

The Impact of the Coronavirus Pandemic on Commercial Contracts in France

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Abstract

The world has witnessed a highly contagious virus which resulted in a significant halt in the productive activity and therefore in the commercial operations of the company. The consequences are obviously diverse, but it is appropriate to question the impact of the Covid-19 pandemic on commercial and employment contracts in France.

Since the spread of the virus, France has put in place legal tools concerning companies to deal with the effects of unforeseen future events and unforeseen changes in circumstances, particularly in long-term contracts.

Given its global dimensions, and its powerful effects on international contracts, the COVID-19 pandemic will generate years of post-pandemic disputes focused on the use of force majeure. The paper examines the conditions under which the pandemic is qualified as force majeure. On the basis of this analysis, the article shows that in this extraordinary event, the doctrine of Force Majeure allow the company which invokes it not to fulfill its obligations without being accused. Faced with this uncertainty, prudence requires the contracting partner to carefully analyze his situation in order to secure his position, which implies starting with an audit of the contractual clauses applicable in the event of force majeure.

Thus, in an attempt to contain the large-scale economic crisis as a matter of urgency, the government and the European Commission have already implemented a series of support measures in the form of several regulations for preventive purposes intended to curb the spread diseases and limit their economic and social impact.

This paper aims to analyze the legal and financial measures taken by the government to guarantee maximum stability. These measures mainly concern the status of companies (state aid, bank loan) and employees (telecommuting) who are the first victims of this pandemic.

Keywords: covid-19, Undertaking, force majeure, State measures, Telecommuting.

Introduction

When China coughs, the global economy gets cold! A common saying has it that *when America sneezes, the rest of the world catches a cold*. However, with China's economic rise, this phrase is yet to gain another spin.

Unfortunately, globalization today, took another unexpected turn. In fact, taking advantage of the globalization of trade and social mobility, it only took a couple of week for the COVID-19 virus to be detected outside of China. At the beginning of March 2020, several hundred million schoolchildren must stay at home because of the epidemic, especially in Italy, Iran, South Korea.

Consequently, the World Health Organization (WHO) described the COVID-19 epidemic on March 11, 2020, as a pandemic due to its global wide spread.

In fact, to react to this imminent risk, and so that the health crisis does not turn into the greatest financial and economic crisis in the World since 1929, several countries in the world have progressively and gradually adopted drastic economic measures, social and health: such as strengthening entry restrictions by announcing the closure of the sea and land and air borders, limited travel, closure of schools and universities.

The consequences are evidently various; however it is opportune to question about the impact of Covid-19 pandemic on business and labor activities and contracts in France?

Companies have been affected. Since then, several questions have arisen, and this paper is to shed light on the legal gaps in contractual, legislative and regulatory matters in the event of a health crisis.

The state of health emergency declared by Law No. 2020-290 of March 23, 2020, and the quarantine measures deployed in Decree No. 2020-293 of March 23, 2020, has paralyzed the usual activity of these companies. To try to stem the large-scale economic crisis that is looming for the coming months, the government has already implemented a whole range of support measures: full coverage of unemployment covers partial, allowances for parents to keep their children at home, Bpifrance (public investment bank) unlocked guarantees and loans procedure, solidarity fund for traders and small businesses, deferral or cancellation of tax and social charges, deferral of rents and invoices gas / electricity....

This plan costs, according to Bruno Le Maire, Minister of the Economy, to 45 billion euro for two months including 8.5 billion for the financing of partial

activities and 2 billion per month for the solidarity fund...

A large-scale plan, which could significantly deepen France's debt, placing it in all probability beyond the famous 3% line.

In contractual matters, the legal regime applicable to situations resulting from the Covid-19 crisis is not always very clear. Questions relating to the qualification of force majeure, the possibility of invoking the recent article 1195 of the civil code introducing a form of revision for unforeseen circumstances, the effects on current contracts or even the drafting to be adopted to provide for clauses incorporating similar risks are numerous.

We should be aware that an exterior or unpredictable event in itself does not always constitute a case of force majeure, in contractual matters. For example, for a contract concluded in March 2020, it would be difficult to claim the unpredictability of the covid-19 epidemic and its effects. Thus, the meeting of the conditions of force majeure as well as unpredictability depends largely on a case-by-case basis, insofar as these concepts call for standards leaving an important place to the interpretation of judges.

I – Corona virus and its impact on business: case of force majeure

In this unprecedented period, where the whole world is forbidden to assemble and where, above all, we can no longer move around with rare exceptions, it is useful to ask the question of the legal effects of the epidemic of COVID- 19 on economic activity and more particularly on contract law. In this article, I will discuss the case of obligations under French contract law.

Today, with these unforeseen events, the execution of contracts is delicate⁽¹⁾.

In this context, several lawyers use force majeure as an argument to justify that one can no longer honor a contract and get out of it without cost. But what are their legal bases?

According to article 1218 of the French Civil Code, created after the reform of contract law in 2016: "There is force majeure in contractual matters when an event beyond the control of the debtor, which could not have been reasonably foreseen at the conclusion of the contract and the effects of which cannot be avoided by appropriate measures, prevent the debtor's performance of his obligation".

(1) Barrière, François, *La réforme du droit des contrats: incidences sur la vie des affaires*, Lexisnexis, 2019, p. 26

In fact, before the reform, in the old article 1148⁽²⁾, the judge characterized force majeure by the combination of three elements: unpredictability, irresistibility and exteriority.

The new text broadly takes these conditions by requiring, for force majeure, that the event considered “escapes the control of the debtor”, “could not have been reasonably foreseen when the contract was concluded” and that its effects cannot be avoided “by appropriate measures”.

It seems to us, however, that the new definition is less demanding and that judges should therefore, in the times to come, admit as a case of force majeure facts which would not necessarily have been so previously.

We could wonder if COVID-19 is reality a case of force majeure?

A. The conditions of force majeure

The existing case law on diseases and epidemics goes in the opposite direction and apparently does not apply to an unforeseen event.

Judges in recent French cases have ruled that viruses such as plague⁽³⁾, the H1N1 flu epidemics in 2009⁽⁴⁾ and the virus of chikungunya⁽⁵⁾ are not health crises and thus does not constitute force majeure events. In these previous cases, the judges considered that these diseases were known and there are cures for that, or that they were not mortal. The judges therefore ruled out that parties of the contract cannot excuse themselves from performing a contract as events of viruses are not considered as a force majeure. An epidemic is therefore not necessarily or automatically a case of force majeure.

But what about Covid-19? Let’s analyze the conditions of Article 1218 of the Civil Code on a case-by-case basis.

1 - An event beyond the control of the debtor

Force majeure has long been defined as necessarily an “external” event to the debtor. This criterion has been further specified in the Civil Code since the Order n°2016-131 of 10 February 2016, and the law now focuses on the power

(2) Before the reform of contract law in 2016, article 1148 of the Civil Code provided that «There is no need for damages when, as a result of force majeure or a fortuitous event, the debtor was prevented from giving or doing what he was obligated to do or did what he was prohibited from doing.»

(3) Court of Appeal (Paris), 2nd Commercial Chamber, Judgment of 25 sept. 1996, general register n° 1996/08159.

(4) Court of Appeal (Besançon), 2nd Commercial Chamber, Judgment of 8 January 2014, General Register No. 12/02291

(5) Court of Appeal (Basse-Terre), 2nd Commercial Chamber, Judgment of 17 December 2018, General register n° 17/00739.

of the debtor over the occurrence of the event, and therefore on his ability, or not, to prevent it.

In the present case, since the non execution is directly linked to the Covid-19 epidemic, the condition should be considered fulfilled.

This virus is considered by the World Health Organization (WHO)⁽⁶⁾ at first as a public health emergency of international scope, then now as a pandemic, seems well beyond the control of simple contractors⁽⁷⁾.

2 - An unpredictable event in the conclusion of the contract

This condition should also be considered fulfilled if the contract was concluded before the spread of the epidemic, or at least before citizens was informed by the government⁽⁸⁾. The unpredictability of the event has in fact long been appreciated by case law in relative terms. This assessment was preserving in the order of February 10, 2016.

Several indications could here tend to qualify it as an unforeseeable event: it is a new disease, unfamiliar for health workforce and for which there is no vaccine. Moreover, the speed of the virus and the extent of its spread worldwide appears to be quite recent⁽⁹⁾. It should be noted that if the contract was concluded (or renewed) after the spread of the covid-19 epidemic, the condition of unpredictability will not be considered fulfilled⁽¹⁰⁾.

3 - Effects that cannot be avoided by appropriate measures

This condition reiterates the former criterion of irresistibility required by the case law of the Court de Cassation, which considered that “the debtor was only relieved of its obligations if he had taken all the necessary measures to avoid the harmful effects of the force majeure event that had, nonetheless, occurred”⁽¹¹⁾.

(6) Declaration of WHO, 30 January 2020

(7) The scale and severity of the coronavirus event may be different. As of January 30, 2020, the World Health Organization (WHO) has declared covid-19 to be a public health emergency of international concern. To this date, there is no vaccine or medication against the Covid-19 virus that causes Covid-19 disease. It is considered a deadly new virus from the coronavirus family.

(8) The exact date to take into account to assess the unpredictability may be difficult to fix. Undoubtedly, we should not consider the first cases that appeared in China, but rather the time when both the existence and the extent of the epidemic were brought to the attention of the contractors.

(9) Court of Cassation, civil, Civil Chamber 1, March 8, 2012, 10-25.913, Published in the bulletin, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025471662&fastReqId=29209447&fastPos=1> (in French).

(10) The chikungunya epidemic, which started in January 2006, was not unpredictable when a contract was signed in June of the same year.

(11) Cass. Civ. 1st, 9 March 1994, n° 91-17459 and 91-17464.

This criterion is assessed on a case-by-case basis and will depend significantly on the situation. However, this condition requires contracting parties to act in good faith and to do everything in their power to ensure that they continue to fulfill their obligations in accordance with the contractual terms.

In this regard, legal commentators and case law alike have accepted that the decisions of public authorities typically have irresistible effects for debtors who cannot break away from them: this is the theory of “Fait du Prince”⁽¹²⁾. This was notably seen with regard to the administrative decisions to stop production in a factory⁽¹³⁾.

This condition may be valuable when the debtor’s illness is invoked to justify its non-performance⁽¹⁴⁾. Likewise, it may be invoked when a decision emanating from a state authority prevents the performance of the service (order or decree canceling the holding of an event, travel ban in certain countries, compulsory containment measures for persons or goods, etc.).

4 - Impossibility of execution

The debtor must be unable to perform. Thus, we do not consider that there is force majeure “financial” for the debtor of the obligation to pay a sum of money: as stated by the Supreme court (Court de cassation), “the debtor of a contractual obligation to unexecuted sum of money cannot be exonerated from this obligation by invoking a case of force majeure”⁽¹⁵⁾.

It is never materially impossible to pay as long as the currency exists! The only exception could be in very specific cases of material impossibility of settling the sums due, such as an illness preventing the hospitalized debtor from settling the sums due⁽¹⁶⁾, or a computer problem¹⁷ preventing payment on the due date.

In the covid-19, only the disease preventing payment from being made could

(12) According to G. Cornu, Assoc. H. Capitant, *Vocabulaire juridique*, Puf, Quadrige, 8th ed., the *Fait du Prince* is «a decision of public authorities which has as a consequence the harming of the financial equilibrium of contractual situations and which, in civil matters, may constitute a case of force majeure».

(13) Cass. Civ. 2nd, 17 June 2010, n°09-13583.

(14) Court of Cassation, Plenary Assembly, April 14, 2006, 02-11.168, Published in the bulletin, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007051847> (in French).

(15) Court of Cassation, civil, Commercial Chamber, September 16, 2014, 13-20.306, Published in the bulletin, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000029480960> (in French).

(16) Court of Cassation, civil, Civil Chamber 3, September 19, 2019, 18-18.921, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000039157072> (in French).

(17) Civ. 3 e, 17 févr. 2010, n° 08- 20.943, Bull. civ. III, n° 47 ; D. 2010. 653, et 2011. 472.

be invoked, but it would only have a suspensive effect and would only allow the debtor to avoid payment of possible late penalties⁽¹⁸⁾.

This may be, for example, because the debtor is himself affected by the covid-19, or even when the employees are obliged to obey to the quarantine measures, or even because the authorities have imposed a prohibition movement preventing them from fulfilling their obligation, etc.

The fast evolution of these measures and their application over time will have to be followed with attention: thus a first decree of March 4, 2020 prohibited until May 31, 2020 gatherings in closed environment of more than 5,000 people on the national territory, but it was then repealed by the aforementioned order of March 9, limiting the ban to April 15, 2020; then, the decree of March 13, 2020⁽¹⁹⁾ extended the ban to gatherings of more than 100 people, even in open spaces, throughout the territory. Finally, the decree of March 15, 2020⁽²⁰⁾ ordered the closure to the public of all businesses deemed non-essential. These developments will naturally have significant effects on many contracts.

Ultimately, the concept of force majeure is casuistic and evolving. There is no doubt that the COVID-19 pandemic is characterized by exteriority and unforeseeability.

The classification of force majeure in each individual case will, therefore, depend exclusively on the development of the situation and the measures taken to address it, on the one hand, and on the obligations whose performance is called into question, on the other.

However, the extraordinary event of the current situation already calls for good faith and collaboration between the parties to find solutions. The situation will most likely favor the debtors prevented from fulfilling their obligations, should a dispute arise⁽²¹⁾.

5 - Impact of decisions by public authorities on the classification of force majeure

The Minister of the Economy Bruno Le Maire announced on February 28, 2020, that, “they will not apply a penalty for government public contracts, in

(18)

(19) Order of March 13, 2020 on various measures relating to the fight against the spread of the Covid-19 virus, Official Journal number 0063 of March 14., <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041721916&categorieLien=id>

(20) Official journal number 0065 du 16 mars, texte n° 2.

(21) Schramek, Adam, Force Majeure in the Age of Coronavirus: Top Five Questions to Consider When Analyzing Your Business Agreements, Texas Bar Journal, Vol. 83, Issue 5 (May 2020), pp. 303-303.

case if there is a delay in the delivery from the SMEs or businesses”, and that the Covid-19 will be “considered as a case of force majeure for companies”. This last statement must be taken with caution: it is not the position of the government to replace a judge in determining in all contracts what can or cannot be considered as force majeure.

Thus, on March 12, the Colmar Court of Appeal⁽²²⁾ considered that the appellant’s confinement for a period of 14 days due to possible contact with a stranger likely to be affected by Covid-19 has the character of force majeure.

B- The effects of force majeure and the case of renegotiation of the contract

Given that the condition of force majeure has been assembled and that unprecedented measures have been taken by the public authorities, force majeure can therefore be invoked from the date on which the government has ordered restrictions as a valid reason justifying the impossibility of the performance of a contract. However, we must be careful with what provides for the contract, even if we consider that the covid-19 phenomenon and the decisions of the authorities constituting cases of force majeure, their effects can be excluded from the contract.

In application of the general principle of freedom of contract, the parties can perfectly decide that, even in the event of a case of force majeure, the contractual stipulations that can be executed must be applied⁽²³⁾.

It is therefore very important, before any action, to refer to the clauses of the contract in question and to any general conditions of sale or purchase.

1 - The effects of force majeure

The second part of article 1218 describes the effects of force majeure on the contract, when it is proven: “If the impediment is temporary, the performance of the obligation is suspended unless the delay which would result from it does not justify the termination of the contract. If the impediment is final, the contract is automatically terminated, and the parties are released from their obligations under the conditions provided for in articles 1351 and 1351-1”⁽²⁴⁾.

(22) Appeal court, Colmar, chamber 6, 12 mars 2020, n° 20/01098.

(23) Andrew Stewart, *Contract law, principles and context*, Cambridge university press, 2019, p. 113.

(24) article 1351 of the civil code: «The impossibility to execute the service releases the debtor to due competition when it proceeds from a case of force majeure and that it is final, unless it has agreed to charge or that it has been previously put on notice. «Article 1351-1 of the civil code: «When the impossibility of executing results from the loss of the thing due, the debtor put in formal notice is nevertheless released if he proves that the loss would have similarly occurred if the obligation had been executed. He is however required to assign to his creditor the rights and actions attached to the thing”.

We notice here that two types of impediments arise. First, the temporary impediment where the impossibility to execute will only be temporary. For example, production of goods may resume once the spread of the virus is weakened (this is already the case in China and France since 2 June 2020).

In this case, the execution of the contract will simply be suspended for all parties. The debtor's counterparty may suspend payments, but he cannot demand compensation for the damage caused by this suspension. The qualification of force majeure here avoids any late payment penalties that the debtor would have had to pay if the delay in execution had been caused by him⁽²⁵⁾.

Then, the second impediment concerns that of the final Impediment. If the impediment to execute due to force majeure is definitive (for example destruction of the goods or illness or death of the contractor), the contract is automatically terminated, and the parties released from their respective obligations. No compensation will be due by the debtor prevented for the damage that would result from the breach and termination of the contract. Likewise, he cannot be held responsible for the harmful consequences for third parties of his contractual non-performance. Indeed, the solution of the *Bootshop*⁽²⁶⁾ judgment, recently confirmed by the plenary session of the Supreme Court⁽²⁷⁾

2- Renegotiation of the contract

Since 2016, article 1195 of the Civil Code has made it possible to request renegotiation of the contract in certain circumstances. However, the invocation of this article by contracting parties' victims of the Covid-19 crisis will only be possible under several conditions.

First, there must be an acceptance of the application of article 1195. The clause of renegotiation of the application of article 1195 has almost become a clause which is present almost in all business contracts. It is a supplementary and is perfectly possible for the parties to exclude it.

For example, for contracts that have opted for the application of article 1195

(25) Attias Benjamin, *Droit des contrats : bilan de la réforme et loi de ratification*, Edition législatives, 2016, p85

(26) Court of Cassation, Plenary Assembly, October 6, 2006, 05-13.255, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007052928>

(27) Court of Cassation, Plenary assembly, January 13, 2020, 17-19.963, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000041490393&fastReqId=1307813481&fastPos=1>

to deal with the consequences of the Covid-19 epidemic during a standard form agreement, it must be proven that it was non-negotiable and created a significant imbalance between the parties.

Second condition is an unforeseeable change in circumstances, it can be economic, legal or even political; all the consequences of the current health crisis could therefore be concerned. Finally, the execution made excessively expensive⁽²⁸⁾.

If all these conditions are fulfilled, the invocation of the article is possible. Whoever invokes it must respect the regime provided for in article (1195). He must begin by requesting an amicable renegotiation from his contracting partner. In case of refusal or failure of the renegotiation, if the parties do not agree to terminate the contract or request its adaptation to the judge by mutual agreement, the debtor victim of the change of circumstances may seize the judge of his request review or termination by providing proof of meeting the conditions of article 1195. This device has a major drawback: the time it takes to obtain a judicial review is hardly compatible with the pace of business life.

To conclude, it is necessary to draw the attention of the contractors to the importance during the occurrence of such events of the drafting of certain contractual clauses including for the contracts which are concluded during this epidemic and which could be affected by its evolution⁽²⁹⁾.

This is why, the careful re-reading of contracts, must be established as a preliminary measure to any hasty will not to honor its obligations or to assign its contracting partner... Then, the renegotiation, in all verified legal knowledge of things must allow solving a number of problems⁽³⁰⁾.

For contracts governed by the legislation of a country of unwritten law or common law system (Great Britain, United States, etc.), where this notion of “force majeure” does not exist, a clause explicit must be included to claim a “force majeure” event. The parties may also provide for a so-called “hardship” clause (in French a safeguard clause) which allows renegotiation of a commercial contract in the event of unforeseen circumstances making its execution difficult or particularly expensive.

(28) Esquenazi Julie, *Droit des contrats*, Lexifiche, second edition, 2019, p. 33.

(29) Bros Sarah, *Les innovations des réformes du droit des contrats*, Institut universitaire Varenne, 2018, p. 66.

(30) Dehayes Olivier, La propagation des délais en période de Covid-19 : quels effets sur les contrats, 15/7860,23 April 2020, p.831(in French).

II- Consequences of Coronavirus: business support measures

From the appearance of an unknown virus in China to a “black Monday” that has seen markets fall like never since the end of 2008: in two months, the Covid-19 epidemic has put the global economy to the test.

For shops, markets, theaters, etc, the economic consequences of Coronavirus are already a serious reality. If the crisis were to continue, some would not recover.

Similarly, tourism and transportation sectors are the first to be concerned about this epidemic, when many states restrict the arrival of nationals.

The coronavirus epidemic is hitting businesses and undertakings hard in the first place. They are the first victims to see a terrifying drop in turnover for both multinationals and small traders. Apple, the \$ 1.4 trillion company, has warned that it no longer expects to meet revenue forecasts released last month⁽³¹⁾. In addition, HSBC plans to cut 35,000 jobs as profits fall 33%⁽³²⁾.

To avoid an increase in bankruptcies, the government has put in place immediate support measures for businesses.

B- Economic emergency measures and adaptation to the fight against the Covid-19 pandemic in France

The fight against the coronavirus epidemic already has a cost! The exceptional endowment to buy medical equipment, supporting and helping companies ... Every day, the State releases amount of money to fight against the crisis caused by the Covid-19.

In the end of March, the Minister of Public Accounts had indicated that France was going to devote two billion euro to the health crisis at the hospital, the purchase of masks and the wage of the health workforce...

In addition, the President of the Republic announced an exceptional allocation of 4 billion euro to Public Health France to finance medical devices (drugs, masks), which are in addition to the 2 billion already provided by the Ministry of Public Accounts.

(31) *Tripp Mickle*, *Apple to fall short of projected revenue due to coronavirus*, in *the wall street journal*, <https://www.wsj.com/articles/apple-says-wont-meet-revenue-guidance-in-quarter-due-to-coronavirus-11581974923> (17 February 2020)

(32) *Kalyeena Makortoff*, *HSBC to cut 35,000 jobs worldwide as profits plunge*, in *the guardians*, <https://www.theguardian.com/business/2020/feb/18/hsbc-to-cut-35000-jobs-worldwide-as-profits-plunge-coronavirus> (18 February 2020)

The most expensive urgent measure, however, remains for partial unemployment set up for employees of companies due to quarantine. The government had planned to commit 8.5 billion euro over two months. The economic situation of France is in critical condition!

Law numbers 2020-290 of March 23, 2020, of emergency to deal with the epidemic of covid-19 provides for the possibility of declaring a state of health emergency on all or part of the territory.

This declaration of the state of health emergency authorizes “the Prime Minister to take by decree measures listed by law. For example, decrees concerning quarantine, requisitions, prohibiting gatherings⁽³³⁾. It can also take temporary measures to control the prices of certain products, allow patients to have access to medicines and decide on any regulatory limit on the freedom of ‘undertake⁽³⁴⁾. The Minister responsible for health may, by decree, fix other general measures and individual measures. In addition, the prefects also play a role in this health crisis and may be empowered to take local enforcement measures.

All these measures must be motivated by the health crisis and proportionate to the risks run. They can be the subject of a suspension proceeding or a freedom proceeding before the administrative judge”.

The government is authorized to take orders, by July 24, 2020, interim measures (some applicable from March 12, 2020) to address the containment situation in the country. These measures cover many areas. These include:

1- State aid

The concept of State aid includes any advantage granted selectively to certain undertakings by the State or by means of State resources. This may include, for example: grants, loans on concessional terms, a state guarantee or tax advantages.

Although state aid is generally prohibited, there are a number of exceptions which allow European governments to help companies in difficulty due to the coronavirus crisis. These rules also apply to the UK during the transition period to leave the EU (currently scheduled to end on December 31, 2020).

“It is a major shock. But it is temporary. We have to work together to make it

(33) Article 3 Decree No. 2020-293 of 23 March 2020 prescribing the general measures necessary to deal with the epidemic of covid-19 in the context of the state of health emergency.

(34) Article 2, chapitre 1bis, alinéa 10, de la loi du 23 mars 2020.

as short and as limited as possible”, said Ursula Von Der Leyen. Commission President has reiterated that the EU will “do whatever is necessary” to help the 27 to soften the effects of this crisis.

First, governments can implement general measures (such as tax breaks) that also apply and do not differentiate between businesses. Such measures may fall outside the scope of State aid rules, as they do not selectively benefit certain groups of companies.

Then, the aid granted to companies which do not meet financial difficulties can benefit from:

the general block exemption regulation in European Commission regulation 651/2014 of 17 June 2014, which authorizes aid associated with certain political objectives, such as regional development and aid to support SMEs, as long as the criteria are met; or the de minimis regulation, which authorizes up to 200,000 euros in aid for a single company over a rolling three-year period⁽³⁵⁾.

Member States may adopt aid measures to repair the damage caused by exceptional events. On March 13, the European Commission announced that it considered the emergency caused by the coronavirus, which is an extraordinary and unpredictable event with an economic impact, to be qualified as an exceptional event. As one of the first examples of the use of this exception, the Commission approved, within 24 hours of receipt of the notification by the Danish government, an aid scheme in Denmark amounting to 12 million euros.

The purpose of this aid scheme is to compensate the organizers for damage suffered during the cancellation of events due to the coronavirus. The Commission considered that this aid scheme would help to remedy the economic damage suffered and that it would be proportionate to the results envisaged.

The Commission has declared that Italy, as the Member State so far most affected by the crown crisis, can provide aid to remedy a serious disturbance in its economy. The Commission adopts a restrictive interpretation of what can be considered a “serious disturbance of the economy”, which underlines the gravity of the urgency with which the country is confronted.

Companies in need of liquidity could benefit from rescue and restructuring

(35) Herwig C. H. Hofmann, *State Aid Law of the European Union*, 1st edition, Oxford university press, 2016.

aid. Sectors such as aviation, tourism, hospitality or financial services could request this type of support in the coming weeks. The Commission has already indicated that it would apply the “last time principle” flexibly - which normally prevents companies from receiving rescue and restructuring aid more than once every ten years.

It is not the first time that the Commission has used these measures to safeguard the European economy. It adopted a similar approach during the 2008 financial crisis, by publishing specific communications on the application of State aid rules to measures taken both in the financial sector and in other sectors of the economy. ‘economy.

The Commission is also preparing a legal framework based on the exception of aid to remedy a “serious disturbance in the economy”.

In addition, the Commission has set up a specific coronavirus response team to help coordination between the Member States and provide assistance.

In order to use these exceptions effectively, it is essential that governments and recipients take into account the parameters set by state aid rules at an early stage in the process. Experience shows that aid can often be obtained in full legal certainty, if the measures are designed in the right way and that potential problems with State aid are recognized and dealt with quickly⁽³⁶⁾. It is therefore important to involve state aid experts as soon as an application for aid is examined.

2- Deferral of payment of contributions and taxes due in March 2020

“All the companies can choose if they want to postpone the payment of the contributions and taxes due in March without justification, or formalities, or penalties”, announced Emmanuel Macron during his televised address Thursday March 12.

“Endangered” companies may request a direct tax rebate as part of an individual review with the tax authorities.

Rishi Sunak, the chancellor, focused on five measures to preserve liquidity and prevent the insolvency of British businesses.

SMEs that cannot afford to pay their tax bills can apply to HM Revenue & Customs for a “payment delay” agreement that would suspend debt collection. The system has been used to help companies affected by the floods and the

(36) Reygrobelle Arnaud, *Le droit des sociétés en période d'état d'urgence, sanitaire*, revue des sociétés, numéro 5, May 2020, p. 275 (in french).

2008 financial crisis. Each agreement is negotiated on an individual basis via a dedicated hotline. During the coronavirus epidemic, the usual annual interest of 3.5% on deferred tax payments will be canceled.

3- Partial unemployment simplified and reinforced⁽³⁷⁾

In the event of economic difficulties, employers can temporarily reduce the working time of their employees by paying them hourly compensation representing 70% of gross wages. In return, they benefit from a flat-rate allowance co-financed by the State and the UNEDIC⁽³⁸⁾, the amount of which has been increased from 7.74 to 8.04 euro per hour worked and per employee, i.e. at the minimum wage.

The head of state has promised to go further. “From the coming days, an exceptional and massive mechanism of partial unemployment will be implemented,” said Emmanuel Macron on Thursday evening. The state “will take care of compensation for employees forced to stay at home”, “whatever the cost”.

Around 3,600 companies have already requested partial activity for around 60,000 employees.

Luxembourg goes in the same direction of France and proceeds to the mechanism of partial unemployment, “The application is made via a dedicated online procedure, whereby employers may request the repayment by the Employers’ Fund of the compensatory allowance paid for the inactive hours (80% of the salary received) capped at a maximum of 250% of the minimum social wage for an unskilled worker (EUR 5,354.975) and up to a maximum of 1.022 hours”⁽³⁹⁾.

4- Creation of a Solidarity Fund

Bruno Le Maire, the French prime minister, announced on Thursday March 12 the creation of a solidarity fund, which will be “reserved for the smallest businesses, which are short of cash”⁽⁴⁰⁾.

(37) Decree n ° 2020-325 of 25 March 2020 relating to the partial activity, official journal of the French republic number 0074 du 26 mars 2020.

(38) UNEDIC is the acronym of «Union nationale interprofessionnelle pour l’emploi dans l’industrie et le commerce». It was created in 1958. Until 2009, it was an agency of the French government which provided unemployed people with social benefits.

(39) Elombo, Jacky, Legal impact of Covid-19 in Luxembourg, ICLG.com, <https://iclg.com/briefing/12158-legal-impacts-of-covid-19-in-luxembourg> (12 May, 2020)

(40) François Benedicte, Mesures de soutiens aux entreprises impactées par l’épidémie du coronavirus, Revue des sociétés, numéro 4, April 2020, p. 203 (in french).

Un fonds de solidarité de 2 milliards d'euros par mois est mis en place. Il pourrait concerner quelque 600 000 entreprises et se traduira par un chèque de 1 500 euros, promis “ comme simple et rapide à obtenir “.

This method is included in the Amending Finance Law adopted on Sunday March 22, 2020, and has been operational since April 1, 2020⁽⁴¹⁾. This solidarity fund, set up is dedicated to small businesses, whose activity has collapsed and allows them to receive, under certain conditions, a form of financial assistance, the assistance of which can go up to 1500 euro.

This aid concerns Companies with a workforce of less than or equal to 10 employees, a turnover for the last financial year less than 1 million euro, and a taxable profit of less than 60,000 euro.

Their activity must have started before February 1, 2020 and there must not have been a declaration of cessation of payment⁽⁴²⁾ before March 1, 2020⁽⁴³⁾.

Companies that meet the conditions to benefit from this aid can also obtain a deferral of their rents and bills for water, gas and electricity.

5- Granting or maintaining bank loans

To avoid cash flow problems, the State and the Bank of France can intervene with private banks to obtain a rescheduling of bank credits.

For its part, the Public Investment Bank (Bpifrance) recalls that it will be able to guarantee cash loans to SMEs affected by the crisis. The guarantee, already increased from 40% to 70% last week, is now increased to 90%. “Companies express their requests to their banker; the latter makes his own analysis of the subject, grants a loan and requests a guarantee from Bpifrance. And we, we make the commitment in five working days to give our response “, explains Georges Planes, the director of network animation for Bpifrance.

6- Delayed penalties

Concerning the companies which work with public markets of the State, the penalties of possible delay will not be applied⁽⁴⁴⁾, because of the recognition

(41) Law number 2020-473 of April 25, 2020 of amending finance for 2020.

(42) For companies created after March 1, 2019: a comparison is made between the level of turnover in March 2020 and the average monthly turnover over the months of activity since the creation of the company.

(43) The Government has decided to widen access to the Fund by lowering the threshold for loss of turnover from 70 to 50% from March.

(44) François Benédicte, Loi d'urgence pour faire face à l'épidémie du Covid-19, Revue des sociétés, numéro 4, April 2020, p205 (in french).

by the State of the coronavirus as “case of force majeure”, as explained by the French president on March 16, 2020.

B- European Union position

In these times of crisis, the EU and its Member States collaborate and help each other, by mobilizing resources, by ensuring the supply of protective equipment.

At the economic level, the EU has proposed an aid program of up to 540 billion euro to deal with the crisis and support workers, businesses and the Member States. In addition, the European Central Bank is mobilizing 750 billion euro to relieve public debt during the crisis, as well as 120 billion euro in quantitative easing and 20 billion euro in debt buy-back.⁽⁴⁵⁾

The EU is making full use of the flexibility offered by EU budgetary rules to help the authorities support healthcare systems and businesses and preserve jobs during the crisis. EU state aid rules have also been relaxed so that governments can bring liquidity to the economy to support citizens and businesses, thereby saving jobs.

The temporary framework of the European Commission provides for some types of aid that can be granted by the Member States⁽⁴⁶⁾:

1- Aid in the form of direct grants, selective tax advantages and repayable advances

It sets up systems granting up to 800,000 euro to a company to enable it to meet its urgent cash needs;

2- Aid in the form of guarantees on loans taken out by companies with banks:

The European Commission is committed to ensuring that banks continue to lend to professional customers who need it. These public guarantees may relate to loans making it possible to help companies cover their immediate working capital and investment needs⁽⁴⁷⁾.

(45) Moreaux Anne, Covid-19, quel impact sur l'économie et quelles solutions ? Affiches parisiennes, <https://www.affiches-parisiennes.com/covid-19-quel-impact-sur-l-economie-et-queelles-solutions-10172.html> (21 avril 2020).

(46) European Commission, Coronavirus: the Commission mobilises all of its resources to protect lives and livelihoods, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_582 (2 April 2020).

(47) Teboul Georges, l'adaptation des droits des entreprises, en difficulté à la crise du coronavirus, Recueil dalloz, number, 14/7859, 16 April 2020, p785 (in french)

3- Aid in the form of guarantees for banks:

Some Member States plan to build on and use banks' existing lending capacity to channel support to businesses, in particular small and medium-sized enterprises. - The framework specifies that this type of aid is considered to be direct aid to bank customers, not to the banks themselves, and provides guidance on how to minimize distortions of competition between banks;

4- Aid in the form of short-term export credit insurance

The European Commission also provides more flexibility on how to demonstrate that risks are not transferable in certain countries, allowing member states to provide export credit insurance when necessary.

III- Consequences for employees of undertakings

A- Telecommuting - the case of French law

The threat of an epidemic constitutes an exceptional circumstance making it possible to impose on several countries in the world, telecommuting to employees without their agreement.

Due to the spread of the coronavirus in France, some non-sick employees found themselves working remotely to ensure continuity of work. Employers who cannot set up telecommuting in their company must declare the employees concerned on sick leave compensated via a dedicated platform.

Article L1222-9 of the French Labour Code defines telecommuting as follows: "Any form of work organization in which work which could also have been performed on the employer's premises is carried out by an employee outside these premises on a voluntary basis using information and communication technologies. " Telecommuting is therefore any form of remote work carried out in particular via an Internet connection.

Certainly, telecommuting in companies is regulated by law. It must be implemented within the framework of a collective agreement or, failing this, within the framework of a charter drawn up by the employer after consultation with the social and economic committee. In the absence of an agreement or a charter, the employee and his employer may agree to use telecommuting. They must imperatively formalize this agreement by the means of their choice. An email, for example, may be adequate.

Except in exceptional circumstances or in cases of force majeure, the employee must agree to be telecommuting. Refusing to be telecommuting cannot be considered as a ground for dismissal.

If an agreement or charter applies, this text must in particular specify⁽⁴⁸⁾:

- The conditions for switching to telecommuting and the conditions for returning to work
- The terms of acceptance by the employee of the conditions for implementing telecommuting
- The procedures for controlling working time and the time slots during which the employer can contact the employee by telecommuting

An employee in telecommuting must have the same rights as an employee present on the premises. As such, he can claim the same rights in terms of remuneration, working time, paid holidays ... The telecommuters also benefit from affiliation to the general social protection scheme as well as to the supplementary retirement scheme. Like all employees, the telecommuter must also respect the obligations set by his employer and is liable to disciplinary sanctions (such as a warning or even a layoff) in the event of non-compliance.

The government created a right for telecommuting for French employees in the law for the strengthening of social dialogue, promulgated in September 2017. The employer can however refuse to an employee for telecommuting even if an agreement or a charter provides for it. However, he must justify his answer⁽⁴⁹⁾.

In Kuwait, telecommuting was used during the epidemic, especially in the education sector to ensure the educational continuity of students. However, there is no text of law explaining the telecommuting in a force majeure case.

B- The Employees rights

Does the employer have to lower wages if their activity has been reduced / stopped because of the COVID-19?

The pandemic hitting the whole country has yet to be resolved: it is an exceptional situation and there are no regulations under Kuwaiti law that could govern it. However, one could consider that this epidemic corresponds to a situation of force majeure, defined as “an external, irresistible and unpredictable event”. Force majeure may be a cause of termination of the

(48) Court of Cassation, Social Chamber, of February 25, 1998, 95-44.096 96-40.144, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007040389&fastReqId=802034010&fastPos=1>

(49) Court of Cassation, Social Chamber, of October 2, 2001, 99-42.727, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007046319&fastReqId=1291121004&fastPos=1>

contract not attributable to either the employer or the employee. In this case, the employment contract is considered to be suspended and not terminated.

In Kuwait, the employees are protected in the article 61 of Kuwait's labor law⁽⁵⁰⁾: The employer is required to pay the wages of his workers during the closing period if the establishment is intentionally obliged to compel workers to accept and to obey his requests, and he is also required to pay the wages of his workers during the whole period of disruption of the installation.

In French law, to restrain the spread of the Covid-19, the President of the Republic Emmanuel Macron announced a series of measures⁽⁵¹⁾, including a facilitation of short-time working, in companies that would be forced to stop or slow down their activity. This means a temporary reduction in weekly working hours or the temporary closure - in whole or in part - of the business. By making it easier to appeal, the government intends to protect jobs and prevent companies from being forced to lay off workers due to the slowdown in activity caused by the health crisis.

The head of state therefore announced an “exceptional and massive mechanism of partial unemployment”. The Minister of the Economy, Bruno Le Maire, gave some details on Friday March 13, in the radio of BFM-RMC: “The State will pay the compensation for all employees placed on partial unemployment, whatever their level of remuneration.

In the event of partial activity, and to compensate for the loss of salary due to his reduction in working time, the employee indeed receives from his employer an indemnity equal to 70% of his gross salary per hour worked. This corresponds to approximately 84% of his hourly net salary. Currently, the State only pays this compensation up to the minimum wage⁽⁵²⁾. The Minister of Economy said he was open on Thursday to uncapping this device, but nothing has yet been decided.

Also, whether in the case of partial unemployment or even in the event of sick leave, a large number of employees who cannot telecommute will experience a drop in their income in the coming weeks. And this for an as yet undefined period. Moreover, for the self-employed, the liberal professions or small

(50) He shall also pay the remuneration of workers throughout the complete or partial period of closure in case such closure is due to any other reason not related to the workers as long as the employer wishes them to keep working for his account.

(51) Law of 16 March 2020.

(52) Smith, D. Todd, Law Firms Working Remotely during the Coronavirus Shutdown, *Texas Bar Journal*, Vol. 83, Issue 5 (May 2020), pp. 314-315

traders, who will also experience a slowdown in activity. In this situation, some borrowers are surely already worried about their ability to repay their next credit terms.

Conclusion

To sum up, the containment measures taken to prevent the spread of the coronavirus epidemic are already causing significant economic and organizational difficulties for businesses. Fortunately, today, French government emergency measures have been applauded by a large number of countries. However, these measures were very costly and weighed heavily on the French government (state aid, non-partial employment, solidarity funds, etc.) and on the European Commission.

Nevertheless, the management of the coronavirus crisis has highlighted the disengagement of the private sector, even the attempt by certain economic sectors to exploit the crisis in their favor on the one hand. On the other hand, we have seen the growing need for public action giving back to politics the place it deserves and to the State the role it is supposed to play. When the State requisitions, puts at the service of citizens all the financial and human means to ensure security and the preservation of life, it redefines its priorities and asserts its sovereignty.

On a contractual matter, the coronavirus which has spread since January 2020 can now be considered as a case of force majeure in French law, subject to paying special attention to the chronology of events.

However, if a company is facing events of force majeure and wishes to suspend its obligations or terminate the contract because it considers that its economy has been disturbed, it must inform its partners with commercial loyalty and in good faith in order to limit the harmful consequences against them.

This notification must indicate precisely how the contract is affected by the force majeure and what practical impact it has on its performance.

However, the examination of these legal implications in this research leads us to present some recommendations. Indeed, prudence requires the contracting partner to analyze his situation well in order to secure his position, which implies starting with an audit of the contractual clauses applicable in the event of force majeure.

For this, it is recommended to first, Check the content of your contract to determine if there is a force majeure clause and the way in which this has been

defined because French law allows derogations from the legal provisions. It is then recommended to identify the conditions of implementation of the force majeure clause and to anticipate the contractual consequences (suspension of the contract, termination, etc.). Finally, it is recommended to Contact the other party in order to discuss the measures that will be taken as a result of the applicable clauses.

Each situation is specific and must be subject to a careful analysis of all the particular circumstances of the case. Caution should therefore be exercised before invoking force majeure, especially as other legal tools may exist depending on the situation.

Finally, in the context of telecommuting, it is true that this is a new form of work is still regulated in France. It allows employees to exercise their activity while being flexible, motivated and above all saves time. It is recommended first that employers with teleworkers therefore establish a mechanism to track these hours and ensure their accuracy in the absence of a supervisor to monitor the hours of work of employees.

Finally, it is recommended for Arab countries like Kuwait to comply with their labor laws, at least for delicate jobs in order to ensure continuity of work during the period of the health crisis.

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