



ARST AVOCATS

## COVID-19 AND CONTRACT LAW : WHAT IF THE BEST CONTRACTUAL SOLUTION WAS NEGOTIATION?

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France has just passed to stage 3 of the Covid19 epidemic that is currently sweeping through the country. Many sectors (tourism, transport, events, hotels, entertainment, culture, etc.) are already being impacted by the strong drop in demand and the cancellations caused by the measures taken by the public authorities and customer behaviour.

With regard to public procurement, the Minister of the Economy and Finance has publicly announced that the State's doctrine would be to consider that the Covid19 is a case of *force majeure* intended to exonerate the parties from their contractual obligations.

For the private sector, the delay or impediment in the performance of the contract will in particular be understood in the light of the concept of *force majeure* as defined by the contract itself (in which case it is to this definition that reference should be made to determine whether the Covid19 does indeed constitute *force majeure*) or, failing this, by article 1218 paragraph 1 of the French Civil Code according to which "*there is force majeure in contractual matters where an event is beyond the debtor's control, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects cannot be avoided by appropriate measures, prevents the performance of his obligation by the debtor.*"

It is recalled that, according to Article 1218(2) of the French Civil Code, the degree of the case of *force majeure* has a direct influence on the scope of its exonerating effect. Therefore, "*if the impediment is temporary, the performance of the obligation is suspended unless the resulting delay justifies termination of the contract. If the impediment is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions set out in articles 1351 and 1351-1.*"

In the absence of a contractual definition to specify the case of epidemics, the universality of Article 1218 of the French Civil Code will oblige lawyers to say whether the Covid19 phenomenon and/or the events which resulted from it were events which were unforeseeable at the time of concluding the contract, which became irresistible at the time when the contract had to be performed, and will probably turn to the case-law.



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The decisions, few in number, which have been issued on this question all point in the direction of a refusal to assimilate an epidemic to a case of *force majeure* capable of exonerating the debtor from liability for a contractual obligation.

Therefore, whether we are dealing with Dengue fever, the H1N1 virus, Chikungunya, seasonal flu, avian flu, or even the plague, the decisions published to date have all led to a refusal to recognise the existence of a case of *force majeure*.

Even if, in view of the strength of the Covid19 epidemic, a change of paradigm cannot be ruled out, particularly having regard to the decisions taken by the executive bodies which are themselves likely to affect the conditions for the performance of contracts, debtors should therefore assume that the impossibility of performing their obligations because of this epidemic is not necessarily such as to exonerate them from their contractual liability, but rather to encourage them to try, upstream, to negotiate with their creditors an adjustment of their contract.

In the absence of a negotiated solution, they may, if their contract does not prohibit them from doing so, turn to Article 1195 of the French Civil Code, according to which *“if an unforeseeable change of circumstances at the time of the conclusion of the contract makes performance excessively onerous for a party who had not agreed to assume the risk, that party may request a renegotiation of the contract from his co-contractor (...). In the event of refusal or failure of the renegotiation, the parties may agree on the termination of the contract, on the date and under the conditions that they determine, or ask the judge by mutual agreement to adapt it. If no agreement is reached within a reasonable period, the court may, at the request of one of the parties, review or terminate the contract on the date and under the conditions which it shall determine.”*

Much criticised when it was adopted because of the cumbersome renegotiation procedure which it provides for, Article 1195 of the French Civil Code could today become the best contractual remedy against the misdeeds of the Covid19.

For professionals who have taken out “business interruption” insurance coverage, the question could finally arise as to whether losses related to Covid19 could fall within the scope of the guarantee. However, in the absence of “material damage” at the origin of the business interruption, it is the very existence of a covered loss that is likely to be lacking, if the insurance contract does not also provide for a specific exclusion of the guarantee for epidemics.

With regard to travel and stays, Article L. 211-14 II of the French Tourism Code gives the traveller the right to cancel his contract without charge (but without additional compensation) in the event of *“exceptional and unavoidable circumstances occurring at or near the place of destination”* having *“significant consequences on the performance of the contract or on the means of transport for the travellers”*.



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Here again, the question will arise as to whether the Covid19 meets the legal definition of exceptional circumstances, being pointed out that the courts could have a more flexible appreciation of the matter as far as individual consumers are concerned.

In view of these many uncertainties, the most appropriate recommendation is not to wait for the situation to worsen and to try to negotiate, with its customers, sub-suppliers and business partners, a negotiated solution consisting in arranging contractually, by way of a rider, the postponement or cancellation of services which cannot be provided.

To this end, Arst Law Firm has developed a "Covid19" clause which may serve as a basis for negotiation and which must, of course, be adapted and supplemented in order to fit perfectly into the contract it is intended to integrate.

Do not hesitate to contact us.

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