

ARTICLE

IS CORONAVIRUS A FORCE MAJEURE EVENT AND/OR A CAUSE OF HARDSHIP?

IT and Data Protection Competition, Retail and Consumer Law Commercial and International Contracts |
04/03/20 | Marie Danis Alexandra Berg-Moussa

LIFE SCIENCES & HEALTHCARE

The coronavirus will be "*considered as a force majeure event for companies*", said the Minister of Economy and Finance, Bruno Le Maire on Friday 28 February. And he clarified his position regarding public contracts concluded by the State.

However, should we consider that, in internal or international commercial contracts intended to be executed in France, a party will be able to suspend or terminate its obligations on such ground?

The question is raised in the presence of large events, but also smaller events that are cancelled, in the case of current or foreseeable disruptions in supplies for companies that obtain their supplies, particularly in Asia, and in the case of reduced number of visitors to shops causing very significant drops in sales in certain regions of the world.

The companies will have to review their contracts and verify the drafting of the force majeure clause they contain, if any. Although French law provides a definition of force majeure in Article 1218 of the Civil Code, parties are free to adapt it: modification of the definition, list of examples, whether it is restrictive or not. Article 1351 of the Civil Code even provides for the case where the debtor of an obligation would have agreed to assume responsibility for the performance of the contract in the presence of a force majeure event, thus renouncing the right to rely on it, which is nevertheless relatively rare in practice.

In any event, in the present context, apart from the cases where it will indeed be necessary to analyze the existing contractual clauses, if they exist, the two major questions which will give rise to discussion are :

- the "reasonable" foreseeability of the event at the time the contract was signed. What about Coronavirus? The parties having recently concluded a contract will probably have more difficulty to raise a force majeure event, but what about the others? If this is not indeed the first flu epidemic, it seems unprecedented by the extent of prevention measures in certain geographical areas (confinement of the population, bans on events of a certain size, travel bans issued by companies for example).
- the possibility of avoiding the effects of the Coronavirus by putting in place appropriate measures (alternative sources of supply in particular).

In addition, the effects of force majeure on the contractual relationship are also generally provided for in the contract: obligation to inform the contracting party within a certain period of time, suspension of services, obligation to negotiate in good faith possible adjustments and/or termination. Here again, this must be complied with and must be done in good faith; this last criterion is increasingly being analyzed by the judge in the event of a dispute.

Beyond the question of force majeure, companies could also consider whether there is hardship. Article 1195 of the Civil Code in fact allows, in the event of a change in circumstances unforeseeable at the time of the conclusion of the contract, rendering the performance of the contract excessively onerous for a party who had not agreed to assume the risk, that the latter may take steps to renegotiate the contract with its contracting party. One could imagine that a party who would have the possibility of circumventing the effects of the Coronavirus by implementing appropriate measures as mentioned above, making force majeure difficult to invoke in his case, could on the other hand request a renegotiation of the contract from his contracting party if these appropriate measures are particularly onerous.

Here again, if the unforeseen circumstances are the subject of legal provisions, the contract may amend them. Here again, therefore, it is the contractual clause, if any, which should be used to determine whether or not a party may invoke hardship and what contractual mechanisms are in place to overcome the change. Here again, an *in concreto* analysis of the situation should be made and the parties should demonstrate good faith in their discussions. As a reminder, in cases where hardship is raised and the parties have not provided for a clause dealing with the matter, the judge has, at the request of a party, the power to revise or terminate the contract based on conditions it will determine.

Finally, the parties will analyze their dispute resolution clauses in order to know which route to take if a dispute arises that they are unable to resolve amicably.

