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The Paris Commercial Court rules that Covid-19 is to be considered as a force majeure event

On May 20, the President of the Paris Commercial Court, ruling in summary proceedings, considered that the requirements for establishing the existence of force majeure provided for in the framework agreement signed by EDF and Total Direct Energy were met and ordered EDF to accept the suspension of this framework agreement.

Before being discussed before the Commercial Court, the force majeure clause had already been debated during summary proceedings before the *Conseil d'Etat* (French Administrative Supreme Court) on April 17.

As a reminder, the conclusion of a framework agreement is a prerequisite for an alternative supplier to have the right to purchase energy from EDF under the so-called ARENH mechanism ("*Accès Régulé à l'Electricité Nucléaire Historique*", i.e. regulated access to historic nuclear electricity).

However, the declaration of the state of health emergency in March 2020 caused a considerable decrease in consumption and market prices of electricity. Energy suppliers, no longer able to sell the energy purchased from EDF in anticipation for the year 2020, were forced to sell it at low prices on the markets.

In these circumstances, a number of alternative suppliers chose to invoke in summary proceedings before the *Conseil d'Etat* the force majeure clause provided for in the framework agreement and according to which "*force majeure means an external, irresistible and unpredictable event making it impossible to perform the Parties' obligations under reasonable economic conditions*".

On March 26, 2020, the Electricity Regulatory Commission ("*Commission de régulation de l'électricité*" or "CRE") acknowledged the existence of a disagreement between EDF and the beneficiaries of the ARENH mechanism, ruled that the force majeure requirements were not met and refused to revise the volumes to be supplied under this mechanism.

An appeal for misuse of authority and an application for interim measures for the purpose of the provisional suspension of the CRE decision were lodged with the *Conseil d'Etat*. On April 17, 2020, the latter dismissed the application for the provisional suspension of CRE decision on the ground that the claimants had not demonstrated the urgency to suspend the objected decision, all the more so since - according to the judges - EDF and the beneficiaries of the ARENH mechanism could still reach an amicable solution. On the other hand, the appeal for misuse of authority continues.

It is under these circumstances that Total Direct Energie, one of the beneficiaries of the ARENH mechanism, initiated summary proceedings before the Paris Commercial Court.

Total Direct Energie considered that EDF's refusal to acknowledge the existence of force majeure and consequently to agree to the suspension of the performance of the framework agreement constituted a manifestly unlawful nuisance insofar as said agreement provided that as soon as the force majeure event occurred, the obligations of the parties were to be suspended, resulting in the automatic interruption of the annual electricity sale.

It also claimed that the definition of force majeure had been adjusted in the agreement insofar as performance could continue only under "reasonable economic conditions". However, Total direct Energie contended that it was obliged to sell on a particularly weak market the quantities purchased from EDF that were not consumed by its customers because of the restrictions on business activities imposed by the public authorities.

EDF, for its part, considered that its co-contractor did not demonstrate that it was unable to perform inasmuch as performance was reflected, in particular, by taking delivery of the volumes reserved and by the payment of the corresponding invoices. EDF argued that Total Direct Energie was not claiming that it was unable to perform but wanted to call the agreement into question. It also pointed out that case law relating to force majeure does not apply to a contractual obligation to pay a sum of money.

The defendant also claimed that Total Direct Energie was able to obtain energy at the price of the ARENH mechanism, that the market price was not within the scope of the agreement and that, in any event, the force majeure clause could not be applied unilaterally.

EDF was seeking to justify the existence of a serious objection in that the interpretation of the clause, the enforcement of which was requested by Total Direct Energie, exceeded the powers of the summary judge and that the plaintiff in no way demonstrated proof of the existence of an imminent damage.

RTE, as operator of the public electricity transmission system, and the French Independent Association of Electricity and Gas were also parties to these proceedings.

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The President of the Paris Commercial Court granted Total Direct Energie's request and held in particular that, although the Covid-19 crisis did not make it impossible for Total Direct Energie to perform its contractual obligations, specifically with regard to the receipt of the quantities ordered and payment, *"this analysis does not take into account the totality of the force majeure as per Article 10 of the agreement binding the parties, which also includes the performance of obligations under reasonable economic conditions"*.

In this respect, the President of the Commercial Court pointed out that *"the notion of reasonable economic conditions is not defined in any way"* and that *"its connection with the occurrence of a force majeure event nevertheless allows us to assume a disruption of previous economic conditions which results in losses arising from the performance of the contract"*. In these conditions, the summary order noted that the requirements to establish force majeure were met.

Consequently, the President of the Commercial Court held that, according to the framework agreement, the occurrence of a force majeure event results in the immediate and automatic suspension of its performance and the interruption the annual sale of electricity. As such, the summary order specifies that *"this automaticity does not authorize, at this stage, a discussion on the circumstances alleged by the party implementing the provisions of Articles 10 and 13 of the above-mentioned agreement"*.

The Commercial Court thus ordered EDF to *"no longer oppose the application of the framework agreement (...) and, in particular, the provisions relating to the suspension of its performance"* and, consequently, to *"do all that is necessary in order to achieve the interruption of the annual sale of electricity"*.

EDF has already announced that it intends to appeal this order.

On May 27, 2020, the Paris Commercial Court once again confirmed the possibility for an alternative energy supplier, i.e. Gazel Energie, to invoke the existence of a force majeure event and to suspend its commitments accordingly.

The debate as to whether the Covid-19 pandemic is to be considered as constituting a force majeure event is now open before commercial courts.

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