BCLP. Client Intelligent

Insights

FRANCE COVID-19 ACTIONS AS OF MARCH 25, 2020

Mar 25, 2020

In response to the Covid-19 Coronavirus pandemic, various fiscal, banking, rent payment and public procurement measures were put in place by the French Government to support struggling companies.

Following the decrees dated 14 and 15 March 2020, the question also arises of the impact of the current situation on ongoing contracts. Similarly, Decree No. 2020-260 of 16 March 2020 regulating travel as part of the fight against the spread of the Covid-19 virus affected all professional activities.

Finally, the law of 23 March 2020 established, among other things, the principles of rent deferral within the framework of commercial leases for micro-enterprises within the meaning of Decree 2008-1354 of 18 December 2008.

Indeed, the creditor of an unsatisfied obligation may have an interest in asserting its non-performance, whereas its debtor may invoke the present circumstances to justify itself.

I. In contract law

1. About force majeure

(i) About the notion

In accordance with Article 1218 of the French Civil Code, in order to characterize force majeure, the following four conditions must be fulfilled:

- Event beyond the debtor's control (exteriority);
- Which could not have been reasonably foreseen at the time of entering into the contract (unforeseeable);
- The effects of which cannot be avoided by appropriate measures (irresistible);
- And which prevents the performance of the obligation by the debtor.

It results from the study of case law that in the case of epidemics, force majeure is rarely admitted, it being specified that, in addition to being able to be characterized, a chain of causation must exist between force majeure and non-performance.

The case law is therefore quite severe concerning the qualification of force majeure. For example, the impact of avian flu on the results of the farm does not establish that this epidemic was of an insurmountable and irresistible nature likely to confer the qualification of an event of force majeure (Court of Appeal of Toulouse 3 Oct. 2019, No. 19/01579).

Similarly, the H1N1 flu epidemic had been widely announced and predicted, even before the implementation of health regulations, so that its unpredictable nature cannot be accepted (Besançon Court of Appeal, 8 January 2014, No. 12/02291).

It will therefore be necessary to demonstrate that all the criteria of force majeure are fulfilled:

- **Unforeseeable:** Several clues could lead here to this qualification since it is a new disease, unknown in humans and for which there is currently no cure or vaccine; moreover, the speed and extent of its worldwide spread seems completely new (Cass. Civ. 1, 8 March 2012, No. 10-25.913 relating to the eruption of the Icelandic volcano Eyaföll, qualified as a case of force majeure due to the unpredictability and irresistibility of its occurrence and its effects).

- Moreover, the date on which the Covid-19 was known to impact the contract must be determined: its birth in China, its arrival in France, or as from the exceptional measures applied by the Government? In our opinion, the latter case could be the most legitimate to defend, as these measures have never been applied before and are the only ones to justify a proper slowdown in the execution of the contracts. In any case, only contracts that were entered into before the virus appeared shall have this condition considered as fulfilled;

- **Irresistible:** A virus with an irresistible propagation, qualified as a pandemic by the WHO, against which the states try to fight without succeeding in eradicating it, seems impossible to control for the co-contracting parties;

- Moreover, the WHO recognized in its declaration dated 30 January 2020 that "*the conditions for a public health emergency of international concern are met*".

- The WHO itself defines this event as sudden, unusual or unexpected, with repercussions beyond national borders and requiring immediate international actions.

- **Impossibility of performance:** it is basically this condition that distinguishes a case of force majeure, making performance impossible, from an event of unforeseen circumstances that makes it more difficult or onerous. In the event of performance being materially impossible, it could be considered that the condition would be fulfilled. Indeed, if the Covid-19 is not in itself a cause of interruption of the construction site, the measures taken by the Government may become so. Indeed, these measures are exceptional and have never been applied before in France, making the performance of the obligations potentially impossible;

- **About the exteriority**: This is no longer studied by case law (Cass., ass. plen., 14 Apr. 2006, no. 02-11.168), although in this case it is the only condition which is not in doubt.

In these circumstances, it is difficult to assert that Covid-19 can be considered in itself as a case of force majeure. Could the measures taken by the Government to limit the spread of the epidemic be considered as force majeure?

The French Minister for Economic Affairs, Bruno Le Maire, announced on 2 March 2020 that this epidemic would constitute a force majeure event for **public procurement**. The fate of private markets was not specified. On its website, the French Building Federation (FFB) recommended the enforcement of force majeure **for all contracts** (public, private with professionals or consumers, etc.)[1].

In addition, the President of the FFB, Jacques Chanut, required the protection of companies during the health crisis[2].

Nevertheless, the Government has always considered that construction sites are part of the economic activities that are allowed to continue, since they take place outside and not in a confined space. According to a letter from the French Minister of Home Affairs addressed to prefects on 18 March 2020, the Government wishes to maintain construction sites, despite the partial confinement.

Thus, the Government has refused to require the hold of construction sites to date and is in favour of keeping them in operation. They may therefore continue subject to the provisions of the decree of 16 March 2020 and the application of health measures on construction sites.

On this subject, it shall be recalled that the provisions of article 1 1° of the decree of 16 March 2020 warns the following:

"*In order to prevent the spread of the Covid-19 virus, the movement of any person outside his or her home shall be prohibited until 31 March 2020, with the exception of movement for the following reasons, in compliance with the general measures to prevent the spread of the virus and avoiding any gathering of persons:*

1° Journeys between the home and the place(s) where the professional activity is carried out and professional journeys that cannot be postponed;"

Thus, on 21 March 2020, the FFB, the French Federation of Public Works and CAPEB reached an agreement with the Government that allows the continuation of the projects while observing the protection of employees[3].

These professional organisations of building and public works companies will disseminate a guide to good practice in the coming days, previously approved by the Ministries of Labour and Health Solidarity.

In the case of very complex sites, a period of time may be necessary to define suitable procedures.

Furthermore, in this agreement, the Government has invited principals and companies not to seek contractual liability of companies, their subcontractors or suppliers who were forced to suspend their activity when the conditions of operation no longer made it possible to guarantee the health and safety of their employees.

Finally, it should be noted that some municipalities have suspended all construction works in progress.

In conclusion, there is likelihood that Covid-19 alone may not necessarily constitute in itself a force majeure event.

However, the measures that have been taken to limit its spread, namely partial containment, closure of non-essential shops, limitation of all travels, are unique measures in France that will have very significant economic repercussions and may, in certain cases only, constitute a force majeure event. Indeed, it may be necessary to analyse for each sector and each contract whether the regulatory measures taken to limit the spread of the virus have effectively prevented the provision of contractual services.

(ii) About the consequences

The second paragraph of article 1218 of the French Civil Code provides that: "*If the impediment is temporary, 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.*"

As a result, three situations are possible:

- the impediment resulting from force majeure is temporary: the execution of the contract will then be suspended;

- the impediment resulting from force majeure is definitive: one or both parties may cause the contract to be terminated by operation of law and be released from their obligations;
- the impediment resulting from the force majeure is partial: the debtor of the obligation is released only from the only obligations concerned by the case of force majeure.

The measures to confine employees coupled with the supply difficulties of the construction site may certainly be invoked.

In addition, standard NF P-03-001 provides for:

- the possibility of extending the deadlines for the duration of the impediments due to force majeure (article 10.3.1.2);
- the possibility of automatic termination of the contract, without the fulfilment of any legal formality, in the event of force majeure making it impossible to continue the worksite (article 22.2.1).

2. About contingency

This notion is defined by article 1195 of the French Civil Code:

"*If a change in circumstances unforeseeable 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 its co-contractor. It shall continue to perform its obligations during the renegotiation*".

Consequently, the triggering of the contingency clause is subject to several conditions:

- the change of circumstances unforeseeable at the time of conclusion of the contract;
- the execution becoming excessively onerous;
- the failure to accept the risk of assuming the content of the contract;
- the total absence of fault on the part of the claimant.

Unlike force majeure, unforeseen circumstances do not prevent the execution of the contract but simply make it excessively onerous.

The change in circumstances shall therefore make the performance of the contract excessively onerous. A simple performance that is more difficult is therefore insufficient. Conversely, performance need not be impossible. It is sufficient that it has become excessively onerous for one party.

Moreover, this article applies if the change of circumstances makes **performance** excessively onerous.

Finally, to our knowledge, there is no case law on this subject, particularly in the event of an epidemic, since Article 1195 of the French Civil Code was codified in 2016 following the reform of the law of obligations.

This provision, introduced by the reform of contract law, only applies to **contracts entered into after 1 October 2016**.

Moreover, in the majority of contracts, the legal provisions relating to contingency are now derogated in order to avoid the enforcement of these provisions.

3. About contractual good faith

Like binding force, the requirement of good faith follows the duration of the contract.

Positively, the requirement of good faith is reflected in an obligation of cooperation between the parties, which is increasingly and clearly affirmed by case law, in order to observe a minimum of contractual solidarity *(R. J. Mestre, D'une exigence de bonne foi à un esprit de collaboration : RTD civ. 1986, p. 101. – Y. Picod, L'obligation de coopération dans l'exécution du contrat : JCP G 1988, I, 3318. – Ph. Le Tourneau (ss dir.), Droit de la responsabilité et des contrats, préc., n° 17, spéc. n° 3124-101)*.

Therefore, we should advise companies to also discuss the contractual situation in order to find an amicable and common sense solution.

II. About litigation

1. About the bailiff's acts

As part of the continuity of the public service of justice, public and ministerial officers shall provide a minimum service.

The President of the National Chamber of Commissioners of Justice and the French Minister of Justice thus met to define a first outline of the perimeter of intervention of judicial officers referring to a circular fixing the conditions of intervention of judicial officers in this period. Orders specifying the device are awaited. As a first step, the law of 23 March 2020 began to specify that:

- For the notification of acts: suspension of **all time limits for acts in civil and commercial matters**, as regards proceedings before the courts with retroactive effect to **12 March 2020**. The concrete modalities will be defined by ordinance;
- For coercive enforcement: For obvious health reasons, coercive enforcement measures at the debtor's domicile are frozen until further notice.

Furthermore, with regard to other civil enforcement proceedings, such as expulsion (command for resolutory clause), seizure and attachment (which is done electronically), discussions are under way with the Ministry of Justice.

In any event, the National Chamber of Commissioners of Justice recommends that enforcement proceedings should be postponed as long as possible and that preference should be given to telephone or mail/e-mail contacts with clients, especially debtors.

The end of the winter truce is postponed **until 31 May 2020**.

For reports: remote reports (via the Internet) can be continued without difficulty. On-site inspections can also be carried out provided that government instructions are observed.

2. Regarding the risks of limitation of actions

Following the announcement by the French Minister of Justice of the closure of all courts, judicial activity is now reduced to "*essential litigation*" (criminal hearings, immediate appearances, etc.).

What if a lessee or lessor wishes to serve a document (termination notice) or bring an action against the other, within the statute of limitations?

In respect of documents to be served, the time limits are suspended with retroactive effect as to 12 March 2020 and an order setting out the terms and conditions is expected shortly.

With regard to time limits for action, Article 2234 of the French Civil Code provides that "*prescription shall not run or shall be suspended against a person who is unable to act as a result of an impediment arising from law, agreement or* ***force majeure***".

III. Regarding commercial leases

1. Regarding the rents

The decree of 14 March 2020 on the closure of non-essential shops was supplemented by the decree of 15 March 2020, and by a decree accompanying this amendment to make it immediately applicable.

It should be noted that the rapid evolution of the situation seems to make any legal opinion on the matter precarious. For example, it will be necessary to wait for the terms of the suspension of rents and water and gas bills announced by the President in his speech of 16 March 2020.

On 19 March 2020, Bruno Le Maire announced that the suspensions or postponements (although it is not known to date whether there is a real difference between these terms) of rents and charges would only concern very small enterprises ("**VSEs**") and small and medium enterprises ("**SMEs**") with a turnover of less than one million euros.

On March 21, 2020, the Minister of the Economy brought together the main federations of commercial lessors and Caisse Dépôts et Consignations to discuss the implementation of rent suspensions for small businesses in difficulty (i.e. VSEs and SMEs).

The law of 23 March 2020 confirmed these measures.

In a press release following this meeting, he announced that the main federations of lessors and Caisse des Dépôts et Consignations had recommended to their members to suspend rents for VSEs and SMEs that are forced to close under 15 March 2020 Order, and to offer them repayment schedules without penalties, adapted to their situation once business resumes.

In any event, the suspension or postponement will be aimed at making traders pay later, in order to overcome the economic difficulties following the epidemic.

In this wake, some organizations such as the FSIF have recommended to their members to suspend the rent of their lessees, VSEs and SMEs, whose activity is legally stopped in view of the current crisis.

In a press release, the FSIF, AFG, ASPIM, CNCC and UNPI have also recommended that VSEs and SMEs belonging to one of the sectors whose activity is interrupted in application of Article 1, paragraph I of the Order of 15 March 2020 notice:

- rents and charges **paid monthly** and no longer quarterly;
- the payment of rents and charges suspended as of 1 April 2020, and for subsequent periods of cessation of activity imposed by the decree. When business resumes, these rents and charges **will be deferred or deferred without penalty or interest on arrears** and adapted to the situation of the companies in question.

Finally, it is not inconceivable that some lessors will grant their lessees rent reductions corresponding to the length of time they are closed, for establishments that are not essential.

With regard to rents and charges for the second quarter of 2020, lessors and lessees may raise various arguments to defend their position.

To justify the payment of rents and charges from the lessors' side:

First of all, on the lessors' side, it must be possible to argue that force majeure cannot be invoked for the payment of a sum of money. Indeed, a judgment in principle (Cass. Com, 16 September 2014, n°13-20,306) states that "*the debtor of a contractual obligation of an unpaid sum of money cannot be exonerated from this obligation by invoking a case of force majeure*".

Moreover, it seems that it is not in the lessors' interest to immediately invoke the termination clause for non-payment by the lessee. Indeed, this could conflict with their obligation of good faith.

Moreover, if the lessee were to sue the lessor for breach of the termination clause, the lessor would, in addition to being held to be in bad faith, be exposed to the risk of an opportune decision in favour of the lessee and/or to punitive delays in payment.

Conversely, lessees may argue:

In the context of the provision of the premises and their operation, the very exceptional nature of the situation to maintain that it presents the characteristics of force majeure.

In addition, the businesses covered by the decrees of 14 and 15 March 2020 could rely on Articles 1218 and 1219 of the French Civil Code (obligation to deliver) relating to the exception of non-performance against their lessor to argue that the payment of rents is suspended and to defer their payment. This is clearly the situation in which lessors and lessees in shopping centres find themselves (except for shops that can remain open, the list of which is set by decree).

Any action against them shall in any event (even if the rent is due) lead them to ask the judge for payment terms of up to two years (Article 1343-5 of the French Civil Code) with a probability that seems quite high that they will obtain them in the present circumstances.

In addition, it is necessary to take into account the not insignificant risk of the opening of collective proceedings, and the legal consequences resulting therefrom in the relationship between lessor and lessee.

2. Regarding the insurances

As far as commercial leases are concerned, the subject is still unclear to this day since force majeure could come in the way of any action against insurers. Indeed, if the obligation no longer exists because of a force majeure, there is nothing more to insure. This is obviously what insurers will defend.

It is essential to note that insurance generally does not cover epidemiological risks, losses being covered only if they result from material damage. Therefore, companies that are, for example, victims of a breakdown in their supply chain are exposed to considerable operating losses.

However, when only material damage is guaranteed, the penalties for delay owed by the supplier are, in principle, not covered (Cass. 1re civ., 7 Feb. 1990, no. 87-10.799: RGAT 1990, p. 364, note by R. Bout). A contrary clause providing for their coverage is possible but is rarely stipulated.

The question appears relatively clear as to whether it is appropriate for the lessor to implement his "*loss of rent*" insurance. In principle, it is a matter of covering the loss of rent suffered by the lessor as a result of damage to the real estate asset which is the subject of the lease. However, "*loss of rent*" insurance does not appear to cover the risks associated with an epidemic and it will therefore be difficult to implement.

It is therefore up to the lessee to try to implement the "*operating loss*" cover taken out under his insurance policy. Indeed, it is the lessee who suffers the consequences of the health situation. It will then be advisable to analyse on a case-by-case basis, taking into account the lessee's activity and the insurance policy taken out, whether there is cover for operating loss without damage. It should be noted, here again, that losses related to a

pandemic are, in the majority of cases, explicitly excluded from coverage because they do not create material damage.

Finally, while preventive measures have been taken by the Government with regard to companies at risk of being in difficulty, it is likely that curative measures, particularly on the issue of operating loss coverage, are also under consideration as the spread of the epidemic accelerates.

IV. Main impacts in the context of external financing

As part of the implementation of specific measures related to the Covid-19 epidemic, it is recommended that investors whose real estate assets are backed by external financing ensure that these measures are in accordance with the commitments made under the said financing and to anticipate as far as possible any possible default situations that may result. The main points of attention concern in particular:

- implementation of measures to carry over all or part of the rent and/or charges recoverable - credit contracts usually contain commitments limiting the ability to amend leases, particularly where this has a negative impact on lenders. In addition, the borrower's claims against its lessees under leases are almost systematically assigned as business receivables as collateral (Dailly assignments), which limits the possibility of freely adjusting the payment of rents;
- anticipation of default on financial ratio commitments: the calculation of financial ratios (mainly LTV Ratio and DSCR/ICR Ratios) may be impacted by the situation:
- Concerning the calculation of the LTV Ratio, the difficulty may result from obtaining reliable expertise. Indeed, some experts have already indicated that, in view of the current situation, they cannot guarantee the reliability of the valuations given. It is therefore recommended to anticipate as much as possible the delivery of the next valuations to the lenders if the next LTV Ratio test date falls in the next few weeks;
- The DSCR/ICR ratios can quickly be impacted when calculated on a forward basis. Indeed, in this case, there are a certain number of assumptions in which the rents of certain tenants are excluded from the calculation of the ratios, particularly in the event of late payment (often more than 90 days) or in the event of insolvency (this term is very often broadly defined) of the tenant concerned. Investors and lenders will therefore have to be careful in calculating these ratios;
- the possible implementation of a material adverse event clause. The definition of such an event in the financing documentation (sometimes defined broadly and including any situation that negatively and significantly affects the economic, legal and/or financial situation or assets of the borrower and, sometimes in the case of a single-tenant asset, the lessee) should be carefully reviewed. Clearly, the current situation (particularly for shopping centres) could lead some lenders to question the occurrence of such an event and conclude that an event of default has occurred (not necessarily with a view to accelerating credit but to restrict the management of the borrower's bank accounts or prevent distributions);
- hedging instruments - the risk of early termination of hedging instruments by the hedging banks (particularly in view of the possible occurrence of a significant adverse event) leading to a probable cross default with the credit documentation should be anticipated as far as possible (it should be noted, however, that the hedging banks' right of termination is usually set out in the financing documentation).

---

1. r. https://www.ffbatiment.fr/federation-francaise-du-batiment/laffb/actualites/faire-face-aux-chantiers-arretes-et-aux-chantiers-qui-continuent.html

2. r. also the guide of the FFB on the management of Covid-19 on the building sites and in particular p.19 on the private markets:

https://www.ffbatiment.fr/Files/pub/Fede_N00/NAT_ACTUALITES_3218/48363381f567438aa70a3de410ce5c0d/PJ/2020-GUIDE-FFB-CORONAVIRUS.pdf

3. https://travail-emploi.gouv.fr/actualites/presse/communiques-de-presse/article/covid-19-continuite-de-l-activite-pour-les-entreprises-du-batiment-et-des

RELATED PRACTICE AREAS

- Real Estate
- Business & Commercial Disputes
- Retail & Consumer Products

MEET THE TEAM

Henry Ranchon

Paris

henry.ranchon@bclplaw.com
+33 (0) 1 44 17 77 62

Laurent Schittenhelm

Paris

laurent.schittenhelm@bclplaw.com
+33 (0) 1 44 17 77 61

Suzy Lasry

Paris

suzy.lasry@bclplaw.com
+33 (0) 1 44 17 77 64