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Covid-19: What impact on your business contracts?

The question is on every business operator's lips: Does the Covid-19 pandemic make it possible to suspend or terminate one's obligations under a business contract to be performed in France by invoking the existence of a force majeure event?

It should be recalled that under French law force majeure allows a debtor who is unable to comply with his obligations due to an event that is unforeseeable on the day the contract is concluded, irresistibly happening and whose effects are unavoidable - i.e. an event beyond the debtor's control -, to be relieved from such obligations without any penalty being due.

Pursuant to Article 1218 of the French Civil Code, 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."*

This Article further stipulates that if contract performance is temporarily impossible, the performance of the obligation is suspended unless the resulting delay justifies the termination of the contract. If contract performance is permanently impossible, the contract is terminated by operation of the law and the parties are discharged from their obligations.

That being said, the parties are free to contractually determine precisely which events may constitute a case of force majeure, alter the meaning they give to it in their business relationships or even waive their right to invoke it.

Any business partner must therefore first of all check if the relevant contract includes a force majeure clause,

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if any adjustments on the meaning of force majeure has been agreed upon between the parties and what are the effects of such clause on their contractual relationship.

French Minister of Economy and Finances Bruno Le Maire declared that Covid-19 will be considered as “*a case of force majeure for companies*”, in particular for public procurement contracts. However, is this systematic for all business contracts?

While case law has already considered that an epidemic can be invoked by a business partner as being a case of force majeure, this epidemic must not have been known at the time of the conclusion of the contract and must have a causal link with the invoked contractual non-performance.

As such, the Covid-19 epidemic should be difficult to invoke as force majeure for contracts concluded from January 2020 onwards as this is the date on which the epidemic began to spread.

In any event, any business partner invoking force majeure will have to prove that the requirements necessary for force majeure to be established have been met, and should rely in this respect *inter alia* on the unprecedented scale of what has now become a worldwide pandemic, the difficulty in avoiding the effects of Covid-19 by circumvention measures and the measures taken by the authorities.

In addition to the existence of a case of force majeure, the impacted business partner may also wonder whether it is possible to request renegotiation of the terms of the contract on the basis of the theory of unforeseeability (“*imprévision*”) provided for by French law.

Pursuant to Article 1195 of the French Civil Code, if a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party, that party may ask the other contracting party to renegotiate the contract. If renegotiation falls through, the parties may terminate the contract or ask the court to revise the contract.

In such a case, a business partner who is forced to implement particularly onerous measures to continue to perform its contractual obligations could invoke the existence of a case of unforeseeability.

Since the parties have full latitude to adjust in their contract the conditions governing unforeseeability, business partners should carefully analyze the relevant contract, verify the existence of such a clause and adjust the terms and conditions thereof.

In any event, before suspending or terminating its obligations, the business partner should closely analyze all the provisions of the relevant business contract in order to consider all the available measures and demonstrate its good faith in implementing any of them.

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