



## PUBLICATION

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### **COVID-19 CORONAVIRUS – HOW TO KEEP CONTROL OVER YOUR AGREEMENTS GOVERNED BY FRENCH LAW ?**

Many French and foreign companies are directly affected by the global coronavirus epidemic and its lockdown measures and are therefore facing difficulties in enforcing their agreements.

What applies under French law if one party is unable to perform all or part of its contractual obligations ? Is COVID-19 an event of Force Majeure ? What tools offers French law ?

#### **Specific measures taken by the French Government toward private contracts**

France has adopted lockdown measures on 17 March 2020 and declared state of health emergency on 24 March 2020 for a two months period and the Government has been granted the power to legislate by means of Orders in several areas.

Among them, Order No. 2020-306 of 25 March 2020 on extension of deadlines and procedural adjustment of proceedings during the health emergency period has direct impact on contracts and provides in particular for :

- All obligations imposed by law and regulation of which deadlines are expiring between the 12 March 2020 and one month following the end of the state of health emergency to be postponed.

Therefore, governmental authorizations may be delayed as well as conditions precedent requiring the grant of such authorization to be waived.

- Suspension of certain contractual provisions sanctioning debtor's failure to perform its obligations such as liquidated damages, indemnity or penalty for delay, unilateral termination or forfeiture provisions.

Such provisions shall have no effect during emergency measures and will start to produce their effects on 25 June 2020 in event of non-performance (where health emergency measures have not been renewed).

- Extension of termination and tacit renewal rights that should have expired during the health emergency measures.

Other Orders have been enacted to deal with payment of rent, water, gas and electricity bills for business premises as well as specific measures to public procurement contracts.

### Could COVID-19 triggers an exception of Force Majeure ?

It all relies on existence and drafting of a specific contractual provision governing Force Majeure and its effects in your agreement. Absence of a specific Force Majeure provision will lead to French statutory legal framework which is applicable to any Force Majeure events and is far from being automatic.

### Statutory Force Majeure

Under French law, Force Majeure is a statutory legal term governed by the provisions of Article 1218 of the French Civil Code : *"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 his obligation by the debtor".*

Thus, statutory Force Majeure requires the following questions to be answered :

- At the execution date of the agreement, was COVID-19 epidemic foreseeable by the Parties ? Was it possible to anticipate the current health crisis ?
- Has COVID-19 epidemic made performance of the contract impossible, irrespective of all appropriate measures being implemented ? Have all alternative solutions been undertaken by the affected party ?

For contracts entered into before 2020, there is no doubt that the pandemic was not foreseeable. For contracts entered into as of 2020, diligence of the parties in anticipating the health crisis may depends on the evolution of the epidemic becoming global. Official communication of WHO declaring COVID-19 being a pandemic on 11 March 2020 may however provide for guidance.

Then, the affected party must assess if performing its obligations is impossible from an operational point of view. Does all reasonable means to seek alternative solutions have been undertaken such as using alternative suppliers or providers ? In fact, an increase in costs, burdensome, delay or the ability to remotely perform part of the contract prevents any party from raising a Force Majeure event. To the contrary, mandatory act of the government such as shop's closure, lockdown measures or any sort of official ban making performance of an agreement impossible may be qualified as a "*fait du prince*" and may constitute a type of Force Majeure event.

In any case, raising statutory Force Majeure is always challenging for companies as it requires a case-by-case approach and French courts have been very reluctant to apply it in the past. However, the current status of the COVID-19 being global might change appraisal by French courts.

## Force Majeure effects depending on short vs long term event

- Contract suspension : where a Force Majeure event prevents a party to perform its obligation for a short period of time, the contract may be suspended and will resume as soon as the event does not meet any more Force Majeure criteria.
- Contract termination : where a Force Majeure event is declared permanent, the contract may be terminated and parties are released from their obligations.

Parties being released from their obligations means that where goods or services have not been delivered, payment is not due, advance payment must be repaid and any liquidated damages or penalty may not apply.

In any case, the affected party requesting suspension or termination due to a Force Majeure event shall always act in good faith and must :

- Immediately inform its contracting party as soon as being aware of the impossibility to perform its obligations because of a Force Majeure event.
- Provide information on the nature and expected duration of the Force Majeure event.
- Use all reasonable endeavors to remedy as quickly as possible the effect of the said event of Force Majeure.
- Where the event continues, take all measures to limit damaging consequences of its non-performance.

## Parties' Force Majeure

Despite being a statutory legal term under French law, exception of Force Majeure is not an imperative provision and may be defined and implemented by parties.

Many French law governed contracts include a provision relating to Force Majeure. A good Force Majeure provision must have a strong definition and implementation process.

In that case, you must (i) review the definition which may include or may expressly exclude an epidemic or certain official ban or government decision and (ii) review the implementation process of the provision which may allow a party standstill of its contractual obligations for a short period of time or right to terminate with or without notice depending on the duration of the Force Majeure event.

In practice, a Force Majeure event lasting for more than six (6) months is generally considered as a long term Force Majeure event allowing either party to terminate an agreement with or without a prior written notice.

Thus, reviewing your agreement is key in order to enforce a Force Majeure clause.

Whether a Force Majeure contractual or statutory provision applies, declaring a Force Majeure event is a last resort decision and is not always the best solution to mitigate a contractual relationship.

### What other solutions are offered under French law ?

COVID-19 epidemic is not likely to have created fundamental change in circumstances having substantial effect solely on you but also on your contracting party's business which is probably facing similar difficulties in other activities of its business.

For agreements entered into as of 1<sup>st</sup> October 2016, Article 1195 of the French Civil Code allows a party to request renegotiation of the contract on the basis of an unforeseen change of circumstances. Contrary to Force Majeure, this French type of Hardship allows a party to request renegotiation where performance of the agreement is possible but has become excessively onerous due to an unforeseen change of circumstances.

Of course, terms and conditions of the agreement remain binding on the parties during renegotiation.

In case of refusal or failure to renegotiate, parties may agree to terminate the contract or request the Court by mutual agreement to amend or terminate it. Where no agreement has been reached within a reasonable time period, the Court may at the request of one party amend or terminate the contract at a date and under terms he has decided.

This French hardship remedy does not apply to contracts entered into before 1<sup>st</sup> October 2016 as it was not implemented in the law and Parties may simply have excluded Article 1195 – or any kind of hardship – of their contracts.

Irrespective of such measure, parties may always mutually decide to amend terms and conditions of their agreements. It is therefore necessary to scan your agreements for any provision related to review, amendment or termination and assess what is offered and how to implement it. Then, you will be prepared to successfully request for renegotiation of your agreements.

From a legal perspective, French agreements must always be enforced by parties on the basis of good faith which from a business perspective means cooperating with your contracting party when facing difficulties. Dialogue appears to often be the best way to mitigate crisis effects and safeguard your contractual relationship.

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Le cabinet ARGALI vous assiste à tous stades de vos opérations contractuelles et des formalités qui en découlent.

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