the remedies available to them and (iii) prepare for the longer term.

The issues covered in this note are complex and highly fact-dependent. The situations may obviously also differ depending on the nature of the contract and the industry in which the relevant company is operating. In addition, the regulatory and legislative landscapes are constantly and quickly changing, and issues and solutions presented in this note may therefore evolve from one day to the next as new laws and regulations are adopted to deal with Covid-19.

Key issues

- Acting and performing contractual commitments in good faith remains a key principle in the current environment.
- Mitigating the liability exposure in the event of non-performance needs to be assessed on a case by case basis, depending for instance on the existence of a force majeure event and/or non-performance by the other party ("*exception d'inexécution*").
- Whilst performance of the contract remains the principle in the current context, associated sanctions may be suspended as a result of recent legislation in France.
- Parties may want to consider a longer term approach for their contractual relationships, including assessing the possibility to renegotiate some of them.

MANAGING EXPOSURE TO LIABILITY FOR NON-PERFORMANCE

The current situation due to Covid-19 has undoubtedly impacted the performance of many commercial contracts. Generally speaking, failure to perform a contract results in the non-performing party being exposed to contractual liability. However, a non-performing party will not be held liable in certain cases, in particular if its non-performance is attributable to a force majeure event and/or to non-performance by the other party.

Relying on a force majeure event causing the failure to perform?

Since the outbreak of Covid-19, force majeure has been in the spotlight as the main legal argument to justify the non-performance of many contracts. Force majeure is a statutory regime[1], applying where a specific type of event prevents a party from performing its obligation. More specifically, this requires

[1] Provided for in article 1218 of the French Civil Code, it is applicable to all contracts concluded (or possibly renewed) since 1 October 2016 unless provided otherwise by the parties. For contracts concluded before 1 October 2016, the situation is in principle governed by a case law regime (whose criteria are generally similar to those of the statutory regime). There are specificities applicable to force majeure in the context of public law contracts. These are not addressed here.

an event (i) that is beyond the control of the relevant party, (ii) that could not reasonably be foreseen at the time of the conclusion of the contract and (iii) whose effects cannot be avoided through appropriate measures.

Why is force majeure key to manage the performance of contracts?

The legal concept of force majeure is of course of paramount importance, as it can act to release a party from its liability for non-performance. Where force majeure is established, the following important consequences apply at law:

- For the party affected by force majeure: performance of its relevant obligation is suspended on a temporary basis (this is the most frequent outcome in practice).
- For the party not affected by force majeure: where its counterparty does not perform as a result of force majeure, it may in turn be entitled to suspend the performance of its own (related) obligations.
- For both parties: the contract (or the relevant part of the contract) can be terminated where a party is prevented from performing on a permanent basis (e.g. destruction of the production facilities by a natural disaster) or where the delay that would result from the force majeure justifies the termination. Termination is said to be "automatic" ("*de plein droit*")[2], although in practice a party would in principle still need to invoke it.

Force majeure clauses must be checked on a case-by-case basis

The starting point for an efficient contract management is to check the existence of specific clauses dealing with force majeure in the contract. This is key, as the legal regime would only apply if and to the extent the relevant contract does not already include contractual provisions dealing with the definition of force majeure for that contract, and the consequences that the parties want to associate with force majeure.

In the silence of the contract, would Covid-19 qualify as force majeure?

A case-by-case analysis is required. For Covid-19 to qualify as force majeure, it would need to be established that it satisfies the general criteria of force majeure, as referred to above, and prevents performance of the relevant obligation *in concreto*.

Performance should be rendered impossible, and not merely more difficult or costly.[3]

Some recent case law seems to regard consequences linked to the Covid-19 epidemic as force majeure.[4] However, the position in these rulings did not relate to contracts. In any event, it cannot be generalised and cannot be applied, without distinction, to the variety of existing situations.

Whether Covid-19 or related measures constitute force majeure is indeed a highly fact-dependent question (e.g. depending on the nature of the contract / obligations, the sector, the territory, the impact of public authorities' orders on the business).

---

2 The situation may have been different under the previous case law regime.

3 The hardship regime (described later in this briefing) could be an alternative in the event that performance is costlier, but its effects are different.

4 See Colmar Court of Appeal, 12 March 2020, No. 20/01098 and 23 March 2020, No. 20/01206. In these very recent decisions, Covid-19 / related measures were mentioned as constituting force majeure. This case law should be treated with great caution however, including as force majeure is a highly fact-dependent question, and the rulings were in very specific contexts.

For instance, it will be very difficult, if not impossible, to meet the force majeure criteria where there is a reasonable way of overcoming the difficulties arising from the pandemic that allows the normal performance of the contract (e.g. the use of remote working).

***Illustration**: A delivery that is not completed on time will not automatically be excused. It will have to be established that there was no possibility of having recourse to substitutes or alternative circuits.*

Similarly, in the absence of contractual provisions to the contrary, it is highly unlikely that Covid-19 would qualify as an event of force majeure preventing a party from satisfying its payment obligations in so far as the relevant party owns sufficient assets[5].

The position may evolve over time

What constitutes force majeure at a given point in time may no longer qualify at a later point, as Covid-19 involves a fast-evolving situation.

***Illustration 1**: A party becomes able to avoid the effects through measures that were not previously available or because an event stops being unforeseeable.*

***Illustration 2**: 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 some of the related measures, were unforeseeable at the time of conclusion of the contract[6].*

"*Fait du prince*" as a specific case of force majeure

Numerous governments and public authorities around the globe have adopted and continue to adopt regulatory measures to fight the pandemic and its spread. France is no exception, with rigorous confinement measures implemented since 17 March 2020.

These measures could correspond to a "*fait du prince*", i.e. force majeure resulting from a competent authority taking lawful and legally binding measures that themselves prevent a party from performing its obligations. In such a case, it would no longer be Covid-19 that is argued to constitute force majeure, but those measures themselves.

"*Fait du prince*" is a type of force majeure. Accordingly, it does not require the satisfaction of other conditions or entail additional consequences compared to any other case of force majeure but it does make the demonstration of the existence of a force majeure event easier.

This being said, the affected party will still need to be able to evidence that the relevant measures render performance impossible for it, and not just more difficult or onerous.

***Illustration**: "Fait du prince" would be likely to apply where mandatory confinement measures prevent the normal continuation of the business activity*

---

5 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*".

6 See Saint-Denis de la Réunion Court of Appeal, 29 December 2009, No. 08/02114: "*(…) it must be stressed that the chikungunya epidemic began in January 2006 and cannot be considered as an unforeseeable event justifying the termination of the contract (…).*". See also Besançon Court of Appeal, 8 January 2014, No. 12/02291, pursuant to which the H1N1 flu epidemic, which had been widely announced and planned, could not be regarded as an unforeseeable event for the parties at the time of the conclusion of the contract.

and no remote working or other alternative is possible. Conversely, if a service can be provided by means of remote working, there is no impossibility of performance and therefore "fait du prince" / force majeure does not apply.

Suspending performance in response to the other's non-performance?

When faced with the other party's non-performance ("*inexécution*"), it is possible for a party to reconsider the performance of its own obligation(s).

The legal concept of *"exception d'inexécution*"[7] could indeed enable the latter to suspend its own performance, without incurring the risk of being held liable. In terms of effect, the right to suspend performance pursuant to the "*exception d'inexécution*" is therefore similar to force majeure. However, whereas force majeure requires demonstrating that a specific event, satisfying different objective criteria, has occurred and prevents performance of the relevant obligation, the "*exception d'inexécution*" is a remedy that arises as a result of the other party failing to perform its obligation.

There is no express requirement for the other party to be "at fault" in its non-performance ("*inexécution fautive*") to be able to rely on the *"exception d'inexécution*". On that basis, some argue that it is the "*exception d'inexécution*" concept that enables a party, where its counterparty is not performing its essential contractual obligations on the grounds of force majeure, to suspend the performance of its own contractual obligations that are directly linked to the un-performed obligations (please see above).

A company can suspend its performance as a reaction to the other party's non-performance, not only where that non-performance has actually occurred, but also possibly in anticipation of the non-performance. In both cases, specific conditions have to be satisfied.

Here again, the regime at law would only apply if and to the extent the parties have not introduced specific contractual provisions dealing with the relevant issues. In order to prevent disputes as to the conditions upon which a party can suspend the performance of its obligations, the parties may contractually define what is likely to constitute a relevant non-performance or the consequences that they consider sufficiently serious.

Suspending performance further to an actual non-performance by the other party

A party may suspend performance if:

- There is already an actual non-performance by the other party; and
- That non-performance is sufficiently serious.

Illustration*: The delivery, during a severe pandemic crisis illustrated by a high contamination rate, of anti-projection masks that do not comply with minimum safety standards, would constitute a sufficiently serious non-performance.*

[7] Now codified under articles 1219 and 1220 of the French Civil Code. It is applicable to all contracts concluded (or possibly renewed) since 1 October 2016 unless provided otherwise by the parties. For contracts concluded before 1 October 2016, the situation is in principle governed by a case law regime.

Suspending performance for an anticipated non-performance by the other party[8]

Where a party wishes to suspend its performance in response to an anticipated (and not an actual) non-performance, higher standards apply:

- It must be obvious ("*manifeste*") that the other party will not perform on time.

Illustration*: This could be the case, for example, of a company that announces the interruption of all activities in a given field as a consequence of a closure of all of its production plants for an indefinite period of time.*

- The effects of the non-performance must be sufficiently serious.

Unlike what applies where the non-performance has already occurred, here it is not the seriousness of the (anticipated) non-performance itself that is taken into account, but the seriousness of the consequences of that non-performance.

Illustration*: The company faces a risk of insolvency as a result of the contractor's breach of contract.*

- The suspension must be notified promptly to the other party. This is also a way to prompt a reaction from the other party and give it an (ultimate) chance to confirm its performance.

WHAT REMEDIES FROM THE DEFAULTING PARTY?

When confronted with a breach of contract, the main question for each company is what remedies are available to it in order to manage the enforcement of its contractual rights.

These remedies are set out at law and/or are agreed contractually between the parties. They may include such things as specific performance, damages for breach of contract, the right to obtain a proportionate price reduction, penalty clauses ("*clauses pénales*") and termination rights.

However, in the current environment, some existing contractual remedies have been impacted, and their effects suspended. This is the result of a number of temporary and exceptional measures introduced in France to manage the consequences of Covid-19. Indeed, France introduced an emergency law dated 23 March 2020[9] to deal with Covid-19. It notably implements a state of "sanitary" emergency and allows the Government to take temporary measures by way of ordinances.

More than 40 such ordinances have already been adopted, covering a great many different topics (e.g. paid leave, working hours, public procurement, rules and procedures before the courts or competent authorities, corporate issues, the payment of rent and water, gas and electricity bills with respect to professional and commercial premises, bankruptcy and related proceedings, intellectual property, professional training, etc.).

One of the ordinances that has been adopted – ordinance n°2020-306 of 25 March 2020 (as subsequently completed and amended by ordinance n°2020-

---

8 This would apply to contracts concluded since 1 October 2016 (or possibly renewed after that date) unless provided otherwise by the parties. For contracts concluded before 1 October 2016, the situation is more uncertain.

9 Loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de Covid-19.

427 of 15 April 2020) (the "**Ordinance**") – introduces provisions that temporarily paralyse or suspend the effects of certain measures and clauses that apply to breach of contract and extends certain timeframes with respect to the termination of contracts.[10]

All these measures introduced by the Ordinance are temporary[11] and they are defined by reference to a specific date (12 March 2020) and a specific timeframe (the "**Reference Period**")[12]. The duration for which the relevant measures / clauses are suspended varies (please see below). To provide more clarity, we have also set out below a high-level timeline of the key milestones and periods under the Ordinance.

The Ordinance gives rise to questions of interpretation, all the more so following the adoption of ordinance n°2020-427 of 15 April 2020, and various aspects remain open. Key points regarding these provisions include the extent to which the parties can deviate from them, and whether they could be qualified as "overriding mandatory provisions" in the context of international contracts.

Impact on penalty clauses and "*astreintes*"

(i) Suspension of "*clauses pénales*" and "*astreintes*" that took effect before 12 March 2020

There is a specific treatment for these measures / clauses, where they took effect before 12 March 2020. In such a case, their application is suspended throughout the entire Reference Period.

Illustration*: A contract provides for the delivery of goods on 8 March 2020, with penalties of EUR 1,000 per day's delay applying from 9 March 2020. The clause started to apply on 9 March 2020, if the relevant party failed to deliver on time. However, its application will be suspended as from 12 March and until the end of the Reference Period. The application will in principle resume on the day following the end of the Reference Period, if the relevant party has still not performed in the meantime.*

(ii) Suspension of "*clauses pénales*" and "*astreintes*" where the relevant timeframe expires during the Reference Period

"*Clauses pénales*" and "*astreintes*" are suspended where they apply to a failure to perform an obligation within a given timeframe, and that timeframe expires during the Reference Period.

Basically, the idea of the Government appears to be to suspend their application for a period reflecting the impact of the state of "sanitary" emergency measures on the performance of the contract[13]. That period is calculated by looking at the time that has elapsed between (i) 12 March 2020 (or the date on which the relevant obligation "arises"[14], if later) and (ii) the date on which the obligation should have been performed, and adding that to the Reference Period.

---

10 The Ordinance covers various other topics, and it may also impact such things as statutory limitation periods.

11 Although some of the measures introduced by ordinance n°2020-427 of 15 April 2020 do not appear to be clearly limited in time.

12 Meaning the period from 12 March 2020 until one month after the end of the state of sanitary emergency that began on 24 March 2020 for two months in principle (i.e. until 24 June 2020 based on the current situation).

13 Under the Ordinance as initially drafted (before the publication of ordinance n°2020-427 of 15 April 2020), these measures and clauses applied / took effect one month after the end of the Reference Period (i.e. on 24 July 2020 based on the current situation), if the relevant party had still not performed by then. It was therefore a "one size fits all" approach.

14 "*(…) la date à laquelle l'obligation est née*".

The relevant "*clauses pénales*" or "*astreintes*" will apply / take effect upon the expiry of that suspension period, if the relevant party has still not performed by then.

Illustration 1 *(contract concluded before 12 March 2020): A contract for the delivery of goods that was concluded before 12 March 2020 provides for delivery by 30 March 2020 (i.e. 18 days after 12 March 2020), failing which the defaulting party pays penalties. Applying the new rules, if the relevant party fails to deliver on 30 March 2020, the penalty clause will apply only 18 days after the end of the Reference Period, if the relevant obligation has still not been performed by then.*

Illustration 2 *(contract concluded after 12 March 2020): A contract entered into on 1 April 2020 provides that penalties apply, in the event of a failure to deliver the goods, on 15 April 2020. If the relevant party fails to deliver on 15 April 2020, this 15-day period (i.e. the period between the date on which the "obligation arises" and the date on which the obligation should have been performed and the penalties were to apply) will serve to calculate the suspension period. The penalties will therefore apply 15 days after the end of the Reference Period, if the relevant obligation has still not been performed by then.*

(iii) Suspension of "*clauses pénales*" and "*astreintes*" where the relevant timeframe expires after the Reference Period

"*Clauses pénales*" and "*astreintes*" sanctioning a failure to perform an obligation within a timeframe that expires after the end of the Reference Period see their effect postponed for a period equal to the time elapsed between (i) 12 March 2020 (or the date on which the relevant obligation arises, if later) and (ii) the end of the Reference Period. This rule does not apply to monetary obligations however.

Currently, there doesn't appear to be a limit set by the Government on how long after the end of the Reference Period the relevant timeframe can expire to come within the scope of these provisions.

It is reasonable to expect further clarifications from the Government in the coming weeks in this respect.

Illustration*: A contract entered into prior to 12 March 2020 provides for the delivery of goods on 10 July 2020 (i.e. after the end of the Reference Period). In such a case, the date of application of the penalties sanctioning the non-performance of this obligation would in principle be postponed by a period corresponding to the entire Reference Period.*

Impact on the termination of contracts and forfeiture of rights

(i) Suspension of termination clauses and clauses providing for the forfeiture of rights ("*déchéance*") where the relevant timeframe expires during the Reference Period

Termination clauses and clauses providing for the forfeiture of a right are also suspended where they apply to a failure to perform an obligation within a given timeframe, and that timeframe expires during the Reference Period.

For these clauses, the same rules and consequences as those relating to "*clauses pénales*" and "*astreintes*" apply (please see above).

Illustration 1 *(contract concluded before 12 March 2020): Cloud computing services under a contract concluded prior to 12 March 2020 are scheduled to*

be operational on 27 April 2020 (i.e. 46 days after 12 March 2020), failing which the other party can terminate the contract. Applying the new rules, if the relevant party fails to perform on time, the termination provisions will apply only 46 days after the end of the Reference Period, if the relevant obligation has still not been performed by then.

***Illustration 2** (contract concluded after 12 March 2020): A contract entered into on 1 April 2020 (i.e. after the beginning of the Reference Period) contains a termination clause taking effect, in the event of breach, on 15 April. If the relevant party breaches the contract, this 15-day period (i.e. the period between the date on which the "obligation arises" and the date on which the obligation should have been performed and the termination clause was to apply) will serve to calculate the suspension period. The termination clause will therefore apply 15 days after the end of the Reference Period, if the relevant obligation has still not been performed by then.*

(ii) Suspension of termination clauses and clauses providing for forfeiture of a right where the relevant timeframe expires after the Reference Period

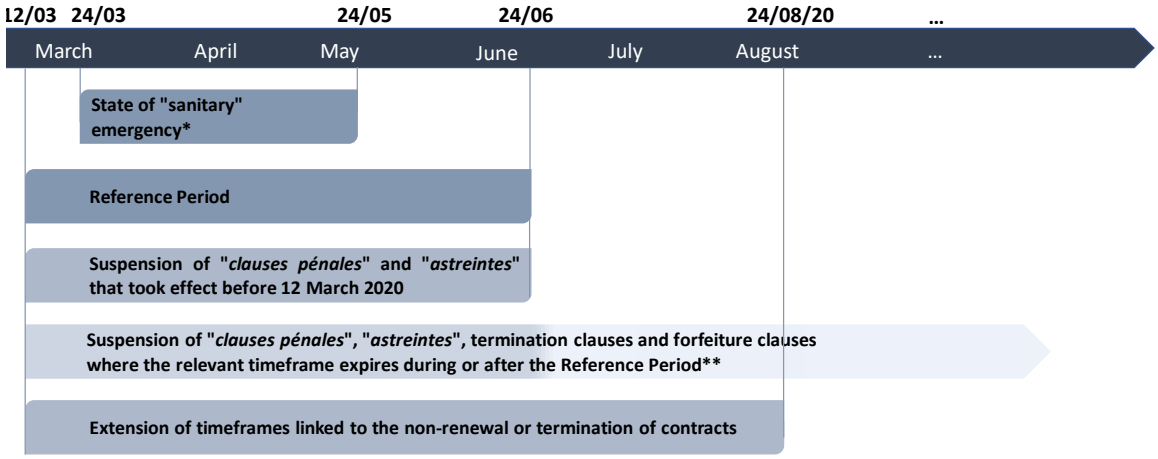
The solution applying to "*clauses pénales*" and "*astreintes*" also applies here (please see above).

(iii) Extension of the timeframe to terminate a contract where that timeframe expires during the Reference Period

Where a contract can only be terminated or is renewed failing termination within a given timeframe, and that timeframe expires during the Reference Period, then the timeframe is extended by two months after the end of the Reference Period.

***Illustration**: A three-year contract was concluded on 19 June 2017 and provides for its automatic renewal in the absence of notice to the contrary by the parties three months before the expiry of the initial term, i.e. by 19 March 2020. This deadline is therefore extended, and the parties can still object to the renewal, two months following the end of the Reference Period (i.e. until 24 August 2020 based on the current situation).*

Overview of key dates under the Ordinance



* The dates indicated are subject to a potential extension.
** Period of suspension will vary (roughly, to take account of the period of performance of the contract which has been impacted by the measures resulting from the state of sanitary emergency) and be determined on a case-by-case basis.

What impact on other remedies?

Aside from the specific clauses and measures listed above, French contract law provides for a wide range of remedies at law. These will still apply to the extent not affected by any exceptional legal or regulatory measures, or contractual provisions to the contrary.

Following a breach of contract that is not excused by one of the mechanisms managing liability exposure (*e.g.* force majeure or "*exception d'inexécution*"), it would in principle still be possible to hold the other party contractually liable and obtain compensation for breach of contract where the relevant conditions are met (damage, fault and causal link between the two). Furthermore, some other remedies remain available to the parties at law, such as:

- Compelling the defaulting party to perform its obligations ("*exécution forcée en nature*"), which may include alternatives (e.g. having the obligations performed at the defaulting party's cost).
- Accepting a "defective" performance of the contract in exchange for a proportionate reduction in the price.

DEALING WITH THE ANTICIPATED LONGER TERM IMPACT ON COMMERCIAL CONTRACTS

Several of the measures which have been presented in this note are aimed at dealing with the short-term effects of Covid-19, for instance by enabling a temporary suspension of performance pending an improvement in the situation and allowing for a subsequent resumption under normal conditions.

However, this may not be sufficient where the entire balance of contracts is materially impacted in the long-term, rendering performance not impossible

but excessively expensive. This is where the legal concept of "hardship" is worth considering.

Illustration*: A contract providing for the sale of sanitising products is impacted by the increase in world demand and sees the price of raw materials rise to such an extent that the cost price of manufacturing the products exceeds the selling price. In such a case, there is not force majeure or impossibility to manufacture these products, but an excessive production cost.*

A specific hardship regime ("*imprévision*")

When the contract becomes excessively onerous for a party (the "**Affected Party**"), it may be able to obtain a renegotiation of its terms.

In order to do so, the Affected Party could seek to rely on the specific hardship regime under French law, which applies in the silence of the contract and is subject to specific contractual provisions.[15]

Unlike force majeure and the "*exception d'inexécution*", the hardship regime only allows a renegotiation of the contract. It does not enable a party to suspend its performance or exonerate it from liability.

The threshold is less high than for the statutory force majeure regime, as it requires a situation rendering performance excessively onerous – but not impossible.

What situations trigger the application of the hardship regime?

In order to obtain a contract renegotiation, the hardship regime requires establishing that:

- There has been a change of circumstances, that was unforeseeable at the time of conclusion of the contract;
- The change of circumstances renders performance of the contract "excessively onerous" for the Affected Party;
- The Affected Party had not accepted to bear the risk.

Illustration*: Returning to the example of the contract for the sale of sanitising products impacted by the increase in global demand. Here, there is a change of circumstances that was unforeseeable at the time of entering into the contract (the epidemic inducing extremely high demand for the product), which can be argued to make the performance of the contract "excessively onerous" (due to the increase in the price of raw materials).*

In our experience, many contracts concluded since the entry into force of this statutory hardship regime actually expressly exclude (or at least adapt) it. Therefore, a case-by-case analysis will be necessary to assess whether a renegotiation can be obtained applying the statutory regime, whether the contract contains specific adaptations with respect to that regime or whether it expressly excludes it.

[15] This is a new mechanism under French law that would apply only for those contracts concluded (or possibly renewed) after 1 October 2016. Before that time, there was no specific hardship regime under French civil law, although parties at times invoked other grounds (e.g. good faith or questions of consideration) to try to obtain a contract renegotiation.

What consequences on the contract?

The Affected Party seeking to use the hardship regime must comply with the following main rules and principles:

- It must continue to perform its obligations throughout the process; unlike the force majeure concept and the concept of "*exception d'inexécution*", the hardship regime does not enable a party to suspend its performance but merely entitles it to seek to renegotiate the contract whilst continuing to comply with its obligations;
- It has to make a request to the other party to renegotiate the contract, and justify that the criteria above are met.

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.

Failing agreement within a reasonable timeframe, the judge can, upon request by one of the parties, revise the contract or terminate it.

Generally, and in accordance with one of the key principles of French contract law, the parties must conduct the negotiations, and more generally act, in good faith. Finally, in theory nothing would prevent a party from seeking to simultaneously (i) rely on a force majeure event, to be released from its liability for performance, and (ii) renegotiate the contract in the context of the hardship regime. However, this would require different conditions to be satisfied in parallel, which is highly unlikely in practice.

CONCLUSION

There is a wide range of potential "tools" that are available to the parties to a contract governed by French law and that enable them to manage their contractual relationship in an efficient manner, including in the current environment where the parties may encounter major difficulties to perform their obligations or where they may be in breach of their obligations.

A decision, based on the relevant facts, should be taken on a case-by-case basis to select the contractual "tool" that is the most appropriate for each specific situation. Consideration should be given, amongst other things, to the specific context of the relationship with the other party, as well as to the longer term and more generally, to the relevant company's strategy in managing its contracts in these times of Covid-19.

CONTACTS

Dessislava Savova
Partner

T +33 1 4405 5483
E dessislava.savova
@cliffordchance.com

Alexander Kennedy
Counsel

T +33 1 4405 5184
E alexander.kennedy
@cliffordchance.com

Olivier Gaillard
Counsel

T +33 1 4405 5297
E olivier.gaillard
@cliffordchance.com

Alexandre Manasterski
Associate

T +33 1 4405 5971
E alexandre.
manasterski
@cliffordchance.com

Jeremy Guilbault
Associate

T +33 1 4405 2480
E jeremy.guilbault
@cliffordchance.com

Julie Martres
Associate

T +33 1 4405 2493
E julie.martres
@cliffordchance.com