

## Impact of COVID-19 on French Law Governed Contracts

***How can companies respond to the impact of the COVID-19 crisis on their current contracts, either because a reduced workforce, interrupted supply chain, or governmental orders to shut down businesses?***

On 30 January 2020, the World Health Organization declared the COVID-19 pandemic a public health emergency of international concern.<sup>1</sup> Acknowledging the spread of the virus to France, in turn, the French government advised employers to encourage work-from-home schemes or to resort to partial activity if needed. On 24 March, an emergency law that enables the declaration of a state of health emergency as well as further restrictions to the freedoms of movement, enterprise, and assembly was enacted.<sup>2</sup> These measures (implemented by ordinance and/or decrees) will likely cause significant disruptions to businesses' operations and commercial relationships. Consequently, parties to French law contracts may wish to review the available contractual rights and obligations in order to manage and mitigate the effects of the COVID-19 outbreak.

### Opportunity to invoke a force majeure event

Unless otherwise expressly provided, force majeure may apply to all contracts governed by French law. Force majeure is defined by Article 1218 of the French Civil Code, which provides: "in contractual matters, there is force majeure where 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."

### Three cumulative conditions

- An event external to the debtor (beyond its control)
- An unforeseeable event (that could not reasonably have been foreseen when the contract was signed)
- An unavoidable event (the effects of which could not be avoided through appropriate measures)

### Two possible outcomes

If the obstacle is temporary, performance of the obligation is suspended. If the obstacle is permanent, the contract is terminated and parties are discharged from their obligations.

## **A case-by-case assessment**

The cases in which epidemic outbreaks have been invoked as a force majeure event show that French courts have generally refused to characterize those events as force majeure (the events not being viewed as unforeseeable and/or unavoidable and/or external in the circumstances at stake – e.g., Chikungunya epidemic,<sup>3</sup> H1N1 flu pandemic,<sup>4</sup> Dengue fever outbreak,<sup>5</sup> SARS epidemic,<sup>6</sup> Plague epidemic<sup>7</sup>).

It remains to be seen how the COVID-19 outbreak will evolve in France as the characterization of force majeure clauses by French courts is made on a case-by-case basis. However, parties will likely not invoke, as force majeure, the COVID-19 epidemic alone, but rather the quarantine and lockdown measures that have been ordered by authorities to stop the outbreak.

## **Key considerations when reviewing contracts for COVID-19-related force majeure**

- Check the exact provisions of the contracts (is force majeure expressly excluded?).
- In case the contract contains a force majeure provision, review its wording, exact scope, and applicable notification procedure.
- Check whether the contract was concluded before the COVID-19 outbreak and/or before the first quarantine measures. If the contract was concluded after the COVID-19 and/or before the first quarantine measures, the unforeseeable nature of the event could be called into question.
- Check whether the situation completely prevents the performance of the obligation or whether it may be possible for the debtor to limit the effects of force majeure by taking certain measures

## **Opportunity to invoke hardship (imprévision)**

Unless otherwise provided by law or contract, hardship applies in agreements governed by French Law and signed or renewed after 1 October 2016. Note however that, pursuant to Article L. 211-40-1 of the French Monetary and Financial Code, Article 1195 of the Civil Code does not apply to “*obligations resulting from operations on financial contracts and securities*”. In those contracts, material adverse change provisions could be included, although they are less common in contract governed by French law.

Hardship is defined by Article 1195 of the French Civil Code<sup>8</sup>.

### **Three cumulative conditions**

- A change of circumstances unforeseeable at the time of the conclusion of the contract: Article 1195 of the French Civil Code may cover a wide range of circumstances, for instance increase of prices, environmental disasters, enactment of new policies, etc.
- A change of circumstances that renders performance excessively onerous for a party: it must be shown that performance of the contract has become excessively onerous, and not merely more difficult
- None of the parties have expressly contractually accepted to assume the risk of hardship

### **Consequences**

To avoid parties invoking hardship in order to excuse non-performance, Article 1195 of the French Civil Code clearly states that the party seeking relief must keep on performing the contract pending relief, if any. The party invoking hardship must therefore follow a three-step process:

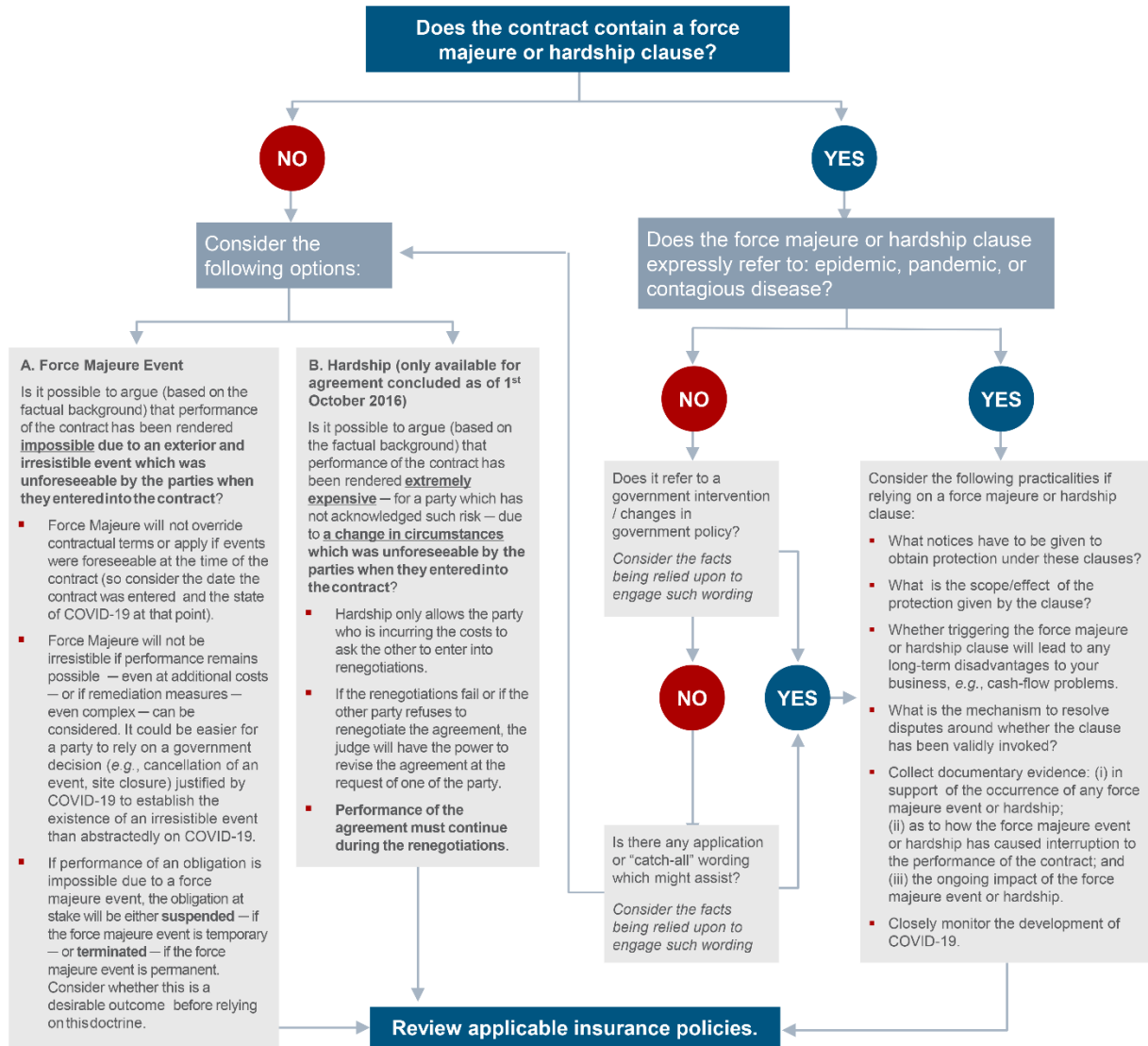
- A party must ask the other party to renegotiate the contract.
- If the renegotiation is refused or fails, and if the parties do not agree to terminate the contract, they can jointly ask the judge to adjust the contract.
- As a final resort a party may unilaterally ask the court to either terminate or amend the contract; the court will probably closely examine whether the demanding party really tried to enter into renegotiations with its co-contractor.

To the best of the authors' knowledge, Article 1195 of the French Civil Code has not yet been applied to an epidemic outbreak. Nevertheless, it is not excluded that COVID-19 will be considered by French courts as a "change of unforeseeable circumstances".

### **Key points to consider when reviewing contracts for COVID 19-related hardship**

- Confirm that the contract was concluded or renewed after October 1st 2016.
- Check whether the contract was concluded before the coronavirus outbreak and/or before the first quarantine measures.
- Check whether the contract expressly excludes the provisions of Article 1195 of the French Civil Code.
- In case the contract contains a hardship provision, review its wording, exact scope and applicable notification procedure, if any.
- Consider the specific impact the COVID-19 epidemic has had on the financial conditions of the contract and determine whether it would be enough to qualify as hardship.

The following scheme summarizes the two aforementioned options:



None of these remedies are straightforward to establish and so the risk of unsuccessfully asserting these remedies should be carefully considered, especially given that it might put a party in breach of contract thereby giving its counterparty a right to claim damages or terminate the contract.

## **Opportunity to invoke another party's non-performance (exception d'inexécution)**

### **Non-performance in response to a debtor's proven breach of contract**

Pursuant to Article 1219 of the French Civil Code, if a party has not performed — or has imperfectly or partially performed — an undertaking, the other party may refuse to perform or may suspend performance of its own undertakings.

Such an approach is not risk-free:

- First, this defense to enforcement may only be invoked if the initial non-performance was serious enough.<sup>9</sup> As a consequence, one may ask a judge to review a posteriori the proportionality between the severity of the initial non-performance by a party and the subsequent suspension of the performance of its own undertakings by the other party. If the latter only faced an insignificant non-performance and triggered this scheme in bad faith, the latter party may engage its own contractual liability.
- Second, the initial non-performing party may demonstrate that (i) its own undertaking was not yet due, (ii) non-performance was the result of a force majeure or an act of God (fait du prince) or (iii) non-performance was justified by the other party's own fault. In such instances, the initial non-performing party may engage the contractual liability of the other party who wrongfully refused to perform.

For example, if a company has agreed to deliver goods, in exchange for payment, but cannot perform its undertakings because of a shortage of workforce following suspected COVID-19 contaminations, the other party may refuse to pay. However, if a lessor breaches its duty to provide cleaning services to its lessee because of a similar shortage of workforce, the lessee should not be able to cease payment of rent: since the lessee continued to enjoy the leased property, non-payment of rent would not be proportional.

### **Non-performance in response to a debtor's expected breach of contract**

A party may also preventively suspend performance of its own undertakings if it is evident that the other party will not perform in due course and the consequences of such non-performance are sufficiently serious<sup>10</sup>. Here it is not the severity of the breach that must be assessed but the severity of the consequences of said breach. Such suspension must be notified as soon as practicable and is exercised at the risks and perils of its author.

For example, upon hearing of new measures to be implemented by the government, a company may anticipate that its debtor will probably breach its obligations. In such cases, that company should gather all evidence of the probability of the upcoming breach (e.g. public statements released by the debtor and related to its management of the COVID-19 crisis) and of the severity of the consequences of such a breach (e.g. impact of the breach of the capacity of the company to perform its own obligations towards a third party). If the company is confident in its findings, then it may suspend its own undertakings.

### **Opportunity to invoke the lapse of the contract (caducité)**

Finally, a party might consider the opportunity to rely on Article 1186 of the French Civil Code as a defense to the enforcement of a contract that has completely lost its interest for that party as a result of the COVID-19 epidemic. Pursuant to said article, a contract lapses when one of the elements that was deemed by the parties to be essential to said contract disappears. A party may claim that one such

element disappeared because of the health crisis and that, as a result, the contract has lapsed and is therefore unenforceable.

## **Enforcing contractual obligations at times of reduced judicial activity**

In the immediate aftermath of the French President and Prime Minister's announcements of 12 March, the Ministry of Justice announced that all courts and tribunals would be authorized to implement their service continuity plans. Consequently, from 16 March onwards, judicial activity has been drastically reduced and all non-essential hearings have been postponed to a later date.

## **Urgent claims may be heard by the competent courts and tribunals**

The Ministry ensures that courts and tribunals continue to process and hear claims related to "essential" matters. This notion of "essential" matters has not received a unified definition so that compliance with the Ministry's instructions may take slightly different forms in each court and tribunal, depending on that court or tribunal's service continuity plan. Based on the publicly available plans, the authors understand that claims of an urgent nature and cases involving threats to fundamental rights will be heard by the competent judges<sup>11</sup>.

As for bailiffs, for now, most continue to serve procedural acts such as claims. However, several have indicated that they may not be able to maintain this activity in the coming days and weeks. Some have altered their modus operandi in order to adapt to the present crisis (including to take into account their own staff restrictions), for instance (i) by serving only urgent claims, (ii) by serving all claims but on the disclaimer that they may not be able to respect the stated delays or (iii) by serving claims through a notice sent to its recipient by simple mail to inform him/her that a procedural act that concerns him/her is available at the bailiff's office and that he/she may make an appointment with the bailiff to come fetch the said procedural act.

## **Civil and commercial claims of a non-urgent nature should be maintained on hold**

At the present time, most courts and tribunals do not have the capacity to process civil and commercial claims of a non-urgent nature.

Prospective claimants should note that the emergency bill includes a provision enabling the government to legislate by ordinance to adapt the rules for computing statutes of limitations in the context of the current health crisis. This measure would have a retroactive effect as from 12 March 2020 and should have a limited duration.

In the event of a non-urgent dispute, parties should favor negotiations and, failing that, gather all useful evidence in anticipation of future court proceedings. In the meantime, a party suffering from another party's breach may want to take actions to mitigate its losses, for the date on which courts and tribunals will be back to full capacity is unknown and there will probably be an important backlog of cases to deal with. However, please note that there is no recognized general duty to mitigate under French law, including in cases of force majeure or hardship.

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**Endnotes**

- <sup>1</sup> Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), 30 January 2020, available on the World Health Organization website at [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).
- <sup>2</sup> Emergency bill No. 376 to deal with the COVID-19 epidemic (accelerated procedure) presented by Mr Édouard PHILIPPE, Prime Minister, available on the Senate website at <http://www.senat.fr/leg/pjl19-376.html>.
- <sup>3</sup> Basse-Terre Court of Appeal, 17 December 2018, No. 17/00739.
- <sup>4</sup> Besançon Court of Appeal, 8 January 2014, No. 12/02291.
- <sup>5</sup> Nancy Court of Appeal, 22 November 2010, No. 09/00003.
- <sup>6</sup> Paris Court of Appeal, 29 June 2006, No. 04/09052.
- <sup>7</sup> Paris Court of Appeal, 25 September 1998, No. 1996/08159.

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- <sup>8</sup> Pursuant to Article 1195 of the Civil Code: “[i]f a change of unforeseeable circumstances at the time of the conclusion of the contract renders the performance excessively costly for a party that had not accepted to bear the risk, the latter may ask the co-contracting party to renegotiate the contract. It shall continue to perform its obligations during the renegotiation. Should the renegotiation be refused or fail, the parties may agree to terminate the contract, on the date and in the conditions they will determine, or jointly ask the court to adapt it. Failing an agreement within a reasonable timeframe, the court can, at the request of either party, revise the contract or terminate it, on the date and in the conditions it will determine”.
- <sup>9</sup> Article 1219 of the French Civil Code.
- <sup>10</sup> Article 1220 of the French Civil Code.
- <sup>11</sup> While these service continuity plans are in force, certain courts and tribunals have put in place specific schemes to be able to process non-adversarial petitions (*requêtes*) as well as petitions to be authorized to summon a party to a summary hearing at an indicated time (*requêtes aux fins d’assigner en référé d’heure à heure*). For instance, for the Paris Judicial Tribunal, see Communication of the Paris Bar dated 17 March 2020 (available [http://dl.avocatparis.org/com/mailling2020/Covid\\_19\\_communique11.html](http://dl.avocatparis.org/com/mailling2020/Covid_19_communique11.html)).