



COVID-19 EXCEPTIONAL MEASURES

Harlay Avocats | 10 April 2020

The Force Majeure Awakens

After [X] days in confinement and the possibility of increased measures being taken by the Government in the fight against the Covid-19 epidemic, some economic actors may be forced to invoke the force majeure in order to suspend or terminate an agreement, or try to avoid liability for failure to meet their obligations.

As far as public procurement contracts for local authorities are concerned, the French Minister of the Economy and Finance has declared that Covid-19 will be “**considered as being a force majeure event for businesses**”.

But what about the private sector ?

According to article 1218 of the French Civil Code, for an event to constitute a case of force majeure, that event, preventing a debtor from performing his obligation, must be beyond the debtor's control, could not reasonably have been foreseen at the time the agreement was concluded and cannot be avoided by taking suitable measures.

Looking at case law on the subject of force majeure shows that, in the event of an epidemic, the judges strictly apply the conditions set out in article 1218 of the French Civil Code. In various cases concerning epidemics, force majeure has not been upheld by the judges because the conditions set out in article 1218 of the French Civil Code had not been met.

As an example, the qualification as force majeure was set aside when (i) performance of the obligation had not been rendered impossible in the presence of the Ebola virus; (ii) the illness (here, chikungunya, even in case of epidemic) was known, could be relieved using painkillers and was not insurmountable ; (iii) the Dengue epidemic was recurrent and, having existed prior to the conclusion of the agreement, was not unforeseeable; and (iv) the spread of the H1N1 virus (flu) was widely known to the public before health regulations were put into place.

However, today we are facing an unprecedented situation, namely the administrative shutdown of a number of public and private establishments together with a decision to confine. An event that, until now, was unforeseeable.

In this specific context, a case of force majeure could be considered as being, for example (if no alternative solution can be put into place and subject to an analysis of the full context), contractual non-performance linked to:

- the closure of an establishment ordered by the French Government;
- the debtor's state of health if this latter is physically unable to perform because of the infection and the illness that resulted after the agreement had been concluded;
- the ban on all physical contact ordered by the authorities, if the obligation cannot be performed without travelling and direct contact with a third party.

However, any debtor of an obligation under a agreement concluded after the confinement decision had been made cannot validly argue force majeure by fact of the confinement, because that event was known at the time the agreement was concluded.

In any case, a qualification as force majeure depends on the sovereign appraisal of the courts and will be assessed on a case by case basis.

Article 1218 of the French Civil Code also provides that, if the impediment arising from the force majeure event is temporary, performance of the obligation will be suspended, unless the resulting delay justifies rescinding the agreement. Nevertheless, the contractual clauses relating to force majeure may specifically regulate the period during which the obligation can be suspended and provide the termination of the agreement after a certain time, even if the impediment has not become definitive.

The unprecedented situation that the French Government is facing has led it to take emergency measures that could be considered as taking into account a force majeure. These are notably emergency Orders, adopted in application of law n° 2020-290 of March 23 2020, to deal with the Covid-19 epidemic, providing in particular (i) for the deferral of social welfare contribution payments, (ii) the deferral of certain tax payments, or again (iii) the deferral of rent, water, gas and electricity payments for very small businesses, which are entitled to a flat-rate hardship payment of 1500 Euros, paid out of a solidarity fund.

A final point: the parties to a agreement can also rely on the provisions of article 1195 of the French Civil Code, dealing with unforeseeable circumstances. In order to obtain the agreement renegotiation, or, if that has failed, the termination of the agreement, the debtor may also argue that performance of the agreement has become too burdensome because of the change in circumstances, a change that could not have been foreseen by the parties when they concluded the agreement.

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