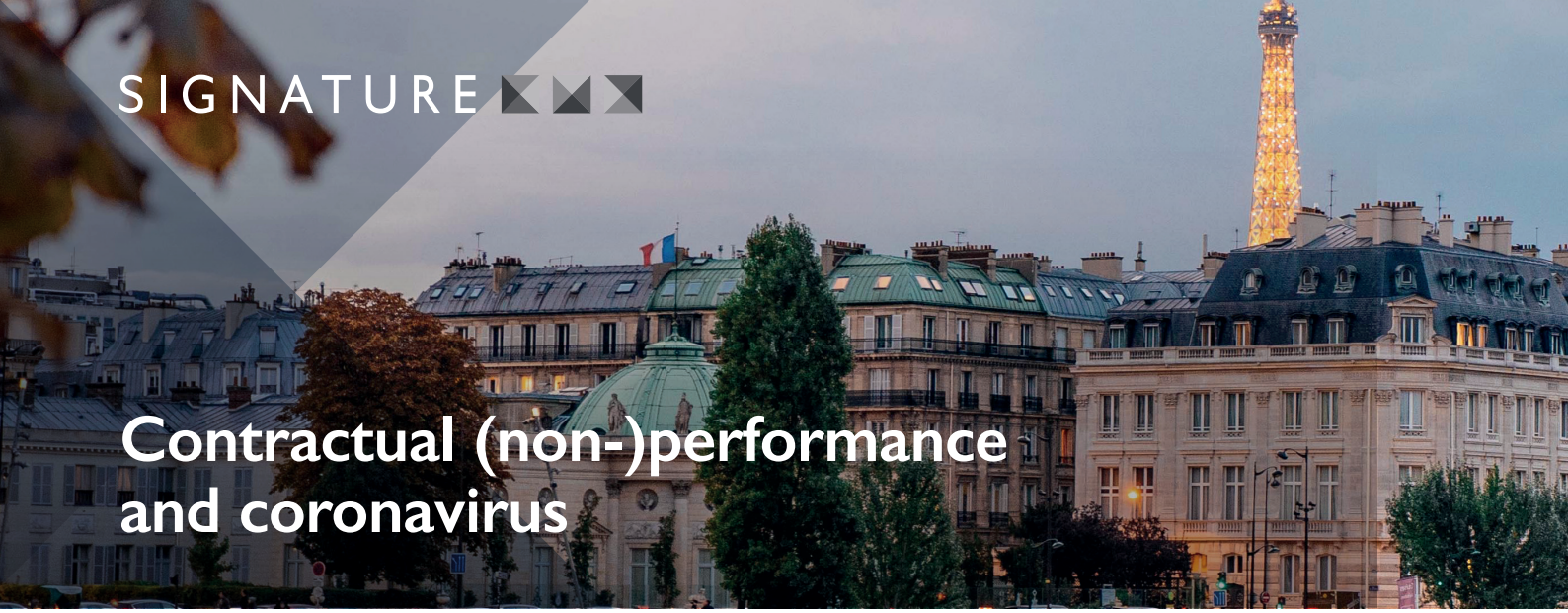

Contractual (non-)performance and coronavirus

The worldwide epidemic of COVID-19 and the recent measures taken by the French Government to contain the outbreak, have put a stop to the business of companies operating in France and in the rest of the world.

Procurement difficulties, confinement measures, lack of personnel or other restrictions on movement are the concrete difficulties that are currently being faced by companies.

In light of these hitherto unseen conditions, some companies will no longer be able to meet their contractual obligations. From a legal standpoint, the question consists in knowing whether they will be able to bring forward the coronavirus to explain their contractual non-performance.

Under French contractual law, the binding nature of the contract may be called into question in cases of force majeure (when the performance of the contract is impossible) or in cases of unforeseeable circumstances (when the cost of the performance becomes excessive).

Companies willing to bring forward such a claim will have to answer the three following essential preparatory questions:

1. Which law is applicable to the contract at stake? It being specified that the below developments only concern French law.

2. When was the contract at stake concluded? Indeed, this question is essential given that Order no. 2016-131 from 10 February 2016 reforming contractual law, the general rules and the rules governing evidence in the field of obligations, which came into force on 1 October 2016, established the concept of unforeseeable circumstances in Article 1195 of the French Civil Code. As a consequence, both concepts of *force majeure* and unforeseeable circumstances may apply to contracts concluded after 1 October 2016. Furthermore, for all contracts concluded after December 2019, the question arises of the real unforeseeable nature of the current situation and, therefore, the real possibility to implement the mechanisms of *force majeure* and/or unforeseeable circumstances.

3. What are the consequences of the measures taken to fight against the coronavirus on the performance of the said contract? These consequences will determine the application of the theory of *force majeure* or unforeseeable circumstances depending on whether the obligations became impossible or more costly.

Impossible performance: Coronavirus and force majeure

Definition of force majeure

- Traditionally and under former Article 1148 of the French Civil Code, the French Supreme Court defines *force majeure* as follows:"*the occurrence of an extraneous event,* ***unforeseeable at the time of the conclusion of the contract and irresistible at the time of its performance***" (French Supreme Court, Social Chamber, 16 May 2012, no. 10-17.726).

- The reform of contractual law in 2016 clarified the definition of the concept of *force majeure*. Article 1218 of the French Civil Code indicates: "Force majeure *occurs in contractual matters when an event beyond the control of the debtor, which could not reasonably be expected at the time of the conclusion of the contract and the effects of which cannot be avoided using appropriate means, prevents the performance of the debtor's obligation. If this situation is temporary, the performance of the obligation is suspended unless the resulting delay justifies the termination of the contract. If the difficulty is permanent, the contract is automatically terminated and the parties are released from their obligations in the conditions of Articles 1351 and 1351-1*".

To be deemed a case of force majeure, the event in question must be both **irresistible** (meaning that its effects cannot be avoided through appropriate means) and **unforeseeable** (meaning that it could not be expected at the time of the conclusion of the contract). The event must also be **beyond the control of the party bringing it forward** and must not result in any way from that party's own behaviour.

Force majeure and epidemic

While case law has previously ruled that an epidemic was a case of *force majeure* (Ebola outbreak), it has specified the importance of establishing a causal link between the epidemic in question and the impossibility to meet contractual obligations. The Paris Court of Appeal ruled: "*Whereas, nevertheless, the established nature of the outbreak that affected West Africa in December 2013*, ***even by considering it is a case of force majeure****, is not sufficient to ipso facto establish that the decrease or absence of cash flow claimed by the appellant, would be attributable to it* […]" (Paris Court of Appeal, 17 March 2016, no. 15/04263).

Generally speaking, French case law is reluctant to recognise *force majeure* in the event of an epidemic. The following decisions prove this:

- Regarding the H1N1 flu pandemic, the Besançon Court of Appeal considered "*it ought to be reminded, in law, that force majeure refers to an unforeseeable, irresistible and insurmountable event rendering the performance of an obligation impossible.* ***This is not the case of the H1N1 flu pandemic, which was widely announced and expected, even before the implementation of the health regulation*** *behind which SARL ATN 25* [appellant] *is attempting to hide*" (Besançon Court of Appeal, 8 January 2014, no. 12/02291).

- Regarding the Dengue fever outbreak, the Nancy Court of Appeal refused to recognise the nature of force majeure, ruling that: "*The parties have produced extremely complete documentation on Dengue fever, from which it appears that this widespread viral disease called "tropical flu" was described for the first time in 1779 and regularly strikes since the beginning of the 1980s in the entire intertropical zone due to the erosion of the mosquito eradication programmes, mosquitos being carriers.* ***This epidemic phenomenon is recurrent, in particular in the French West Indies.*** […] ***The occurrence in August 2007 and during the months that followed of a high number of Dengue cases, which even exceeded the epidemic threshold, is not a new phenomenon.*** […] *These documents demonstrate that the epidemic that occurred in 2007 was not unforeseeable. The works council claimed it was impossible to constantly protect oneself against mosquito bites, which is obvious, but the management unit of epidemic phenomena* ***insisted on the importance of personal protective measures to be complied with****, such as the use of mosquito nets and repellents as well as the use of long clothing. It also reminded that the symptoms of this disease are a strong fever with headaches, stiffness and asthenia that can last a few weeks and that the disease* ***did not present any complications in most cases.*** *The irresistible nature of this Dengue outbreak was not established in light of the documents produced*" (Nancy Court of Appeal, 22 November 2010, no. 09/00003).

- Regarding a Chikungunya epidemic, the Basse-Terre Court of Appeal ruled: "*in spite of its characteristics (joint pain, fever, headaches, fatigue, etc.) and its prevalence in the West Indies arc and particularly in Saint-Barthélémy in 2013-2014, this event does not have the nature of force majeure within the meaning of the provisions of Article 1148 of the French Civil Code. Indeed, this epidemic* ***cannot be considered to have an unforeseeable and especially irresistible nature insofar as, in any case, this disease relieved with painkillers is generally surmountable*** *(the appellees not having claimed any particular medical condition) and the hotel could provide its service during this period*" (Basse-Terre Court of Appeal, 17 December 2018, no. 17/00739).

These decisions show that the determination of *force majeure* results from the sovereign examination of the courts, which analyse the specific circumstances of the cases. Nevertheless, it is possible to develop a reasoning that goes against this case law to give the COVID-19 outbreak the nature of *force majeure*, in particular by underlining the novelty of this disease, the speed with which it spreads, its global impact and, above all, the unprecedented governmental measures taken throughout the world to stop the outbreak with express prohibitions on travelling and working, which have been issued by the French State.

In reality, in light of the very strict case law in this field, it is likely that it will not be the epidemic as such but rather the confinement/isolation/border closure measures that have been taken to stop the outbreak that will be deemed *force majeure*.

In short, with respect to the coronavirus, close attention must be paid to the two following questions:

- Was the contract concluded before the coronavirus outbreak? If not, the unforeseeable nature of this event will probably be called into question. Yet, it is difficult to identify the moment when the outbreak could reasonably have become foreseeable (occurrence in China? Risk of propagation to Europe? Occurrence in France?).

- Does the situation created by the coronavirus completely prevent the performance of the obligation? In other words, is it irresistible? The co-contracting party may claim the possibility of using alternative means (work reorganisation, different supply sources, etc.).

How to react?

It is essential to review the contract in question and examine the clause on *force majeure* events. The contractual provisions should not only enable to determine whether the situation triggered by the coronavirus may be considered to be a case of *force majeure* but also the applicable procedure (notification to the co-contracting party, etc.) and the consequences of such an analysis on the contractual obligations of the parties.



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Element to be borne in mind: If a notification procedure is mentioned, it is essential to apply it because even if the *force majeure* is recognised, the action would be deemed inadmissible.

More costly performance: Coronavirus and theory of unforeseeable circumstances

Definition of unforeseeable circumstances

The revision of the contract on the ground of unforeseeable circumstances is possible since the reform of contractual law and only applies to contracts concluded after 1 October 2016.

Pursuant to Article 1195 of the French Civil Code: "*If a **change of unforeseeable circumstances** at the time of the conclusion of the contract **renders the performance excessively costly** for a party that **had not accepted to bear the risk**, the latter may ask the co-contracting party to renegotiate the contract. It shall continue to perform its obligations during the renegotiation.*

Should the renegotiation be refused or fail, the parties may agree to terminate the contract, on the date and in the conditions they will determine, or jointly ask the court to adapt it. Failing an agreement within a reasonable timeframe, the court can, at the request of either party, revise the contract or terminate it, on the date and in the conditions it will determine".

Unforeseeable circumstances and epidemic

To our knowledge, this provision has not yet been applied to an epidemic. Nevertheless, everything suggests that the revelation of the coronavirus outbreak may represent a change of unforeseeable circumstances at the time of the conclusion of the contract, provided that the contract was concluded before the revelation of the said epidemic. In such a case and should the performance of the obligations become a lot more expensive in this context, negotiations may be initiated between the parties.

How to react?

Once again, it is necessary to refer to the contract (i) to ensure that it was concluded after 1 October 2016 but (ii) also analyse the hardship clause or at least check that nothing in the contract excludes these rules.

The same care ought to be given to the compliance with notification requirements to the other party, like those that may exist in the event of *force majeure* cases.

Conclusion

It is an in-depth analysis of the wording of the contract, the performance of which is called into question, that will enable to determine the means to be claimed against one's co-contracting party to face up to the COVID-19 crisis. Furthermore, should it be impossible to use the *force majeure* clause or the theory of unforeseeable circumstances, it will be necessary to check whether other provisions in the contract would allow its adjustment (in terms of payment delays in particular) or its termination without fault.

It will also be necessary to look at what competitors are doing because your co-contracting party may attempt to single you out if competitors were to not completely stop their business or only limit it. It will then be necessary to explain why the operation of your company is different.

Lastly, the question arises of the provision of "*force majeure certificates*" by the Chinese authorities to the companies located in China. Case law will undoubtedly rule on their impact, especially if the French State decides to draw inspiration from them. In our opinion, a legislative development could clarify this debate.

For any questions you may have, do not hesitate to write to us at sylvie.gallage-alwis@signaturelitigation.com or thomas.rouhette@signaturelitigation.com or any member of our team whom you know.

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