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Covid-19 and business contracts: What strategy to follow?

The current Covid-19 pandemic is affecting many economic operators operating in a variety of industrial sectors and raises questions about their ability to meet their contractual obligations.

While some wonder about the mechanisms that could be invoked to escape or adjust obligations, the performance of which has become difficult, excessively expensive or even impossible, others would like to block the implementation of such mechanisms.

The possibility for an economic operator to evade compliance with any of its obligations, to adapt it and, more generally, to be exposed to the risk of being held liable in the context of the current pandemic must be analyzed in the light of the contractual provisions and the specific features of the relationship.

Preliminary analysis

First of all and irrespective of the legal basis that might be invoked, it is recommended to carry out a careful review of the relevant contracts in order to determine the rights and obligations of each contracting party as well as any formality that might be applicable for the implementation of one or several contractual or legal provision(s).

In any event, the current circumstances related to the Covid-19 pandemic cannot in any way allow an unfair use of contractual prerogatives.

By way of examples, the following checks could in particular be carried out:

- the existence of essential provisions that may be affected by or implemented in the light of the current circumstances (for example, *force majeure* clause, unforeseeability ("*imprévision*") clause, renegotiation clause, adaptation clause, revision clause, etc.);
- the existence of specific formalities for any notification under the relevant contracts;

- the existence of information duties/requirements to be implemented due to changing circumstances;
- the possibility of fulfilling the relevant obligation by alternative means;
- the existence of any provision sanctioning non-performance or delayed performance[1];
- the specifics of the dispute resolution clause, including any prior formal notice, in order to anticipate any possible litigation, etc.;

The co-contracting party must also consider whether the pandemic prevents performance of the obligations or whether it merely delays such performance.

Depending on the specific features of the relationship, an amicable renegotiation or adaptation of the contractual clauses in the interest of both parties could be envisaged, in particular by clarifying the difficulties faced by each party, and in particular by informing the other party of any possible local emergency regulations affecting it.

Can force majeure be invoked?

Under French law, in contractual matters "*there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of its obligation by the debtor.*"

As such, French courts traditionally use three criteria to establish the existence of *force majeure* in contractual matters and they assess these criteria on a case-by-case basis:

- irresistibility, i.e. the impossibility for the debtor to perform its obligation;
- unpredictability, i.e. the event could not reasonably have been foreseen at the time of the conclusion of the contract; and
- exteriority, i.e. the event is beyond the debtor's control.

As the parties to a contract may under French law adjust the events likely to constitute a *force majeure* event or even waive the right to invoke it, any claim of *force majeure* must be assessed in the light of applicable contractual provisions.

It will be necessary to check the possibilities offered to the parties regarding, for example, the suspension of the performance of the obligations and the definition of the circumstances allowing it.

In the absence of any specific clause, the provisions of the French Civil Code relating to *force majeure* will apply.

Regarding specifically the possibility of considering the Covid-19 pandemic as a *force majeure* event, it should be pointed out that French courts have been so far reluctant to consider that an epidemic may constitute a

force majeure event. As such, H1N1 influenza, SARS, Chikungunya or the plague bacillus have not been considered as *force majeure* events[2].

The magnitude and the seriousness of the current pandemic could however be factors that support the classification of Covid-19 as a *force majeure* event, particularly as regards its unpredictability.

In a recent decision, the Colmar Court of Appeals ruled on the *force majeure* nature of the Covid-19 pandemic[3]. This being said, while this decision concerns administrative custody and special circumstances, it recalled that *force majeure* is assessed on a case-by-case basis.

In this respect, the contracting party invoking *force majeure* must demonstrate the existence of a direct causal link between the pandemic and the impossibility of performing its obligation and prove that it has taken all the necessary steps to prevent the event from occurring and to overcome the consequences once it has occurred[4].

It will also be necessary to demonstrate that the pandemic makes it impossible to perform the obligation in question, it being recalled that *force majeure* is not intended to apply in the case of a claim for a sum of money. In this respect, the *Cour de Cassation* (French Supreme Court) has held that "*the debtor of an unfulfilled contractual obligation of a sum of money cannot be relieved* [from its obligation] *by invoking a force majeure event*".

In such a case, it would then seem more appropriate to enter into amicable discussions with the other party to the contract, or even to invoke a possible unforeseeability ("*imprévision*") clause in order to request a renegotiation.

On the other hand, if it is really impossible to comply, for instance, with the obligation to produce as a result of the pandemic, in particular because operations can no longer be conducted due to the various measures taken by competent authorities which have for example disorganized a contracting party's business, it then appears conceivable to invoke the existence of a *force majeure* event.

In any event, the possibility of invoking *force majeure* must be assessed, in particular, with regard to the date of conclusion or renewal of the relevant contract. It must be specified that when the contract was concluded or renewed after the outbreak of the epidemic, it is to be feared that *force majeure* cannot be invoked since the situation was already known, and the unpredictability requirement would not be considered as fulfilled.

In such a case, an economic operator could nevertheless argue that all the public policy measures taken by the Government, involving in particular a closure of borders and the discontinuation of some business activities, constitute a so-called *act of the Prince* (i.e. an arbitrary decision of the Government) making it legally impossible for it to fulfil its obligations [5], it being specified that the theory of an *act of the Prince* produces the same effects *as force majeure*.

Subject to specific contractual provisions, *force majeure* allows for a suspension of contractual obligations

until the event ends whenever the impediment is temporary, provided however that performance of the obligation continues to be meaningful after the pandemic is over. In this case, the contractual obligations will be suspended without the co-contracting party being able to claim compensation for the damage suffered as a result of the suspension.

By contrast, when the impediment is permanent, for example because the goods are destroyed, the contract is automatically terminated. In a chain of contracts, it will thus be necessary to demonstrate for each contract the existence of a *force majeure* event.

Whenever obligations have been only partially performed, the two-fold question of (i) a possible refund of the sums already paid, and (ii) the release from the mutual obligations remaining to be performed will have to be thoroughly analyzed and a specific response will have to be given to each situation[6].

Can the theory of unforeseeability/hardship (“*imprévision*”) be invoked?

Whenever an event does not meet the required conditions to successfully invoke *force majeure* but makes the performance of the obligation in question more expensive, or even impossible, the contracting party may, under the theory of unforeseeability (concept close to that of *hardship*), request a renegotiation of the contract, or even ask the court to order the judicial termination of the contract (Article 1195 of the French Civil Code).

While unforeseeability/hardship, just like *force majeure*, presupposes a change in circumstances that was unpredictable at the time of conclusion of the contract, that change does not, however, make performance impossible but only “excessively expensive” for one of the contractual parties. In our opinion, unforeseeability/hardship should thus apply where there is financial difficulty in performing the obligation.

This being said, since the concept of unforeseeability/hardship was introduced into the French Civil Code by Ordinance n°2016-131 on the reform of contract law, which provisions apply only to contracts concluded as from October 1, 2016, a distinction should be made between contracts entered into before October 1, 2016 and those concluded or renewed after that date.

To put it simply:

- For contracts concluded before October 1, 2016, the current provisions of the French Civil Code are inapplicable. As such, these contracts should be carefully examined to ensure that no other provisions can be invoked (e.g. a renegotiation clause).

It should be stressed however that while case law applicable prior to the 2016 reform of French contract law considered contracts to be intangible and that it was not within the courts’ purview to modify/adapt them in the light of changing circumstances, it has nevertheless allowed on some occasions contracts to be adapted or even recognized that the parties had the obligation to renegotiate.

The contractual good faith requirement can indeed lead to an obligation to renegotiate the contract and the

contractual liability of the party that does not comply with this obligation can be sought.

By way of illustration, French courts have accepted the possibility of adapting a contract when changes in economic circumstances have had the effect of unbalancing the general scheme of the contract, thereby depriving the commitment of one of the parties of any real consideration and rendering the obligation questionable[7]. Even more explicitly, the *Cour de Cassation* has even held that *"loyalty required to negotiate, if the memorandum of understanding proved difficult to implement, and to propose acceptable conditions"* [8].

In particular, in a case concerning a supply contract, French courts have invited the parties to renegotiate their contract and ruled that a legislative amendment, unpredictable for the parties, required a revision of the supply contract in the interest of the contracting parties. Specifically, the Court of Appeals of Nancy found that *"The majority of French legal writers have, moreover, given a new dimension to the obligation to perform agreements in good faith, considering that "over and above individual interests, the contracting parties must be guided by a search for the common interest (or even the common good)"* and that *"individualistic ethics must partially give way to contractual justice, based on solidarity"* [9].

- For contracts concluded after October 1, 2016, it seems necessary to distinguish according to whether the contract contains a clause that adjusts, excludes or that does not provide for unforeseeability/hardship.

Where the contract contains a clause that adjusts the application of the concept of unforeseeability/hardship, the parties must refer to the provisions set forth in that clause because they will apply, unless they are invalid. Indeed, French courts have consistently and strictly held that contractual provisions agreed upon between the parties should be first considered.

When the contract contains provisions that excludes unforeseeability/hardship, a revision of the contract on that basis is impossible and any attempt by a party to rely on it could be considered as bad faith performance.

If the contract does not contain a clause addressing the issue of unforeseeability/hardship, the provisions of the French Civil Code can apply.

In our opinion, whenever an economic operator intends to invoke unforeseeability/hardship, it is recommended that all contractual provisions be rigorously analyzed and that verifications be carried out to make sure that all required conditions are met. If these conditions are met, it then seems possible to invoke hardship, it being specified however that the parties must continue to perform their contractual obligations.

This being said, the obligations arising from unforeseeability/hardship and the length of the negotiations that the implementation of hardship implies may be out of step with the economic interests of the parties.

Moreover, the public policy provisions set forth in Article 1104 of the French Civil Code on the obligation of good faith during the negotiation, formation and performance of contracts may also be invoked to induce a party to agree to renegotiate the terms of a current contract because of the unforeseen consequences of this

unprecedented health crisis[10].

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[1] It should be specified that Ordinance No. 2020-306 of March 25, 2020 on the extension of deadlines expiring during the state of health emergency and on the adaptation of procedures during that same period, provides that the clauses sanctioning a debtor's non-performance (in particular, penalty payment, penalty clause, termination clause) are ineffective between March 12, 2020 and the expiry of a period of one month from the end of the state of health emergency

See online version of the Ordinance available in French only at:

https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000041756550&dateTexte=20200406

[2] Court of Appeals of Besançon, January 8, 2014 – No. 12/02291; Court of Appeals of Paris, June 29, 2006 – No. 04/09052; Court of Appeals of Saint-Denis de la Réunion, December 29, 2009 – 08/02114; Court of Appeals of Basse-Terre, December 17, 2018 – No. 17/00739; Court of Appeals of Paris, September 25, 1998 – No. 1996/08159

[3] Court of Appeals of Colmar, March 12, 2020 – No. 20/01098: "*These exceptional circumstances, resulting in the absence of Mr. G. at today's hearing, have the character of force majeure, as they are exterior, unpredictable and irresistible, given the time-limit imposed for rendering judgment and the fact that, within that time-limit, it will not be possible to ascertain that there is no risk of contagion and that it will not be possible to have a* [police] escort authorized to take Mr. G. to the hearing. Moreover, the Administrative Detention Center of Geispolheim has indicated that it does not have equipment that would enable Mr. G. to be heard by videoconference, which means that such a solution is not possible for this hearing either"

[4] Court of Appeals of Rouen, September 16, 2004 – No. 03/01728

[5] By way of illustration, a decision of the public authorities having the effect of cancelling previously granted authorizations and permits in an unforeseeable and irresistible manner relieved the debtor from its obligation (3rd Civil Chamber of the *Cour de Cassation*, June 1, 2011 – No. 09-70.502)

[6] As a reminder, Article 1229 §3 and §4 of the French Civil Code stipulates as follows: "*Where the goods or services exchanged could only prove useful through the full performance of the rescinded contract, the parties must return all the items they have provided to each other. Where the goods or services exchanged proved useful as and when the contract was reciprocally performed, there is no need to return such items for the period before the last good or service that has not received consideration; in such case, the rescission is qualified as a termination. Returns must be carried out in the conditions provided for in Articles 1352 to 1352-9*"

[7] Commercial Chamber of the *Cour de Cassation*, June 29, 2010 – 06-67.369

[8] Commercial Chamber of the *Cour de Cassation*, March 15, 2017 – 15-16.406

[9] Court of Appeals of Nancy, September 26, 2007

[10] Article 1104 of the French Civil Code: "*Contracts must be negotiated, formed and performed in good faith. This provision is a public policy provision*".