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Covid-19 - Force majeure or hardship: You do not have to choose

Can a party to a commercial contract escape its obligations because of the economic disruption caused by the Covid-19 pandemic?

The answer to this question, which is of utmost interest to companies of all sizes, is to be found in the new French contract law introduced by Ordinance of February 10, 2016.

For quite a long time, the following principle has prevailed: a party could only be released from its contractual obligation if performance thereof was rendered impossible by a *force majeure* event, which had to meet three requirements to be established: unpredictability, irresistibility and exteriority (this last requirement was abandoned by the Plenary Assembly of the *Cour de Cassation* - French Supreme Court - in 2006).

Since an unforeseeable disruption of existing economic conditions was not in itself considered as a *force majeure* event, the judge was unable to revise the contract under the theory of unforeseeability (a concept close to that of hardship) ("*imprévision*") because of the sacrosanct principle of the sanctity of contracts. And too bad if the consequence was a business failure.

In retrospect, the aforementioned 2016 Ordinance seems to have been created to provide a toolbox for businesses that must deal with the economic upheavals caused by the pandemic and its consequences.

While the principle that contracts lawfully entered into have the force of law for those who have made them is recalled by new Article 1103 of the French Civil Code in terms almost identical to those of former Article 1134 §1, several provisions now grant the judge the right to interfere wherever there is a too great imbalance in the

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obligations of the parties due to an unforeseeable event or change of circumstances.

Pursuant to new Article 1195 of the French Civil Code, where an *“unforeseeable change of circumstances”* renders performance of the contract *“excessively onerous for a party who had not accepted to assume the risk of such a change”*, that party is now entitled to ask the other contracting party to renegotiate the contract. If the parties cannot reach an agreement within a reasonable period of time, the judge may be asked to revise or terminate the contract, on such date and subject to such terms and conditions as he/she shall determine.

Another major change: under new Article 1104 of the French Civil Code, the principle according to which contracts must be negotiated, formed and performed in good faith has become a public policy provision while former Article 1134 §3 merely provided that contracts lawfully entered into ought to be performed in good faith.

New Article 1228 of the French Civil Code on force majeure refers to *“any 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 cannot be avoided by appropriate measures”*

A global health crisis is clearly beyond the control of a debtor contracting party and can have devastating economic effects that no “appropriate measure” can avoid.

Companies that cannot meet their obligations because of the Covid-19 pandemic and its consequences are wondering: should they rely on force majeure or unforeseeability/hardship?

The choice is not insignificant.

A contracting party invoking unforeseeability/hardship may request a renegotiation of the contract, and, if negotiation with its contractual partner falls through, ask the judge to revise or terminate the contract. Problem: during the time of the renegotiation, the party must continue to perform its obligations. Second problem: obtaining a decision from the judge asked to revise or terminate the contract may take several months.

On the other hand, invoking force majeure allows one party to stop performing its obligations without being forced to enter into negotiation and without the need to refer the matter to the judge.

Force majeure and unforeseeability/hardship are not mutually exclusive. The contracting party who cannot meet its obligations due to the economic upheavals caused by the Covid-19 pandemic may therefore notify the other party of the force majeure event while inviting it to negotiate a revision of the terms of the contract.

And if the other party turns a deaf ear, a reminder of the public policy obligation to perform contracts in good faith should bring it back to its senses. Indeed, there is little doubt that a judge would classify as bad faith a refusal to renegotiate the terms of a contract, the performance of which has become excessively onerous because of the economic consequences of the health crisis. And since the duty of good faith is a public policy obligation, a party refusing to take into account the new situation created by the pandemic could not rely on

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contractual provisions to try to escape it.

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