



Stamatopoulos Eftychidou

legal consultants

IMPACT OF COVID-19 ON CONTRACTUAL OBLIGATIONS. IS THE NOVEL CORONAVIRUS A “FORCE MAJEURE EVENT”?

During the last two months, in the light of the coronavirus (COVID-19) pandemic, governments all over the world have implied several restrictions on usual human activities, which have affected, inter alia, businesses. The latter have been confronted with objective, legal or occasional obstacles, making the performance of their contractual obligations in many cases difficult or even impossible.

As of 9 March 2020, a governmental containment system was gradually set up throughout Greece, including significant travelling restrictions within the country but also from and to abroad, the suspension of several businesses' activity and labor contracts, the imposition of mandatory quarantine for all persons entering the country from any foreign state (including EU member states), as well as imposition of organizational measures, such as the frequent regular disinfection and ventilation of work premises, the maintaining safe distance among workers etc., which, in combination with the shortage of supply and illness or confinement of employees, may affect the performance of ongoing contracts, particularly the long - term ones.

These urgent measures have had a significant impact to persons' and businesses' rights and obligations under existing contracts that may lead contracting parties to delays or inability to perform their duties. Consequently, parties to Greek law governed contracts may wish to review the available contractual rights and obligations, including any force majeure clauses, in order to manage and mitigate the effects of the COVID-19 outbreak.

I. FORCE MAJEURE UNDER THE GREEK LAW

A *force majeure* event may be provided for in the contract or as per the Greek Law. Although the notion of “*force majeure*” is not expressly defined in the Greek Civil Law, the well - established case - law of the Greek courts has held that a “*force majeure event*” refers to an unforeseeable event, which may not be avoided, even if all reasonable measures are taken and which may not be attributed to the fault of the contracting parties. Usual examples recognized by Greek case - law as being “*force majeure events*” are non-human induced events, such as earthquakes, floods, hurricanes, strikes etc.



Stamatopoulos Eftychidou

legal consultants

A global pandemic meets the general conditions of a “*force majeure event*” under the Greek legislation and case - law, since it “*constitutes an unforeseeable non -human induced event, which cannot be avoided, even if all reasonable measures are taken and which may not be attributed to the fault of the contracting parties*”. As a general rule of the Greek Civil Law, the party which, in this event, was prevented from performing its contractual obligation, may not be held liable for this non -performance. Moreover, Greek Courts have repeatedly adjudicated that “*government or other administrative acts compelling individuals to act in a specific manner may constitute a ‘force majeure event’*”.

Moreover, for the diagnosis of force majeure, Greek jurisprudence follows the following criteria, that must be cumulatively met: (a) that the force majeure incident caused the impossibility of fulfilling the provision of service/goods as per the contract or a delay of fulfillment for the invoking party, (b) that the non-fulfillment of the provision was caused by circumstances beyond the control of the invoking party, and (c) there were no other justified measures or actions that could have been taken to avoid or mitigate the event and its consequences. In order to prove the concept of force majeure, the significance of the event and the fact whether it substantially affected the subject matter of the contract, as well as the duration of the event are crucial factors. It is also taken into account whether the party invoking a force majeure event timely informed the counterparty in time about their incidents and consequences.

The effect of such events is provided for in the Greek Civil Code.

Article 330 provides that “*The debtor is liable, unless otherwise specified, for any breach of his obligation by deceit or negligence, his own or that of his legal representatives. Negligence exists when the diligence required in transactions is not paid*”.

Article 336 provides that “*The debtor is relieved of any obligation due to inability to fulfill the benefit, if he proves that the weakness is due to an event for which he is not responsible. However, as soon as he learns of the inability to fulfill, he must notify the lender*”.

Also, according to Article 342, “*the debtor does not become overdue, if the delay in the provision is due to an event for which he is not responsible*”.



Stamatopoulos Eftychidou

legal consultants

Article 380 provides that *"If the performance (of goods/services) of one of the parties is impossible due to a fact for which [the party] is not liable, the other party is also exempted from the counter - performance and seeks it, if he has paid it, in accordance with the provisions on unjust enrichment. But he does not exempt if he demanded what to the other party gained because of the fact of weakness"*.

Finally, Article 388 provides that *"If the events in which, in view of the good faith and the transaction ethics, the parties supported the conclusion of a bilateral agreement, were later reversed, for reasons that were extraordinary and could not be foreseen, and due to this change the performance of the contract, also taking into account the counter – performance, has become excessively onerous for the debtor, the court may, at its discretion, at the request of the debtor, allow the reduction of the debtor's performance to the extent appropriate and the dissolution of the contract in whole or to the extent to which [the contract] not yet been enforced. Based on this, the obligations arising from it are depreciated and the parties have a mutual obligation to reimburse the benefits received under the provisions on unjust enrichment"*.

However, again according to the case – law *"parties which may not perform their contractual obligations due to a 'force majeure event' should promptly notify their counterparties of their inability to perform their obligations, invoking the 'force majeure event', and take reasonable steps in order to mitigate the effects of the 'force majeure event' and the damage which may be caused to their counterparties"* (even if such obligation is not expressly foreseen in the contract). Non-prompt notification may hold the parties liable for any expenses made by their counterparties with a view to the performance of the contract.

In this respect, if the execution of the contract has been affected, a prompt and written notification is strongly recommended. This notification would also lead to an amicable solution in order to determine how the contract shall continue and what shall be the deadlines for the contract to be extended.

II. INTERNATIONAL LAW APPROACH

FORCE MAJEURE UNDER THE UK LAW



Stamatopoulos Eftychidou

legal consultants

When UK law applies, the relief of a party from its contractual liability depends on the particular circumstances and the drafting of the relevant contractual provisions. Where the term epidemic or pandemic has been used, that will clearly cover Covid-19 situations. Where no relevant event is specifically mentioned, it is a matter of interpretation of the clause, whether the parties intended such an event to be covered. The invoking party must establish the causal link between the event and its inability to perform. There are, in fact, examples of the UK courts in previous cases, where it was held that, *inter alia*, a pandemic can be regarded as a “*force majeure event*”¹. A provision that requires a party to be “prevented” by the “*force majeure event*” from performing its obligations will likely be more difficult to rely upon than one which only requires the party to be “impeded” or “hindered” in the performance of its obligations².

In the absence of an express “*force majeure*” provision within an UK law contract, parties may be able to rely upon the doctrine of frustration, where parties to the contract will no longer be bound to perform their future obligations.

Some contracts may also contain a “change in law” provision, which addresses circumstances where there has been a change in law that makes it impossible for the party to fulfill its contractual obligations. As a result, parties may have the right to terminate the contract.

Moreover, other legal avenues available are Material Adverse Change (MAC)/ Material Adverse Effect (MAE) clauses, price adjustment clauses or “frustration” of contract³.

FORCE MAJEURE UNDER THE FRENCH LAW

The legal tools offered to the parties to French law governed contract, in order for the impacts of the Covid-19 pandemic to be addressed, shall be analyzed as follows:

¹ In *Lebeaupin v Richard Crispin and Company* (1920) the court referred to the term *force majeure* as follows: “*This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control, and such force majeure is sufficient to justify the non execution of a contract. Thus, war, inundations, and epidemics, are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majeure.*” *This is a wide definition, but I think that it usefully though loosely suggests not only the meaning of the phrase as used on the Continent, but also the meaning of the phrase as often employed in English contracts.*”, while in *Clifford Gardner v Clydesdale Bank Limited* (2013) the court said, *obiter*, that a “flu pandemic” would constitute a *force majeure* (“...absent some form of *force majeure*, for example a flu pandemic.”).

² COVID-19: *Force Majeure Event?*, Shearman & Sterling LLP at Lexology.com

³ COVID-19 Contractual Performance- *Force Majeure clauses and other options: a global perspective*, Mayer Brown at Lexology.com



Stamatopoulos Eftychidou

legal consultants

1. Enforcement of Material Adverse Events (MAC) clause⁴

Under this MAC clause, which is very common in M&A and financial transactions, one party may have the ability to terminate or cancel the contract, in case certain circumstances or events, which are freely defined in the agreement, arise, that have (or are reasonably likely to have) a material adverse effect. Where the terms of a contract are insufficiently explicit to determine whether a specific factual situation falls under the contractual definition of a material adverse change or event, French courts have broad authority to construe the provision using the likely understanding of the parties as a guide.

2. Statutory provisions and/or contractual arrangements on “*force majeure*”⁵

“*Force majeure*” is a statutory exemption clause found in Article 1218 of the French Civil Code, which automatically applies to French law governed contracts, even absent any force majeure clause. If the prevention is temporary, the performance of the obligation shall only be suspended, unless the resulting delay justifies termination of the contract, whereas if it is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations. The COVID-19 pandemic may constitute a permanent “*force majeure event*” for those contracts where time is of the essence. Article 1231(1) of the French Civil Code further specifies that a party will not be liable for damages, if the non-performance or late performance of its obligation is due to “*force majeure*”.

The interpretation and application of force majeure clauses by French courts is made on a case-by-case basis and depends heavily on the wording of the contractual clause under consideration and the specific facts of the case. Overall, while in the past the courts tended to adopt a rather strict approach regarding the force majeure criteria (e.g. SARS epidemic⁶), several recent decisions have characterized the current Covid-19 pandemic as a force majeure event⁷.

⁴ French Law: COVID-19, MAE clauses, *Force Majeure* and Hardship at Debevoise.com

⁵ Covid-19: Impact on commercial contracts – France at Linklaters.com

⁶ Paris Court of Appeal, 29 June 2006, No. 04/09052

⁷ In a decision dated 12th March 2020 (n° 20/01098), the Colmar Court of Appeal considered that the current Covid-19 epidemic was a force majeure event preventing a person held in administrative detention from appearing before the court, as another person held in the same detention center had been tested positive for Covid-19. As regards this decision, see also: <https://www.bakermckenzie.com/en/insight/publications/2020/03/france-decision-declare-covid-19-force-majeure>. The same Court of Appeal adopted a similar solution in several subsequent decisions, even in the absence of a direct link between the detainees and infected persons (16 March 2020, n° 20/01142 and 20/01143; 23 March 2020, n° 20/01206 and 20/01207).



Stamatopoulos Eftychidou

legal consultants

3. Hardship (*théorie de l'imprévision*)⁸

Where an event does not meet the conditions to qualify as a force majeure event, parties may still seek to rely on the French statutory hardship provision, if such a clause is inserted in the contract. Article 1195 of the French Civil Code – applicable to contracts entered into as from 1 October 2016 – provides that a judge will be able to amend or terminate a contract where the contract, unforeseeably, becomes excessively onerous to perform for one of the parties, and where such risk had not been assumed by that party.

III. IN CONCLUSION

During this unprecedented situation we are experiencing, the primary aim of the contracting parties shall be, where possible, to maintain the contractual relationship through communication and negotiations, in order to decide how to resolve the failures or any other difficulty arising from the coronavirus pandemic and its consequences, whereas the termination of the contractual relations shall only be the last resort.

For questions, please contact us:

E. info@stameft.com

T. 00302103808701

L. www.stameft.com

⁸ Covid-19: Impact on commercial contracts – France at Linklaters.com