France Insight: Force Majeure and COVID-19 (Coronavirus) after the Colmar Decision

The French Minister of the Economy, Mr. Bruno Le Maire, announced on February 28, 2020 that COVID-19 was a force majeure event for companies within the framework of contracts signed with the State. However, discussions on whether the pandemic would qualify as a case of force majeure for obligations not related to the State have been heterogeneous.

If the coronavirus is qualified as a force majeure event, Article 1218 of the French Civil Code prescribes that, in the event of a temporary impediment, the performance of the contract will be suspended unless the delay resulting from such suspension justifies the termination of the contract. In the event of a definitive impediment, the contract will be terminated by operation of law and the parties released from their obligations pursuant to Article 1351.

The discussion below will first focus on force majeure and its characteristics, then on the evaluation of the future of force majeure and COVID-19 claims.

Force Majeure and its Characteristics

For a case of force majeure to be found, the judge must look at paragraph 1 of Article 1218 of the Civil Code:

"Force majeure in contractual matters exists where an event beyond the control of the debtor, which could not have been reasonably foreseen at the time of the contract was entered into and whose effects cannot be avoided by appropriate measures, prevents the performance of its obligation by the debtor."

Accordingly, three characteristics must be present for an event to fall under this provision. The first is **exteriority**: the event must be beyond the control of the debtor of the obligation. This is likely to be the easiest to prove when dealing with an epidemic since there is no doubt that it is beyond one's control. The second characteristic is the **unforeseeability** of the event. This condition will most likely be met if a contract is concluded before the declaration of the spread of the coronavirus. Finally, the third is **irresistibility**: the event must be inevitable in its occurrence and insurmountable in its effects. It is not sufficient for it to be more expensive or complicated - its effects must not be avoidable by appropriate measures.

In addition, since force majeure provisions are not public policy provisions, parties to a contract still remain free to adjust the definition in the clauses of their contract. They can specify what will be expressly considered or not as a case of force majeure by the parties. This will depend on the exact wording and scope of the provision in the

contract. Parties to a contract are free to withdraw the exempting effect of force majeure or include clauses in their contract providing a broader definition of majeure. For example, clauses could expressly mention epidemics, diseases and/or public health emergencies to qualify as force majeure events. In this case, COVID-19 would definitely qualify. Still, a more general wording of force majeure, as an unforeseeable event beyond the parties' reasonable control, could also encompass COVID-19. In contractual cases, the burden of proof is on the party seeking to invoke force majeure. This party will have to prove that the conditions are met and most importantly will have to show a causal link between the force majeure event and the failure to perform contractual obligations.

The first decision to qualify COVID-19 as a force majeure case was pronounced by the Court of Appeal of Colmar on March 12, 2020 (case n° 20/01098). The case concerned the administrative detention of a person who was unable to attend the hearing insofar as he had been in contact with persons likely to be infected by the coronavirus. The Court ruled that "these exceptional circumstances ... constitute a force majeure event, being external, unforeseeable and irresistible." After listing the three characteristics of force majeure, even though it was not invoked in connection with a contract in the present case, the Court found that the failure of the litigant to appear in the hearing could not be overcome.

COVID-19 and Force Majeure

The Colmar decision does not however constitute grounds to declare COVID-19 a force majeure event in all circumstances. The circumstances of each claim must be evaluated before declaring an event as a force majeure event. This is why in the aforementioned case, the Court focused on demonstrating that no alternative measures allowed the litigant to attend the hearing even remotely. In fact, French judges have been reluctant in the past to grant force majeure requests in face of certain epidemics, given that their mere existence does not automatically constitute force majeure. For example, the H1N1 virus (Besançon Court of Appeal (CA), January 8, 2014, no. 12/0229) as well as the chikungunya virus (Basse-Terre CA, December 17, 2018, no. 17/00739) had been widely announced even before the implementation of health regulations and were therefore considered foreseeable. The dengue fever epidemic was also recurrent and therefore foreseeable (Nancy CA, November 22, 2010, no. 09/00003).

Judges must therefore assess on a case-by-case basis whether, faced with an external and unforeseeable event, the debtor was genuinely unable to perform his obligation, and whether it was possible or not to adopt "appropriate measures" to avoid adverse effects of the pandemic on the performance of the contract. They will be very attentive, when assessing an application, to the specific circumstances surrounding it, taking into account the dangerousness of the disease and the date of its occurrence.

Furthermore, force majeure decisions are based on a very casuistic assessment that is not necessarily transposable to the COVID-19 epidemic, especially since the measures taken by the government are unprecedented, and the type of measures adopted are evolving rapidly. Also, the World Health Organization has declared COVID-19 as only the sixth public health emergency of international concern, which makes it even more distinctive from other epidemics.

Nevertheless, if force majeure is not applicable then a party is not left without options. It may contemplate referring to the theory of 'Unforeseen Events' (Article 1195 of the French Civil Code). Unlike force majeure, it does not lead to the cancellation of contractual obligations, but provides for the possibility to renegotiate a contract in the event of a change in circumstances unforeseeable at the time of entry into the contract. The courts thus intervene by reducing the onerous obligation to a reasonable extent so that losses are shared between the parties. Also unlike force majeure, the performance of the obligation here has not been made impossible, but only more difficult by the debtor. The theory therefore plays a preventive role since it encourages parties to renegotiate. But this theory will not always be available to parties since Article 1195 may be contractually excluded or its conditions of application may be adjusted.

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