ALLEN & OVERY

Covid-19 coronavirus - Force majeure, *imprévision*/hardship and emergency legislation on contracts under French law in light of the Covid-19 pandemic

The Covid-19 pandemic and its consequences are having a major and sudden impact on economic activities and in particular the conditions in which contracts are being performed. A multitude of *scenarii* can be envisaged, such as supply shortage, ill or confined employees, governmental measures adopted in response to the pandemic…, which may affect the performance of ongoing contracts and lead to a potential breach of contractual obligations or make such performance excessively onerous.

Whether a party to a French law governed contract may be exempt from performing its contractual obligations and/or from incurring contractual liability in light of the Covid-19 pandemic will depend on whether it can rely on force majeure. Likewise, the question whether ongoing contracts will have to be adapted to the change of economic circumstances resulting from the current health crisis will depend on the possibility to rely on *imprévision*/hardship.

This publication addresses the applicable rules on force majeure and *imprévision*/hardship under French law and the possibility for the parties to derogate from those rules in their contract. It also presents the newly introduced derogatory rules adopted by the French Government in the context of the state of emergency recently declared in France. It ends with a focus on the steps you could consider taking to better protect your business in its current and future contractual dealings.

YOUR CONTACTS

Erwan Poisson
Partner - Paris
Tel +33 1 4006 5387
erwan.poisson@allenovery.com

Julie Metois
Associate - Paris
Tel +33 1 4006 5324
julie.metois@allenovery.com

Geoffroy Pascaud
Associate - Paris
Tel +33 1 4006 5307
geoffroy.pascaud@allenovery.com

Quentin Mautray
Associate - Paris
Tel +33 1 4006 5052
quentin.mautray@allenovery.com

Gaspard Neuhoff
Associate - Paris
Tel +33 1 4006 5135
gaspard.neuhoff@allenovery.com

Force majeure

Force majeure is a statutory exemption clause found in Article 1218 of the French Civil Code, which automatically applies to French law governed contracts, even absent any force majeure clause.

The conditions of force majeure under the statutory regime

No event is, in itself, a force majeure event. An event will qualify as force majeure only if it meets cumulatively all the following conditions:

- The event must be beyond the control of the non-performing party;
- The event could not be reasonably foreseeable at the time of entering into the contract; and
- The defaulting party may not avoid the effects of this event with appropriate measures and is therefore prevented from performing its contractual obligations. This means that the event must be irresistible with respect to both its occurrence (the event must be inevitable for the non-performing party) and its effects (the consequences of the event are insurmountable for the defaulting party, who is unable to take the appropriate measures to circumvent them) with the consequence that it is impossible for a party to perform its contractual obligations.

This impediment must be absolute. There will be no force majeure where it is still materially possible for a party to perform its contractual obligations even if such performance has become significantly more difficult or more onerous.

It is in principle impossible to invoke force majeure in relation to an obligation to deliver a fungible good that has perished or has been destroyed: the performance of such obligation is not considered impossible because a fungible good (such as crude oil, corn, precious metals, etc.) can always be substituted by another of the same type.

The same applies to monetary obligations. The French Supreme Court for civil and commercial matters (*Cour de cassation*) considers that a defaulting party may not rely force majeure to be exempt from a contractual obligation to pay sum of money.

State measures may constitute a force majeure event if they meet the above-mentioned conditions. However, the mere fact that public authorities assign a specific status to an event (such as declarations of the World Health Organization qualifying the spread of Covid-19 as a pandemic), though it may give a strong indication as to the gravity of such event, does not bind the Courts when assessing whether it qualifies as force majeure.

French Courts have a wide margin of appreciation in this area and their assessment of force majeure is very much case-based. A party will therefore be able to rely on force majeure in light of the Covid-19 pandemic and its consequences only if it is able to justify that all the foregoing conditions are met, which will depend on the specific circumstances of each individual case.

As of today, one decision has already been rendered by French Courts in relation to the

Covid-19 pandemic and force majeure (Colmar Court of Appeal, 12 March 2020, n°20/01098). Although this decision was not rendered in a contractual matter, the Court held that the circumstance that the defendant could not appear in person at the hearing before the Court due to his potential contamination by the virus constituted a case of force majeure. It remains to be seen in which circumstances French Courts will uphold force majeure in contractual cases.

The consequences of force majeure under the statutory regime

The consequences of force majeure (set out in Articles 1218, 1231-1, 1351 and 1351-1 of the French Civil Code) will depend on whether the impediment to perform the contractual obligation is temporary or definitive:

- If the impediment to perform is only temporary, performance of the contractual obligation is suspended and the defaulting party is not contractually liable for the non-performance or late performance of its obligation. Force majeure exempts the defaulting party of its obligation and contractual liability only for the time during which performance is impossible. However, as soon as the impediment ceases, the defaulting party must resume the performance of its obligation.

  By way of exception, a temporary impediment to perform the obligation will result in the termination of the contract rather than its mere suspension, when no delay in the performance of the obligation is in fact practicable. This would be the case when performance of the obligation within the deadline initially agreed is essential to the proper performance of the contractual operation as a whole and when even a slight non-performance or delay in performance would no longer allow the contract to survive as a whole.

- If the impossibility to perform the obligation is permanent, the defaulting party is in principle definitively released from its obligation and exempt from contractual liability. By way of exception, the defaulting party will still be contractually liable for non-performance if (i) it has contractually undertaken to assume the consequences of force majeure, or (ii) prior to the occurrence of the force majeure event, it has been served a formal notice by the non-defaulting party to perform its obligation.

In addition, the contract is automatically terminated. Termination may lead to reciprocal restitutions between the parties, depending on the nature of the contract at issue (French Civil Code, Article 1229). Therefore, as a result of termination, the non-defaulting party will also be discharged of its own obligations for the future and may, in certain cases, obtain restitution for past performance of its obligations.

What if the contract contains a force majeure clause?

The statutory regime of force majeure is not mandatory law, nor a matter of public policy under French law. The parties may therefore stipulate in their contract a clause that derogates (completely or only partially) from the statutory regime. The statutory force majeure provision will in principle not take precedence over any contractual arrangements.

The parties may insert in their contract a clause having the effect of reducing or extending the scope of circumstances that fall within force majeure:

- The contract may provide a clause that rules out the application of force majeure and puts on the defaulting party the burden of any non-performance due to a force majeure event. Such clause must however be expressly and specifically provided in the contract to be valid.
- The clause may modify the definition of a force majeure event, by providing that an event may produce the exonerating effects of force majeure, even though it does not present the conditions normally required under the statutory regime to qualify as such.
- The clause may list the events which the parties deem constitute or not constitute a force majeure event. This list may be exhaustive, non-exhaustive, conclusive or merely exemplary.

The parties may adapt the effects of force majeure by providing, for example, that should a force majeure event continue for longer than a specific period of time, the parties shall engage in negotiations to adopt adequate measures in light of the circumstances, or that the non-defaulting party shall be entitled to terminate the contract. The clause may also identify the obligations in the contract for which force majeure may or may not be invoked (by providing, for example, that force majeure shall not be relied upon in relation to obligations to make payments fallen due or to provide security for payment).

A force majeure clause may also provide specific procedural conditions that the party intending to rely on such clause must necessarily fulfil within a given deadline, such as prior notification by the defaulting party to the non-defaulting party of the occurrence of a force majeure event.

Imprévision / Hardship

An external event affecting the performance of the contract may not necessarily be qualified as force majeure. In this case, it may still be possible to rely on the mechanism of *imprévision* or trigger a hardship clause if the parties have inserted such a clause in their contract. This will be the case, in particular, when the Covid-19 pandemic does not make it completely impossible for a party to perform its contractual obligations (thus excluding force majeure), but makes such performance excessively onerous.

The conditions of *imprévision*

The mechanism of *imprévision* found in Article 1195 of the French Civil Code provides for the renegotiation of the contract when an unforeseeable change of circumstances makes the performance of the contract excessively onerous for a party.

Imprévision was recently incorporated in French law with the reform of contract law adopted by Ordinance No. 2016-131 of 10 February 2016. Therefore, the regime of *imprévision* only applies to contracts concluded as from 1 October 2016.

The cumulative conditions of *imprévision* are as follows: (i) a change of circumstances that was unforeseeable at the time the contract was entered into (ii) makes the performance of the contract excessively onerous for a party, (iii) who did not contractually accept to bear the risks of such change of circumstances. In addition,

imprévision may not be relied upon in relation to obligations resulting from operations on financial bonds or contracts listed in paragraphs I to III of Article L. 211-1 of the French Monetary and Financial Code.

The consequences of *imprévision*

If these conditions are met, the party invoking *imprévision* may request its contractual partner to renegotiate the contract. The requesting party must however continue to perform the contract during the renegotiation. If such renegotiation fails or if the requested party refuses to renegotiate, the parties may agree to terminate the contract or jointly ask the Courts to adapt the contract. Absent such agreement between the parties, the Courts may, upon either party's request, revise the contract or terminate it.

Hardship clauses

Imprévision may not be applicable, either because its conditions are not met or because the contract was entered into before 1 October 2016. However, the regime of *imprévision* is not mandatory law and the parties may contractually agree to derogate from it through a hardship clause. If the parties have stipulated in their contract a hardship clause, the latter will apply regardless of whether *imprévision* is available (and irrespective of when the contract was concluded).

The parties may stipulate a hardship clause in their contract providing for the revision of the contract in case of a change of economic circumstances. In that clause, the parties can set out the characteristics of the economic circumstances that may lead to a revision of the contract, as well as the terms of such revision (which could be left to a third-party expert or the Courts absent an agreement between the parties).

Derogatory rules resulting from the state of health emergency

Pursuant to Law n°2020-290 of 23 March 2020, the French Parliament declared a two-month state of health emergency in light of the Covid-19 pandemic.

Following this Law, the French Government adopted Ordinance n°2020-306 on 25 March 2020, which contains a series of provisions affecting contracts:[1]

– With respect to contractual obligations that must be performed within a defined deadline, which expires between 12 March 2020 and 23 June 2020 inclusive, payments ordered by way of penalty (*astreintes*), as well as contractual penalty clauses, termination clauses and acceleration clauses that purport to sanction the non-performance of such obligations within that deadline are paralysed up until 23 July 2020 inclusive. The effects of such *astreintes* and contractual clauses will only begin as from 24 July 2020 if the defaulting party has not yet performed its obligation as of that date.

[1] Please note that the following dates are susceptible to be extended, should the French Parliament decide to prolong the current state of health emergency.

- *Astreintes* and penalty clauses that started producing their effects before 12 March 2020 are suspended between 12 March 2020 and 23 June 2020 inclusive. Their effects will resume on 24 June 2020.
- When a contract can only be terminated within a specific period of time or when a contract is automatically renewed absent a formal termination within a specific deadline, and such period of time or deadline expires between 12 March 2020 and 23 June 2020 inclusive, this period of time or deadline is extended until 23 August 2020 inclusive.

These provisions are not applicable to financial obligations and guarantees mentioned in Articles L. 211-36 et seq. of the French Monetary and Financial Code.

These rules apply to French law governed contracts. It is uncertain whether they also constitute overriding mandatory provisions that French Courts (should they have jurisdiction) would apply irrespective of the foreign law otherwise applicable to the contract.

What's next?

With respect to your ongoing contracts as well as contracts which you intend to enter into in a near future, it is necessary to investigate whether they contain obligations which must be performed within a deadline falling between 12 March and 23 June 2020. If that is the case, you or your contracting party will be unable to enforce astreintes, penalty clauses, termination clauses and acceleration clauses that purport to sanction such non-performance up until 23 July 2020.

Moreover, you will have to verify whether *astreintes* or penalty clauses started to run before 12 March 2020 in relation to any of your contracts. If so, note that they are now currently suspended as from that date and will only resume on 24 June 2020.

Regarding the termination or automatic renewal of your contracts, note that the period for terminating or for opposing such renewal has been extended until 23 August 2020 if such termination or opposition had to occur between 12 March and 23 June 2020.

With respect to your current contracts, which you suspect could be affected by the Covid-19 pandemic, it is highly recommended to examine whether they contain force majeure and/or hardship clauses and, in the affirmative, whether those clauses may cover the consequences resulting from the Covid-19 pandemic on the performance of the contracts. If so, these clauses will have to be attentively reviewed to ascertain what their effects are on your contracts (suspension of the contract, renegotiation, termination, etc.) and whether you or your contracting parties may need to fulfill procedural conditions, such as notifications, within a specific deadline to trigger the clause.

Absent any such clause, should you or your contractual partners find it impossible or excessively onerous to perform the contracts due to Covid-19, it will be necessary to verify whether the conditions of force majeure or *imprévision* under the statutory regimes are met.

Of course, in any event the parties are free to engage in discussions and agree on adapting, even temporarily, their contractual relationship for the period of disruption caused by the Covid-19 pandemic. Entering in negotiations early on in the current crisis may indeed achieve a better outcome for both parties in the long term, depending on the content and purpose of your agreement.

Also, we recommend to document the way in which your obligations are affected by Covid-19, and the measures you are taking to try to limit its adverse consequences. If you are at risk of defaulting on a contractual obligation, it is generally recommended to notify your contracting party immediately of the force majeure event that is preventing you from assuring contractual performance. The contemporaneous documentation of the real impact and mitigation measures are often key in a subsequent dispute to help courts or arbitrators to determine liability and, even more so, compensation.

For future contracts, it may be necessary to adapt wording that you usually incorporate in your agreements and to contemplate inserting/modifying force majeure and/or hardship clauses, depending on whether and how your business may be affected by the current circumstances and their potential evolution.

Should you like to discuss in more detail the content of our ePublication or need any additional information, do not hesitate to contact us.