

COVID-19: Force Majeure or Not? – A French Perspective

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If there is no doubt that the Coronavirus and COVID-19 pandemic significantly jeopardizes the world economy and triggers a significant increase of breaches in contract completion, is it nevertheless possible to systematically plead *force majeure* as a justification to such breaches?

COVID-19 pandemic is increasingly present in our day-to-day life and, inter alia, jeopardizes business activities. As a result, there is no doubt that courts will, in the coming months or years, have to review many cases where one of the parties will use these exceptional circumstances as an excuse to justify its default in complying with its contractual obligations.

If the French government has already acknowledged the difficulty of the present situation by waiving any penalties for late completion under all contracts entered into by the French state, should the view be taken, with respect to contracts between private sector parties, that the mere existence of the pandemic should be regarded as a *force majeure* event, that is under French law an event which is – as at the date when the contract was entered into – unpredictable and irresistible, both in its occurrence (unavoidable) and in its consequences (insurmountable) – preventing, temporarily or definitely, the completion of a contract.

In the present circumstances, the pandemic *per se* may not be regarded as a *force majeure* event, as pandemics are not considered unpredictable events. As a factual matter, many pandemics have occurred, some of them with a worldwide dimension; for instance, the H1N1 flu pandemic was not considered as a *force majeure* event by French case law.

Although the existence of the pandemic in and of itself may not be considered as a *force majeure* event, some of the consequences arising from its occurrence could qualify as such. In this respect, it may be anticipated that the binding recent governmental decisions made to combat the spread of the virus, such as the “stay home” policy, the closing of places open to the public (movie theaters, restaurants, museums, etc.) and non-essential shops will be recognized as *force majeure* events, due to their exceptional (i.e., unpredictable) and binding (i.e., irresistible) nature, provided however that, as a result, the contract cannot be performed. This would probably not be the case were these policies to be only non-binding recommendations.

Rather than applying for the suspension or termination of a contract based on *force majeure*, it may be more appropriate for a party to a contract to request an amicable amendment of the agreement based upon the legal hardship procedure. Under this procedure, introduced in French law by the *ordonnance* dated 10 February 2016 reforming contract law, a party to a contract may request its amicable renegotiation in the event of a change of circumstances: (i) unpredictable when the contract was entered into, and (ii) which renders the completion of such contract excessively costly. This suppletive procedure (the parties to an agreement may validly exclude its implementation) will in the last instance involve the judge who, absent any amicable agreement between the parties, may be requested to amend or terminate the contract concerned.

Again, although the pandemic *per se* cannot be considered as an unpredictable event, the exceptional disruptions resulting from it and/or the binding governmental policies implemented to combat the pandemic could base a request for renegotiation of the agreement under this hardship legal procedure, to the extent however that these disruptions significantly impact the conditions under which the contract is completed.

For instance, the tenant of a shop who, for a significant period of time, would be unable to generate turnover due to a nationwide binding governmental policy imposing a closure, could request for suspension or cancellation of the rent due for the period concerned, provided that: (i) the implementation of the hardship legal procedure has not been excluded by the lease agreement; and (ii) it may be considered

that this situation has compromised the balance between the cost of the rent and the turnover that could be expected from the operation of the shop, and hence, made excessively costly the completion of this lease.

The legal hardship procedure seems, however, not relevant for urgent situations given the timeframe necessary for its implementation, bearing in mind that the party requesting its initiation must continue to comply with the provisions of the contract until the parties reach an agreement on some amendments or a court decision is taken.

For both *force majeure* and hardship, the date of the agreement concerned will be a critical point to assess whether the event triggering the issue was or not unpredictable. In fact, if a contract has been entered into after the outbreak of the pandemic, it will probably be difficult to evidence that its consequences were not predictable.

Foley Hoag has formed a firm-wide, multi-disciplinary [task force](#) dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our [Resource Page](#) or contact your Foley Hoag attorney.

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