

FORCE MAJEURE EVENT: THE EXAMPLE OF SUPPLY AND DELIVERY CONTRACTS

Litigation - Arbitration - White Collar Crime Technologies - Media - IP | 23/03/20 | Marie Danis Alexandra Berg-Moussa



As Covid-19 expands and Governments take increasingly restrictive measures, particularly with regard to borders, there are questions about the foreseeable consequences for supply and delivery contracts.

Indeed, the Covid-19 pandemic, by its suddenness and virulence, could in certain cases meet the three criteria of an event of force majeure defined in Article 1218 of the Civil Code: exteriority, unpredictability and irresistibility. If the analysis of previous decisions rendered in the context of other epidemic episodes (dengue fever, chikungunya, SARS) could lead one to believe that this qualification could be rejected, its recognition by judges could on the contrary be facilitated by the novelty and scale of the crisis, as well as exceptional restrictive measures been taken (see our article on this subject).

By focusing on the characteristics of the contractual relationship between a client and its supplier or service provider, the latter (in charge of the supply and/or delivery obligations) could see the application of force majeure invoked by it, being set aside by the judge whenever alternative methods of supply or delivery were possible in order to continue the performance of the contract.

Generally speaking, a person who invokes force majeure to justify his contractual non-performance must be able to demonstrate that he has taken all the necessary steps to avoid the occurrence of the event (CA Rouen, 2nd chapter, 16 September 2004, No. 03/01728), but also to overcome the consequences at the time of its occurrence.

This last requirement was laid down by a judgment of the Commercial Chamber of the *Court de Cassation* of 16 March 1999 on the consequences of the Gulf War on a contract for the carriage of goods. As early as before the arrival of the freight and in order to get around the blockage of the airways caused by the conflict, the carrier had in this case taken "all the measures required to avoid the consequences of this event on transport, but was unable to do so because of the irresistibility of the situation". The *Cour de Cassation* had then held that "even if foreseeable, the situation was, therefore, force majeure" (Cass. com., 16 March 1999, No. 97-11.428).

Nevertheless, the application of a force majeure event was rejected in certain cases, "notwithstanding the steps that it [the party invoking force majeure] was able to take to find alternatives" to the delivery conditions initially set by the contract and made impossible by the occurrence of the event (CA Bordeaux, 5 May 2010, No. 09/02163: the judicial liquidation of a subcontractor is not a force majeure event).

Similarly, it could be held that a company could not invoke the reduction in its supplier's production to justify the cessation of its own deliveries, insofar as the supplier did not hold a monopoly in this area, and the company did not justify the irresistible nature of this failure (Cass. civ. 1st 12 July 2001 n° 99-18.231). In the same sense, it was held that a company could not rely on a force majeure event to justify its non-performance when it had made "the choice of its supplier on its own" and did not explain "how it could not obtain supplies elsewhere to perform the order" (CA Aix-en-Provence, May 16, 2011 No. 10/02823).

In addition, the party invoking force majeure must be able to demonstrate that the difficulty or lack of supply occurred concomitantly with the occurrence of the event (CA Montpellier, 24 October 2017, No. 15/08203; CA Paris, 26 January 2006, No. 04/07947).

Finally, where there is a force majeure event provision in the supply or delivery contract, the court will interpret such clause strictly. For example, if the stoppage of supplies of raw materials constitutes a force majeure event under the contract, their mere shortage will not trigger the application of its clauses (Versailles Court of Appeal, 31 March 2011, No 09/09728).

Consequently, the recognition of a force majeure event by the courts depends above all on a case-by-case assessment of the facts constituting the event likely to meet the criteria, and on a careful study of the drafting of the contract's clauses.

Thus, each company will have to anticipate the conduct to be adopted in order to deal with the economic threats induced by the fulgurancy of the Covid-19 pandemic and foresee the precautionary or alternative measures to be taken in order to meet, as far as possible, its contractual obligations.