SQUIRE PATTON BOGGS

COVID-19 Impact on Contractual Relations in France:

Force Majeure and Hardship

April 3, 2020

Since 28 February, the state has considered the coronavirus disease 2019 (COVID-19) as a "*force majeure*" for public procurement, so companies with public procurement contracts will not be penalised in the event of late performance. What is the impact of this announcement on B2B or B2C agreements? Moreover, could the regulation on hardship also be relevant?

1. Force Majeure

Force majeure applies in a contractual relationship governed by French law (this is not necessarily the case if the contract is governed by another law).

Whatever the applicable law, the contract may happen to define, in a more or less detailed, extensive or restrictive manner, the *force majeure* event and their consequences on the parties. It is, therefore, important to read the content of one's contracts carefully, should you wish to invoke *force majeure*.

With regard to the relationship between a professional and a consumer, the contractual provisions, which are more unfavourable to the consumer than what is provided by law (even implicitly), are likely to be void, since they are abusive. Any clause "that removes or reduces the consumer's right to compensation in the event of the trader failing to fulfil one of its obligations" is considered to be null and void, which could be the case in particular of a clause giving a much defined definition of *force majeure* (Article R. 212-1 of the consumer code).

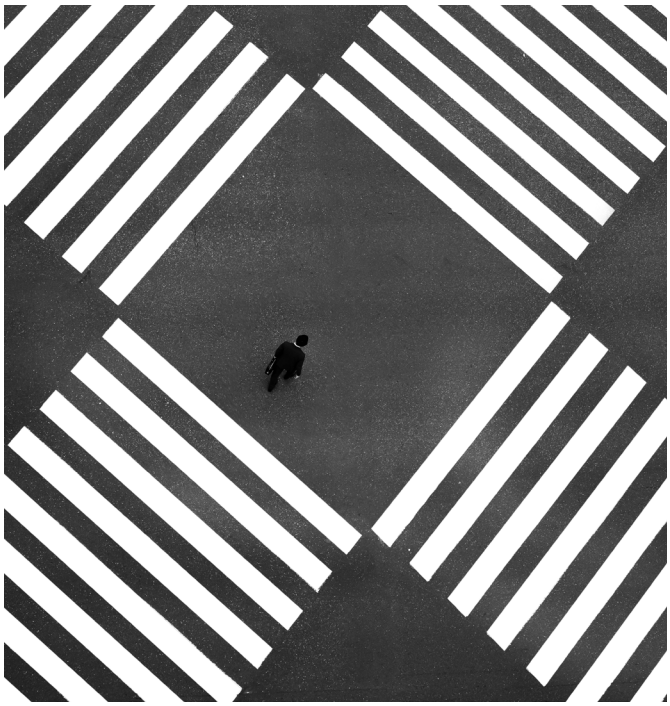
Since 1 October 2016, *force majeure* is defined in Article 1218 of the Civil Code, which provides that "In contractual matters, there is *force majeure* where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract, whose effects could not be avoided by appropriate measures, prevents performance of its obligation by the debtor."

Article 1218 has taken over the previous case-law criteria of unpredictability and irresistibility, abandoning the criterion of externality.

The parties are free to supplement their contracts with specific cases or circumstances as being due to *force majeure*.

The text also provides: "If the prevention is temporary, performance of the obligation is suspended unless the delay that results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by Articles 1351 and 1351-1."

Many contracts provide for the possibility of termination by the parties.



The state has announced that COVID-19 should be treated as a *force majeure* in the context of French public procurement contracts. Even if this decision may influence it, the determination of the existence of a case of *force majeure* is a matter for the sovereign discretion of the courts, particularly in relations between traders or with consumers.

This is not the first time that the question of the *force majeure* of an epidemic has arisen. Judges have, for example, ruled on diseases such as chikungunya, Ebola, dengue fever, plague, SARS and even influenza A (H1N1).

In practice, we will remember that:

- The "unpredictability" of the event qualified as *force majeure* is assessed on the day of the conclusion of the contract. For COVID-19, if the question does not arise for old contracts, it will be necessary to consider when the intervention of COVID-19 on the contract could have (or should have) been anticipated and on the measures taken as a result.
- The severity and the complication or mortality rate of the virus, as well as the existence or not of a medical cure (this is not the case today for COVID-19) and the ease of limiting the risk of contamination (wearing protective clothing or masks, for example) should be taken into account to determine whether the criterion of "irresistibility" is actually fulfilled. The implementation of sanitary measures by the public authorities preventing the debtor from fulfilling its contractual obligations is also taken into account.

- The location of the *force majeure* event is important in some cases. Can the precautionary principle be taken into account when it comes to areas near a risk area? The issue is often dealt with specifically by the tourist and travel industry.
- *Force majeure* cannot be invoked as a mere pretext for disengaging from contractual obligations; there must be a real impediment. A causal link between the event of *force majeure* and the non-performance must be established. In addition, the possibility of using substitutes or substitution circuits must be assessed, and whether the effects can be "avoided by appropriate measures", as provided for in Article 1218.
- If *force majeure* can prevent or delay the performance of a service, case law considers that it does not affect the payment of a sum due (unless *force majeure* makes the debtor insolvent).

2. Hardship

Does the epidemic constitute a case of unforeseen circumstances that would allow a party to renegotiate the contract?

a. Under Private Law

Hardship applies in any contractual relationship governed by French law formalised since 1 October 2016 law (this is not necessarily the case if the contract is governed by another law).

Whatever the applicable law, the contract may happen to define and govern, in a more or less detailed, extensive or restrictive manner, hardship events and their consequences on the parties. It is, therefore, important to read the content of one's contracts carefully, should one wish to invoke unforeseen circumstances.

Article 1195 of the Civil Code states that "If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform their obligations during renegotiation."

Some parties prefer to exclude the application of the article referring to the acceptance of the risk by the parties.

The text further provides that "In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract, on the date and on the conditions that they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine."

Many parties, in practice, rather than leaving the ordinary law of Article 1195 of the Civil Code to govern their contract, provide for a "tailor-made" contractual clause with specific terms, in order to avoid leaving the judge an excessive freedom in the development of the new post-revision contractual regime.

b. Under Public Procurement Law

Public law has recognised hardship since a judgment of the Council of State in 1916. The hardship theory is codified by the Public Procurement Code (PPC), entered into force on 1 April 2019. Article L. 6, 3 PPC provides that an agreement can be modified when an event "exterior to the parties, unpredictable and temporarily disrupting the balance of the contract" takes place. In this case, the other party is entitled to compensation. In exchange for this, the latter is required to continue to execute the agreement and all of the obligations attached to it.

The main contracts affected by such circumstances are public service delegations, which are concluded for a relatively "long" period.

The hardship theory presents similarities to the notion of "unforeseen technical constraints", which covers all the technical difficulties encountered during the performance of a public market and governed by the Public Procurement Code. If unforeseen technical constraints are recognised, the contract may be subject to modification if the overall nature of the contract remains unchanged (Articles L. 2194-1 and L. 3135-1 of the Public Procurement Code) and if the additional works, services or supplies do not entail, for contracting authorities, an increase greater than 50% of the initial amount of the agreement (Articles R. 2194-3 and R. 3135-3 of the Public Procurement Code). It is important to read the content of its contracts carefully as regards the terms governing changes.

Force majeure is an implied term for all agreement governed by French law. Hardship is an implied term in B2B agreement entered into after 1 October 2016 and has been for more than a century in public procurement contract. For each of these implied terms, parties have to make a careful assessment on whether, and to what extent, they apply to exonerate non-performance or termination of the agreement.

Contacts

If you would like to discuss any of the issues raised in this advice note, please contact any of our team listed below.

Litigation, Restructuring and Insolvency

Antoine Adeline
Partner, Paris
E antoine.adeline@squirepb.com

Data Protection and Cybersecurity, Contracts, Intellectual Property and Technology

Stéphanie Faber
Of Counsel, Paris
E stephanie.faber@squirepb.com

International Dispute Resolution

Carole Sportes
Partner, Paris
E carole.sportes@squirepb.com