

Q&A: France anticipating opportunities and securing contractual relationships after the health crisis

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22 June 2020

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The health crisis caused by the Covid-19 pandemic has had an immediate impact on companies' contractual relationships, raising concerns about both the continuation of ongoing contractual relationships and the consequences of performance difficulties. In this uncertain economic landscape, unprecedented derogatory legal regimes have been adopted in order to adjust the application of certain rules during the current crisis.

Many questions will also be raised at the end of the legal “health emergency” period declared by the French government. What contractual management approach should be adopted now that we can measure the impact of the health crisis on contractual relations? We have listed below a few points of interest, as the current period is offering opportunities in that respect

Focus 1 : Contractual implications due to the “legally protected” period in France»

1. What is the purpose of the emergency measures adopted in France during the Covid-19 period?

In order to protect companies during the Covid-19 pandemic, the French government has adopted an impressive series of emergency measures – nearly 40 ordinances – in record time. This significant number is also due to the fact that these ordinances were reviewed in response to changing health conditions, in order to supplement, extend or limit their scope. The downside is that these measures, which are technically complex, have clearly created legal uncertainty.

One of the main temporary measures, Ordinance No. 2020-306 of 25 March 2020, which was amended by Ordinance No. 2020-427 of 15 April 2020, introduced a “legally protected” period by providing mechanisms intended to suspend or extend expired deadlines until one month after the end of the health emergency period.

The health emergency period, that was initially scheduled to last from March 12, 2020 to May 23, 2020 was recently extended to 10 July 2020 by Ordinance No. 2020-546 of 11 May 2020. This extension has led the government to review the period of application of the above-mentioned emergency mechanisms within the legally protected period.

In short, what should be remembered from now on is that 23 June 2020 is the fixed date for the end of the legally protected period (Ordinance No. 2020-560 of 13 May 2020).

The window of opportunity to invoke the protection mechanism will therefore soon close (see Focus 2 for questions of liability and recourse). As a result, scenarios for life after the legally protected period must now be anticipated.

2. What are the exceptions granted by these emergency provisions concerning the performance of the contract?

The emergency provisions adopted provide for temporary suspension of the implementation of contractual clauses sanctioning a failure to perform within a specified period of time. Consequently, the following are thus provisionally suspended:

- Periodic penalty payments (astreintes)
- Penalty clauses (clauses pénales)
- Termination clauses (clauses résolutoires)
- Forfeiture clauses (clauses prévoyant une déchéance) in the event of non-performance of an obligation

Warning: To the extent that mechanisms of a contractual nature are exclusively related to these emergency measures, the sanctions mechanisms **provided by law**, such as penalties for late payment, will continue to apply. On the other hand, **contractual penalties** for delays, such as interest for late payment in excess of the legal rate, have been a *priori* **suspended** by the mechanism of the above-mentioned emergency provisions

This provision actually provides a more advantageous shield of protection for the defaulting party than the force majeure mechanism, as it can be used regardless of the reason for the failure: the defaulting party will therefore not have to demonstrate that the non-performance or failure is directly attributable to the health crisis.

Concerning the contractual provisions for which there may be uncertainty about the right to enforce them during the legally protected period, the context calls for great caution, and requires interpretation.

It should be noted that, to the extent that these provisions are not considered mandatory, **parties may waive this protection mechanism through an unequivocal expression of will**. It is therefore advisable for companies wishing to circumvent this mechanism and/or to maintain deterrent means of enforcement to enter into such derogatory agreements with their co-contractor beforehand, or to wait until 23 June 2020..

3. Are these measures extraterritorial and can they apply to international contracts?

First of all, it is necessary to check the governing law of the contractual relationship.

If the contract is governed by French law, this suspension mechanism applies automatically, even if the contract is to be performed outside France, unless the parties to the contract have agreed otherwise.

If the contract is subject to foreign law but involves a French company, the answer is more ambivalent and will depend on the nature of the measures, that is, whether or not the above-mentioned emergency provisions will be recognised under French law as “overriding mandatory provisions”. Although this qualification has to be defined by courts, in a note dated 17 April 2020, the French Ministry of Justice seemed to move towards this qualification as overriding mandatory provisions, thus widening the scope of application of these extraordinary provisions.

Focus 2 : Managing contractual performance difficulties due to the current health crisis

4. What are the legal mechanisms for a provider, distributor or supplier facing performance difficulties?

When the performance of an agreement becomes impossible or excessively onerous for a company due to the difficulties caused by the Covid-19 pandemic, French law provides parties with two legal mechanisms – force majeure and hardship – which may be freely exercised as long as the agreement does not include a formal waiver of the following legal provisions.

Force majeure: The party to the contract prevented from fulfilling its contractual commitments may invoke article 1218 of the French Civil Code or the provisions of force majeure provided for in the contract in order to be exempted from its obligations as soon as the force majeure event raised is:

- **External**, meaning it is beyond the defaulting party’s control.
- **Irresistible**, meaning its effects cannot be avoided by other measures.
- Unforeseeable at the time of the conclusion of the contract: the Covid-19 pandemic fulfils this condition for contracts concluded before the period during which the extent of the pandemic was known. It is currently difficult to know precisely the date that will be chosen by the French courts, but it will certainly be between 30 January 2020, the date of the official announcement by the World Health Organisation declaring the epidemic, and 12 March 2020, the date the health emergency period began. For contracts

concluded after the latter date, the assertion that the Covid-19 pandemic was unforeseeable will obviously be questionable.

The party that demonstrates force majeure may be released from its obligations without being required to compensate its co-contractor.

It will also be necessary to dissociate – for a given contractual relationship – via the notion of “partial impediment”, the contractual obligations actually affected by the force majeure and those that are still enforceable.

Warning: Invoking an event of force majeure in order to be released from a payment obligation - due in particular to the difficulty of demonstrating the causal link - has not yet been accepted by the French courts.

The First court decisions have already been issued since the beginning of the Covid-19 pandemic. They recognised force majeure and its current regime as outlined above (Total Direct Energie v. EDF, Commercial court of Paris, 20 May 2020 No. 2020016407).

- **Hardship:** Legal Hardship is characterised by an unforeseeable disruption of the contract due to an execution that has become disproportionately expensive, without this execution being impossible. The provisions of article 1195 of the French Civil Code allow a party in difficulty to request either a renegotiation of the contractual provisions for the purpose of rebalancing the execution of the contract – the drafting of new provisions can also be carried out by the judge – or, to obtain the contractual or judicial resolution of the contract in case of failure of the renegotiation.

The above-mentioned mechanism is a recent mechanism, dating from the reform of contract law in France that took place in 2016, and has not yet been “tested” by case law in the event of a crisis.

Warning: The obligation to renegotiate becomes an operational risk, as this renegotiation is now provided by law.

This mechanism should be closely monitored, as it is the one that will chronologically succeed the force majeure mechanism. As a result, parties wishing to take advantage of the mechanism will have to skilfully anticipate its implementation.

Those wanting to prevent renegotiation will also need to proactively address the issue.

5. What remedies are available to a company facing the non-performance of its co-contractor?

The suspension of many contractual prerogatives obviously forces the parties to temporarily waive the mechanisms that might compel their defaulting co-contractor to perform.

However, there are still certain legal remedies to be raised in response to a failure, which have to be used prudently and in good faith in view of the extraordinary circumstances currently surrounding the enforcement of contractual relationships.

Depending on whether a company is facing the non-performance of its supplier or another type of contractual partner, it will have to implement actions with different purposes.

- Confronted with supplier non-performance, the company may want to ensure the continuity of the services it needs in order to continue its own business. Under these circumstances, a renegotiation of the contract taking into account the adjustments, or even the temporary recourse to a subsidiary provider, could be considered. In that regard, it will be necessary to check whether the contract contains a substitution clause in the event of default of a party, or a clause to implement, under certain conditions, the legal mechanism giving a party the option to enforce the obligation itself at the co-contractor's expense.
- In the case of a non-performance of a payment obligation, which, in principle, cannot be exempted by force majeure, the other party may instead prioritise legal sanction mechanisms, which are not suspended by the above-mentioned ordinances.

However, the French mechanism of **defence of non-performance**, which allows a contracting party to suspend the performance of its own contractual obligations, may be validly applied, subject to compliance with its legal conditions of application.

It should also be outlined that French case law accepts the use of the non-performance defence mechanism even in the event of an actual force majeure affecting the performance of the other party's obligations.

Focus 3 : Life after the legally protected period: opportunities for taking into account the impacts of the health crisis in contractual provisions

6. How to address contractual risks related to the health crisis in contract negotiations?

As the impact of the current crisis cannot be ignored, companies will have to be particularly careful to consider potential risks in their upcoming contractual negotiations.

In that respect, new agreements will have to incorporate provisions, sometimes transitional, relating to the consequences of the epidemic on the performance of services. During the drafting of contracts, consideration could also be given either to prevent the qualification of an obligation to achieve a result, known as "obligation de résultat", for certain contractual commitments, such as delivery deadlines in the event of difficulties related to Covid-19, or to provide for the sharing of responsibility if the contract cannot be fulfilled.

In addition, business partners may also consider entering into a contractual obligation to be more transparent, in order to be aware as soon as possible of any difficulties encountered by either party and to streamline the communication process. Appropriate contractual provisions will have to be carefully negotiated to this end.

7. How to address risks of a possible future pandemic or a return of Covid-19?

A first step could be to consider this type of crisis in essential clauses, such as the force majeure clause, but also other clauses for the execution of the contract. The same would apply to address future ad hoc regulation that could be waived. Drafting will be key here.

It will also be more possible to anticipate new risks and uncertainty caused by the health crisis, and parties could introduce particular provisions in order to facilitate renegotiation between them when new needs relating to a crisis arise. These provisions could thus aim to create a "new hardship regime" that would be more flexible than the legal mechanism and not subject to the demonstration of an economic disruption of the contract.

Focus 4 : Opportunities for supply diversification

8. Opportunities for diversifying suppliers in times of crisis or substituting a defaulting supplier without incurring liability?

The main liability issue with diversifying suppliers or substituting a defaulting supplier is that under French law, the termination of an established business relationship can only take place in principle after observing a notice period assessed according to the duration of the relationship.

Otherwise, such termination would be considered sudden termination and would incur liability of the company causing it. Only force majeure or the contractual fault of the co-contractor are considered by French law as valid reasons for the exemption of providing a period of notice that is calculated based on the length of the business relationship.

In principle, force majeure allows a business relationship to be terminated without notice, as definitive force majeure entails termination of the contract.

However, the question of contract survival becomes more delicate if the impediment resulting from force majeure for a supplier is only temporary and not definitive.

Actually, in the event of a simple suspension of contract performance, parties are bound to resume performance of the suspended agreement at the end of the event of temporary force majeure. Otherwise, they may be liable for the sudden termination of established business relationships.

This question in particular has arisen before in the French courts, in a case in which an import ban had been imposed in the context of an epidemic. An action for sudden termination was brought against a co-contractor who had not continued performance of the suspended commercial contract once the import ban had been lifted (CA Paris, 26 September 2018, No. 15/09123). Liability was triggered based on the sudden termination of business relationships.

In order to prevent any risk of liability, parties would therefore be well advised to take preventive measures by contract, that is, for parties to agree in advance on the contractual effects they attach to the force majeure event at the time it is notified.

9. **Does a drop in orders create a risk of liability based on sudden termination of established business relationships?**

In principle, yes. A significant decrease in orders may characterise a breach of established business relationships, so a notice period prior to such a decrease must be put in place within the framework of established business relations.

However, case law has provided for exceptions to this notice requirement if a contracting party can justify to its provider or supplier that the drop in orders is the consequence of a significant drop in orders placed by its own customers due to unfavourable economic conditions, or an economic or financial crisis (Com. 6 February 2019, No. 17-23.361; Com. 8 November 2017, No. 16-15.285).

All of this nonetheless requires proactive preparation and anticipation. Here, as elsewhere, contractual monitoring anticipation will be essential.

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