

The situation created by the Covid-19

The health crisis linked to the spread of Covid-19 and the restrictive measures taken by public authorities to stop the spread of this virus are having a violent impact on all sectors of society.

Brucher Thieltgen & Partners gives you here some answers to the urgent questions that arise in various sectors of the economy.

Issues arising in contractual matters

Due to the health and economic crises caused by the Covid-19 virus, which affect a major part of the world, contractual relations will be put to the test. Indeed, this unprecedented health crisis will have significant consequences on the contractual obligations of many economic players, leading to multiple consequences, namely: delays, interruptions, renegotiations and even contractual cancellations. At the heart of these considerations is the notion of force majeure (or Act of God in the Common Law system), which we will deal with, in this article.

The essential question that arises in the present circumstances is whether, as a result of the pandemic caused by Covid-19, the economic actors affected by the consequences of this virus could invoke the force majeure in order to withdraw from their obligations or to suspend its effects, either temporarily or definitively.

Is Covid-19 a force majeure ?

The criteria of force majeure in Luxembourg

In order to be recognized as force majeure, a fact must have the following three characteristics:

- *The unpredictability of the event, which is assessed on the day of the conclusion of the contract.*
With regard to the coronavirus, the date to be taken into account to consider the moment from which the latter was foreseeable and therefore could have been anticipated by the economic actor invoking force majeure, remains debatable. Indeed, the doubt hovers because several moments can be taken into account: is it the moment when the epidemic began in China? Its expansion in Europe? In Luxembourg? From the moment when the State took radical measures (implementation of stage III)?

This seems to be the most tricky point to apprehend and could be problematic in terms of evidence. It will be necessary to remain cautious with regard to contracts concluded as of today.

- *The irresistibility of the event*
This is actually a twofold condition. On the one hand, the event in question must be both **inevitable** in its occurrence but also **insurmountable** in its effects (that there is no possibility of an emergency solution/replacement). In other words, this means that the irresistibility must make the execution of the contract totally impossible and not only more complex or expansive.
- *The applicant's exteriority in relation to the event relied on.*
In this case, did the Applicant contribute to the spread of the virus and infect his suppliers abroad or locally causing the known consequences? This criterion appears to be very simple to demonstrate in the case of Covid-19, the applicant being obviously external to this event.

Judges' assessment of the criteria of force majeure

Consideration by judges of previous cases of epidemics / pandemics in relation to the force majeure invoked in contractual matters.

It should be made clear from the outset that the qualification of force majeure is, in any event, subject to the sovereign assessment of the judges, who will determine whether Covid-19 constituted an event of force majeure by assessing *in concreto* each case.

With regard to epidemics, it should be noted that case law, in particular French case law, has repeatedly rejected the classification as force majeure invoked by the applicants in order to have their obligations suspended or cancelled, whether in the context of dengue fever, H1N1¹ influenza or chikungunya².

For instance, in the case of the H1N1 epidemic, the conditions of unpredictability and irresistibility were lacking because it had been reported and predicted before the WHO or States put in place health regulations.

In the other cases, the judges considered that an epidemic did not automatically constitute force majeure. Either the disease was not sufficiently known, or its risk of spreading and its effects on the health of the victims were not sufficiently lethal to enable them to be released from their contractual obligations.

The specific case of Covid-19

Are the present circumstances of a completely different magnitude and gravity that could lead to a different assessment by the judges?

In its declaration of 30 January 2020 the World Health Organization (hereinafter "WHO") through its Committee and its Executive Director declared that "*the 2019-nCoV outbreak constitutes a public health emergency of international concern*". This virus is considered lethal, in light of the number of deaths

¹ CA de Besançon, 8 January 2014 – n°12/02291

² CA de Basse-Terre, 17 December 2018 – n°17/00739



that keep rising. To date, no vaccine or treatment is known, although some advances seem to be emerging³.

In addition, there are still many variables and unknown factors inducing States to take drastic measures as quickly as possible to contain the virus and its effects, as reflected in particular by the proliferation of legal and regulatory provisions restricting individual freedoms and providing strong incentives, or even imposing almost strict requirements, for confinement at home.

It is therefore necessary to ask whether the force majeure to be retained by the judges would not fall more within the scope of these state containment and restrictive decisions, which for many constitute insurmountable⁴ obstacles to the performance of contractual obligations, than the force majeure linked to the Covid-19 virus itself, if the judges were to treat it like previous epidemics?

In reality, one may wonder whether it would not be possible to invoke force majeure as a reason preventing the performance of treaty obligations following **the ministerial order of 16 March 2020**, which limited a majority of interpersonal contacts and travel on the territory? Could we not then, in this hypothesis, retain this date as the date from which it would be validly possible to invoke force majeure linked to state decisions, bearing in mind that before this date, the probability that such force majeure would be retained seems low, because, legally, there were no particular restrictions (cf. the condition of irresistibility). Indeed, it remains necessary for the claimant to prove the link between the event (the Ministerial Order/Grand Ducal Regulation or the Covid-19) and the impossibility of being able to perform his contractual obligation. These questions remain open and only the decisions handed down by the judges in the coming months will be able to enlighten us.

Some practical issues caused by Covid-19 in contractual matters

If the issues caused by the Covid-19 pandemic are numerous, we will discuss here some specific questions and problems in order to remain pragmatic, as it is obvious that many national and international contracts will be affected in their execution. However, this list is by no means exhaustive.

- i. With regard first of all to the condition of unpredictability for force majeure invoked by reason of Covid-19 itself, namely : What is the point in time at which the parties were to be considered to have had knowledge of the existence of Covid-19? In some cases, it is a key moment. From that moment it will be considered that the parties decided to enter into the contract at a time when force majeure could no longer be validly invoked, the Covid-19 having been foreseeable.
- ii. The issue here is to determine the date from which the parties were/could be aware of the virus and thus could have foreseen the known consequences. Although such a magnitude seems hardly imaginable, judges may deny the benefit of the qualification of force majeure to those who do not meet the conditions.

³ https://www.lemonde.fr/sante/article/2020/03/18/coronavirus-sanofi-offre-un-antipaludique-pour-traiter-300-000-malades-apres-des-essais-juges-prometteurs_6033466_1651302.html

⁴ Arrêté ministériel dated 16/03/2020 on various measures to control the spread of the Covid-19 virus : <http://legilux.public.lu//eli/etat/leg/amin/2020/03/16/a149/jo> and Règlement grand-ducal dated 18/03/2020 : <http://www.legilux.lu/eli/etat/leg/rgd/2020/03/18/a165/jo> .



This question can be examined by the members of our study, who will be able to determine whether, depending on the time at which force majeure is invoked, you are/were in a position to suspend your contractual obligations or simply terminate them.

- iii. Another interesting aspect is the degree of danger of the virus and the treatments available to cure it, particularly with regard to tourism contracts.
In the case of previous epidemics, the judges have taken account of whether or not the epidemic is lethal in order to assess the legitimacy of a trip cancellation or to evaluate the losses claimed by tourism professionals. But the judges also took into account the available treatments to determine whether or not the event remained insurmountable. As in the aforementioned judgment of 17 December 2018 on the chikungunya virus, the judges considered that this virus "*despite its characteristics (joint pain, fever, headaches, fatigue, etc.) [...] does not have the characteristics of force majeure. And this epidemic cannot be considered as having an unpredictable and above all irresistible character since it can be relieved by analgesics and is generally surmountable...*". What about the current Covid-19? For which no vaccine/treatment is yet available and which appears to be potentially lethal.
- iv. Certain points may be raised in the contractual framework more generally: What if the debtor of an obligation who may not perform it because of personal contraction of the Covid-19 virus or a positive test result, can he validly resort to force majeure linked to the epidemic?
- v. Alternatively, what happens when you, as a contracting party, are in a situation of late/non-payment of rent or various contributions, is it possible to justify this by invoking force majeure due to the epidemic, or to the containment decisions pronounced by the States?
- vi. Can co-contractors validly define/frame/exclude cases of force majeure in their contracts? Can they also provide for limiting the consequences of the occurrence of force majeure?
- vii. *In fine*, what contractual reflexes should be adopted in order to foresee and manage such situations and avoid major risks and doubts?

Points to focus on and some solutions

- i. Which basis of force majeure is it preferable to invoke: the one linked to the epidemic or to state measures?

Depending on the date of signature of your contract, but also on the practical considerations of your situation and having regard to our development on the condition of unpredictability in I. and the issues raised in II. of the present note, we will consider the best defence to take.

- ii. What are the consequences of force majeure?

Pursuant to the Civil Code, force majeure either allows you to suspend your obligations, as a contracting party, provided that the impediment remains temporary unless it is of such a nature as to justify the termination of the contract (assessment by the judges again on a case-by-case basis); or force majeure allows the termination of the contract by operation of law, provided that the impediment invoked is definitive.



In order to provide the best possible framework for force majeure, it is preferable to provide for a contractual clause (see point 4 below).

iii. If the Covid-19 virus is contracted by you or your co-contractor, what should you check?

It should be ensured that no recourse or alternative means of remedy is available before not fulfilling its obligations (in order to meet the criterion of irresistibility). Because if the judges admit the application of force majeure in some cases, it seems unlikely that a principle of general and absolute force majeure can be recognised.

iv. Our advice on contractual matters.

If you have not been able to fulfil your contractual obligations due to the Covid-19 virus and/or its consequences, or if one of your co-contractors is in this case, we recommend that you check the following points:

a) Is there **a clause in the contract dealing with force majeure?**

Indeed, under the principle of freedom of contract, the parties to a contract remain free to tailor the definition of force majeure. Such a clause is thus lawful and very often it will be provided for in the contract, either to regulate and designate specific cases of force majeure and *a fortiori* to suspend or cancel the contract, or to exclude specific cases of force majeure (the list of cases may be limitative or just indicative) and it is not uncommon for the following to be mentioned: the health risk and/or the case of decisions taken by the public authorities.

Very often a time limit is stipulated in the contract in order to allow the parties to distinguish between temporary and permanent impediment. Thus each of the parties will be free to terminate the contract if the period of prior negotiation has not been successful. Current circumstances emphasise the importance for future contracts to provide, through a force majeure clause, for a period of time adapted to the stakes of the transaction and the interests of the parties before it allows any termination of the contract ;

b) If applicable, what are the conditions for implementing the force majeure clause?

In many cases, there will be an obligation to provide information, within specific time limits and according to specific formalities, which will remain the responsibility of the party unable to fulfil its obligations.

c) It is important **to foresee the contractual consequences** of an event of force majeure: suspension, automatic termination, etc.; Indeed it seems necessary, in order to remove any risk, to agree not only on the existence of a case of force majeure but also on its consequences.

d) Depending on your situation, do not hesitate to inform your co-contractor directly of the impossibility of performing your obligations or to ask him if he would like alternative solutions to be put in place in order to continue the performance of the contract.

e) It may also be worthwhile **to include a hardship clause** in the contract. The latter makes possible to renegotiate the contract when its performance becomes too onerous for one party, without having to wait until performance is rendered impossible, as it is the case with force majeure.



The above-mentioned points enable to secure any legal situation in a global way, but each case being particular, a more specific analysis could be necessary and our collaborators are at your disposal to help you and answer you the best possible way.

For further information

Our experts, who remain fully operational during the crisis, are at your disposal.

Please, do not hesitate to contact in particular :



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