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COVID-19: Legal issues, considerations and tips as of July1, 2020

The COVID-19 pandemic affect billions of people worldwide and has an increasingly devastating impact on the economy.

Companies are facing new challenges and the need for practical legal advice is more important than ever. Legal concerns relate to health restrictions, corporate governance, contracts, business transactions, insurance, insolvency and others.

In order to best assist our clients in these difficult times, we have prepared a summary of the main issues that businesses may face as a result of COVID-19.

1. Movement

Requirements and restrictions

The health emergency has been declared in France by Ordinance No. 2020-328 dated 25 March 2020 which also introduced several measures to limit movements on the French territory. Since Decree No. 2020-545 dated 11 May 2020, lockdown measures and entry restrictions are gradually being lifted.

- Restrictions on travel to France from countries within the European zone (EU Member States, Andorra, Iceland, Liechtenstein, Monaco, Norway, San Marino, Switzerland and the Vatican) have been lifted since 15 June 2020. Travelers from these European countries no longer need an international travel

certificate and are not subject to any form of quarantine except for those arriving from the UK who will be asked to observe a 14-day quarantine period in reciprocity of British regulations.

- Restrictions on travel to France from countries outside the European zone remain in force until the gradually re-opening of borders, effective from 1 July 2020. Restrictions will then depend on the health situation in third countries and on the European procedures to be issued by that time. Travelers arriving from outside the EU are given, upon arrival, information on the conditions for a voluntary quarantine in the residence of their choice, or as the case may be, in an appropriate accommodation structure.

As of today, travelers must fill out and carry the exempted international movement certificate and shall present a solemn declaration certifying that they are not infected with COVID-19. Every passenger over 11 years of age is also obliged to wear a face mask.

Requirements and restrictions introduced with regard to movement

The lockdown of the population as well as most of the restrictions are no longer enforceable since Decree No. 2020-545 dated 11 May 2020. However, at this stage some restrictions are still in effect.

Firstly, regarding foreign residents in France during the COVID-19 outbreak with permits expiring between 16 March 2020 and 15 May 2020, Ordinance No. 2020-328 dated 25 March 2020, as amended by Ordinance No. 2020-460 dated 22 April 2020, extends by 180 days the long-stay visas, the residence permits, the provisional residence permits and the delivery receipts of resident permit applications. This extension allows foreign citizens to obtain an additional period of time to renew their permits or to wait for the complete reopening of the borders to leave safely the country.

Secondly, for the airline traffic, as a general standpoint, the flights are limited by Decree No. 2020-663 dated 31 May 2020, as amended by Decree No. 2020-664 dated 2 June 2020. However, people justifying private or familial imperative reasons will be able to travel, depending on applicable border restrictions. The same Decree grants the locally competent public authority the power, without any obligation of doing so, to put in quarantine or in isolation, at his residence or in a requisitioned accommodation structure, every person entering the country who stayed during the previous month in a contaminated area or showing COVID-19 symptoms.

Finally, the main restriction still enforceable as of today is the ban on meetings. This applies to all meetings of more than ten people in public area or in a place opened to the public. Decree No. 2020-724 dated 14 June 2020 outlines some derogations to this measure, such as professional meetings, public transportation and establishments authorized to receive public for education, business, culture and worship matters. Nevertheless, these derogations are only possible if social distancing and the use of so-called “barrier gestures” are ensured.

2. Healthcare

Measures introduced to safeguard public health

Decrees dated 11 and 31 May 2020 have introduced several measures to protect public health in France:

- Obligation to wear a face mask when using public transportation and taxis;
- Implementation of social distancing;
- Prohibition of major public events (shows, clubs, major sports events, etc.);
- Mobilization of the emergency health reserve (retired or unemployed healthcare professionals who volunteer to help health services);
- Price-cap regulation for face masks and hydro-alcoholic gel;
- Implementation of a non-mandatory contact tracing phone application called “StopCovid”;
- Increase of treasury advances granted by the French Government to the Social Security.

Measures introduced to protect healthcare professionals

- A psychological support;
- The automatic recognition of the occupational nature of the contamination by the coronavirus (to allow a classification as a workplace accident for social security purposes);

In addition, Decree No. 2020-568 dated 14 May 2020 and Decree No. 2020-711 dated 12 June 2020 granted an exceptional premium up to €1,500 for health professionals who worked during the pandemic.

3. Stimulus package

The first basis of the economical response to the Coronavirus crisis was introduced with Emergency Law No. 2020-290 dated 23 March 2020 to deal with the COVID-19 epidemic. This Law, in addition to declaring the state of health emergency, provided several reaction mechanisms to fight the difficulties facing private companies. Main measures are as follows:

State guaranteed loans (“PGE” – *Prêt garanti par l’Etat*) – One of the first measures to fight this crisis was the creation of €300 billion State’s guaranteed loans for companies. For further details please see Section 7.2 below.

Partial unemployment/Short-time work – The Government has opened the partial unemployment scheme to all businesses. Its implementation has been eased and the former restrictions based on the workforce size are temporary lifted to allow a greater number of companies to use this scheme. In return, the tax administration has the right to check the accounts of every business that asks to benefit from this scheme. For further details please see Section 3.2.

Solidarity Fund – A Solidarity Fund for small businesses has been created by Ordinance No. 2020-317 dated 25 March 2020, as amended by the Rectifying Finance Law dated 25 April 2020. The aggregate amount of this Fund totals €6.75 billion and is allocated up to €1,500 to small businesses (less than 1 million euros in turnover) and up to €10,000 for a larger range of businesses (less than 2 million euros in turnover).

Cash advances and loans - Decree No.°2020-712 dated June 12 2020 implemented the granting by the French Government, under certain conditions, of refundable cash advances to companies whose request for a PGE has not been accepted.

Deferral of social security and tax payment - The State has approved the deferral of social and tax payments of a period of three months available to all businesses.

Overview of others key measures - Decree No. 2020-397 dated 4 April 2020 has replenished the public device for reinsurance of credit insurance default up to €5 billion; this also includes the guarantee of intercompany credit. The referral procedure to the credit mediator has been eased. The penalty clause (for non-performance) inserted in contracts expiring between 12 March 2020 and 23 June 2020 are suspended by Ordinance No. 2020-306 dated 25 March 2020, as amended Ordinance No. 2020-427 dated 15 April 2020. The deadline for general accounting approval meeting has been extended by three months by Ordinance No. 2020-318 dated 25 March 2020. The penalties for delay in public procurement contracts are excluded by Ordinance No. 2020-319 dated 25 March 2020.

4. Contracts

Impossibility to perform a contract because of the coronavirus crisis

A contract can be either cancelled or suspended upon request of either party on different grounds, including *force majeure* and/or hardship ("*imprévision*").

Force majeure does not necessarily lead to termination and is only applicable to contracts concluded and/or renewed before the outbreak of the pandemic (see question 4.2). If it is not applicable, the economic operator could contemplate invoking the existence of an '*act of the Prince*' resulting from the public policy measures taken by the Government and making it legally impossible for it to fulfil its obligations.

In addition, hardship - applicable only to contracts concluded from 1 October 2016 - requires a prior renegotiation phase whenever the performance of the obligation becomes "excessively expensive", it being specified that it does not suspend the performance of the contract. It is only in case of disagreement between the parties after a reasonable period of time that the contract can be cancelled either by the judge or upon agreement of the parties.

Insofar as French law authorizes the parties to contractually adapt these notions and even waive the right to invoke them, the party should thus scrutinize the contractual provisions on *force majeure* and hardship before requesting the termination of the contract on either of these grounds. The existence of other contractual provisions (e.g., amicable adaptation and/or renegotiation clauses) should also be carefully analysed.

The public policy provisions imposing on the parties the obligation to act in good faith at all stages of the contract, as well as the caselaw notion of "economic upheaval" could also be used to oppose the termination of a contract and instead to induce one party to renegotiate its terms.

Concept of force majeure

Force majeure is recognised under French law by Article 1218 of the French Civil Code. It is assessed by French Courts on a case-by-case basis through the following three criteria:

- (i) irresistibility: the impossibility for the debtor to perform its obligation,
- (ii) unpredictability: the event could not have reasonably been foreseen at the time of conclusion of the contract, and
- (iii) exteriority: the event is beyond the debtor's control.

The effects of *force majeure* also depend on the nature of the impediment: a temporary one only suspends performance of the contract while a definitive impediment allows for termination. In any case, *force majeure* is not applicable to a claim for a sum of money.

Insofar as the parties can contractually adjust the list of events likely to constitute *force majeure* or even waive the right to invoke it, it is recommended to carefully review the provisions agreed upon.

While French courts have traditionally been reluctant to recognize pandemics as being *force majeure* events likely to release one party from its obligations, the magnitude and seriousness of the coronavirus pandemic could be factors supporting its classification as such. As of today, by several interim relief decisions ("*ordonnances de référé*") French courts have alternatively retained it or denied it, and ruled that it should be finally determined during proceedings on the merits.

Practically, a party seeking relief from compliance with its obligations should demonstrate that (i) the impediment is permanent and/or that the performance of the obligations is no longer meaningful, and (ii) the contract was concluded or renewed before the outbreak of the pandemic which was unpredictable.

Considerations to bear in mind

- Causation: The party wishing to invoke *force majeure* should clearly demonstrate the existence of a direct causal link between the pandemic and the impossibility to comply with its obligations.
- Notification: Generally, it is recommended that such party informs as soon as possible the other party of the existence of an event considered as *force majeure* that prevents it from performing its obligations. To that end, such party should carefully review the contractual provisions to verify the existence of specific terms governing notification.
- Mitigation: Although there is no general duty to mitigate under French law, French courts have considered that the party invoking the existence of a *force majeure* event must demonstrate that it has taken any and all necessary steps – even if these steps are particularly expensive – to prevent the event from occurring and to overcome the consequences once it has occurred.
- Burden of proof: The party invoking the existence of *force majeure* must demonstrate that the event fulfils the three abovementioned criteria and the existence of a direct causal link between the pandemic

and the impossibility for it to comply with its obligations. To that end, it is recommended to precisely document the event as soon as it appears as well as its consequences for the party invoking it and the exchanges with the other party in this regard.

5. Insurance

As a general comment, no particular measures have been implemented in France with respect to insurance matters. Insurance coverage against disruption resulting from the coronavirus crisis shall depend in practice on the terms and conditions of the relevant insurance policies.

Business interruption insurance

Business interruption may be compensated provided that the relevant insurance policy expressly sets forth that losses suffered as a result of a closure of a facility, whether ordered by an administrative authority or in case of a pandemic, are expressly covered.

Several French courts have been asked to determine the perimeter of this type of insurance in disputes brought by restaurant owners against the insurer AXA for the indemnification of losses they have suffered due to the interruption of their business operations during the pandemic:

On 22 May 2020 the Commercial Court of Paris, ruling in summary proceedings, sentenced AXA to indemnify the business losses suffered by a restaurant up to €45,000. AXA has lodged an appeal and the matter is still pending.

Several other cases have been brought by restaurants and are pending before the Commercial Courts of Lyon and Bordeaux. They relate to the validity of provisions inserted in insurance policies excluding the enforcement of the insurer's guarantee in case establishments (restaurants) are shut down pursuant to an administrative decision, whereas the relevant insurance policies expressly cover the losses arising from the business interruption. Article 1170 of the French Civil Code prohibits and invalidates clauses that deprive an obligation of its substance.

It is very likely that insured companies will pay more attention to the content of insurance policies on this point and that French courts will have to adjudicate many disputes in the near future.

Supply chain insurance

Provided that a company is insured for losses incurred further to the default of one of its suppliers, the compensation of those losses may depend on the terms and conditions of the relevant insurance policies along with the specific circumstances of the incurred losses.

Event cancellation insurance

Provided that the risk of pandemic is covered by the insurance policy and does not constitute a *force majeure*

event (see Section 4.2 above), event cancellation insurance may allow to obtain a refund of expenses incurred in relation to the cancelled event.

More particularly, pursuant to Ordinance No. 2020-315 dated 25 March 2020, it is now possible for travel operators to issue a credit note instead of proceeding with a refund for package travel contracts if the cancellation occurred between 1 March 2020 and 15 September 2020. This measure has been implemented to support travel operators. It must be noted that it derogates from EU regulations which generally provide for a reimbursement obligation.

In addition, several other regulations may apply to event cancellation. For example, EU Regulation 261/2004 dated 11 February 2004 generally provides that, in case of cancellation of a flight, the relevant passengers shall have the right to be compensated by the air carrier.

Liability insurance

As far as employer's liability is concerned, the civil liability of the company can cover damages caused by a contamination with the COVID-19 provided that:

- An epidemic is not a cause of exclusion under the relevant insurance policy;
- The company is not in default under its obligation with respect to compulsory measures introduced to prevent the contamination of its employees.

Workers' compensation insurance

Workers infected by the COVID-19 can be indemnified by the social security as a sick leave (also see Section 5 above).

6. Insolvency and restructuring

Changes introduced to the insolvency regime

In order to support French companies, two Ordinances have been adopted by the French Government with the purpose of adapting French bankruptcy and insolvency law: Ordinance No. 2020-341 dated 27 March 2020 and Ordinance No. 2020-596 dated 20 May 2020.

From a general standpoint, these measures encourage the use of existing prevention procedures and extend certain time periods relating to insolvency/bankruptcy proceedings.

In particular, they have implemented:

- A new assessment of the date of "*cessation of payments*" (i.e. the date on which a company cannot pay its debts with its available assets): Until 10 October 2020 (this date corresponds as of today to the expiration of a three-month period following the end of the state of health emergency), companies becoming insolvent after 12 March 2020 are not required to file a declaration for bankruptcy with the

Trade Registry. Before the adoption of the relevant Ordinances, the managers had the obligation to file for bankruptcy within a maximum of 45 days from the date on which cessation of payments was established. If they failed to do so, managers could be subject to criminal sanctions.

- The possibility to benefit from conciliation proceedings has been extended to companies that have been insolvent for more than the above 45-days period whereas this type of proceedings was previously reserved for companies not insolvent for more than 45 days. The efficiency of these proceedings has been increased by offering the debtor the possibility of asking the judge to stop/prohibit legal proceedings initiated by the creditors or to obtain a postponement of the repayment of their claim.
- The extension of pending conciliation proceedings, safeguard and recovery plans for additional periods of 5 months to one year.
- The reduction of the time periods allowing for a swifter assumption of unpaid salaries by the AGS (a Wage Guarantee Fund that guarantees the payment of salaries wherever a company has filed for insolvency/bankruptcy).

Options are available to companies facing financial distress because of the coronavirus crisis

The French Government has quickly reacted through the adoption of emergency measures aiming at reducing various burdens imposed on companies and improving (as much as possible) their cash flow.

In particular, (i) direct tax payment deferral (corporate income tax balance, payroll tax and local tax), (ii) deferral of social contribution charges, (iii) postponement of the repayment of outstanding bank loans, (iv) facilitation and generalization of the use of the partial unemployment scheme, (v) suspension of the payment of commercial rents, electricity, gas and water invoices for small companies.

In addition, the Government has implemented an exceptional mechanism of guarantees to secure bank financings for businesses, up to €300 billion (“PGE” - *Prêt garanti par l’Etat*). Until 31 December 2020, companies of all sizes (provided they employ less than 5,000 employees and have a turnover not exceeding €1.5 billion in France) and whatever their legal form, can ask their bank for the granting of a loan secured by BPI France (France’s State-backed investment bank). The amount of the loan is limited to three months turnover (based on the 2019 figures) and BPI’s guarantee secures the bank up to 70% to 90% of the loan (the cover percentage depends on the size of the debtor). No repayment is requested during the first year at the expiration of which a refinancing will be possible for a maximum period of 5 years.

7. Trends and predictions

The health crisis has generated a climate of uncertainty all over the world and its effects on the economy shall indisputably deeply impact economic growth in the very next months. However, while the global economic slowdown has impacted many business sectors, the effects for certain industries might be more long-lasting.

A change of mentality may be possible on certain matters including social distancing and so-called “barriers gestures” at work and in social interactions. A reflection should be undertaken at various levels (governments, businesses, EU institutions, international organizations, etc.) to prevent this type of outbreak to start again

and to avoid any types of situation that will put others at risk of getting ill. Society must prepare to change certain habits in order to prevent further contamination but without shutting down the economy.

The COVID-19 pandemic has fostered the development of tele-justice and tele-medicine which will become widespread in the future. But these features must be further modernized, a substantial training effort is required and technological equipment must be deployed.

France has chosen an “all-loan” policy to face the economic consequences of this pandemic. This policy will impact France’s public debt. This does not herald a quiet and sound political, social and economic climate for the years to come. This will come at a cost and France will have to deal with it with its EU partners. France and 8 others EU countries have signed on 25 March 2020 a letter demanding a financial solidarity within the EU and the issue of so-called “Corona bonds”. The European Commission is working on it and has announced that it would borrow €750 billion on the financial markets. This plan is still in negotiation and this crisis has unfortunately showed that even in these troubled times, some decisions are difficult to implement at the EU level.

With respect to the control of foreign investments in France, the Minister for the Economy and Finance has announced on 29 April 2020 an extension of the existing screening mechanism during the COVID-19 crisis. Main announcements relate to the inclusion of biotech activities in the list of sensitive and critical activities subject to control and to the lowering of the threshold triggering the foreign direct investment screening mechanism to 10% of the voting rights. As of today, these proposals have not been implemented.

8. Tips and traps

In order to survive this crisis and its negative financial and economic effects, it is important that businesses use all the measures and support schemes that have been introduced. The official website of the French Government provides complete and detailed information on all applicable measures and processes to follow.

In addition, in order to limit the effects of potential new health crises, it is wise, for the business sectors where it is possible, to develop software and IT tools to make telework safer and more convenient for the workforce. Many companies have experienced cyber-attacks targeting the personal information of their employees due to the lack of security of their current telework plan. This program needs to be operational at any time and will undoubtedly require technological and digital adjustments.

Companies must also renegotiate some contracts with their business partners, to foresee termination clauses in case of resurgence of COVID-19 or outbreak of any other pandemics in order to be able to withdraw quickly from the relevant contracts in case of a global economic downturn.

Businesses could also try to subscribe to new insurance contracts that will cover the losses incurred as a result of a shutdown or a massive loss of revenues due to transport restrictions. Concerning the difficulties faced by companies, this crisis has highlighted the diversity of situations and unfortunately accentuated the weakness of some businesses that already existed prior to the outbreak of the pandemic. Despite the support measures

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that have been quickly put in place, many companies and activities will not emerge completely unscathed. Shutdowns and job cuts are expected. For examples, the marine and airline industries as well as car manufacturers have already announced massive lay-off plans and budget cuts. Other companies will have to review their business model to adapt to the new post-crisis environment. Even for companies with fewer difficulties, and even though their survival is not jeopardized, the economic recovery is likely to be long and not without obstacles.

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