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COVID 19 CONSEQUENCES ON BUSINESS CONTRACTS

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1) COVID 19 is not a Force Majeure case itself,

One must prove a link between the Covid and the non-performance of the contract

2) DEFINITION by the CISG (Vienna Convention 11 April 1980) except UK & India

It supplants any otherwise applicable law if not excluded by the parties

Exemption : Article 79

Effect of Avoidance : Article 81

(1) Avoidance of the contract releases both parties from their obligations under it,

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

3) DEFINITION by the ICC (International Chamber of Commerce)

The standard form of the ICC March 2020 clause provides for an epidemic as a case of force majeure:

1. "Force Majeure" means the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract,
 2. In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause: (i) war (v)plague, epidemic,..... natural disaster
2. A party successfully invoking this Clause is relieved from its duty to perform its obligations under the contract and from any liability in damages »

4) DEFINITION by the CJEU - Case 145/85. Denkavit/ Belgie

European Court reports 1987 - Page 00565

« THE CONCEPT OF FORCE MAJEURE MUST BE UNDERSTOOD AS REFERRING TO UNUSUAL AND UNFORESEEABLE CIRCUMSTANCES, BEYOND THE CONTROL OF THE PARTY BY WHOM IT IS PLEADED, THE CONSEQUENCES OF WHICH COULD NOT HAVE BEEN AVOIDED EVEN IF ALL DUE CARE HAD BEEN EXERCISED. THAT CONCEPT MUST BE CONSIDERED IN RELATION TO THE PROVISIONS OF EACH REGULATION IN WHICH THE TERM APPEARS ».

5) Statement by the WHO

The World Health Organization's publication of 30 January 2020 which called the coronavirus epidemics:

"Public health emergency of international concern"

6) DEFINITION by National Laws

France: Article 1218 of the French Civil Code is not public policy.

Two criteria:

Unpredictability: Some authors will tell you that everything can now be predicted, that there are studies on all subjects, and that as a result nothing is more unpredictable. One can answer that forecasters can be wrong which makes the reality unpredictable.

A storm can be predicted a long time in advance but is still considered a case of force majeure.

Irresistibility: the debtor of the obligation must be unable to do anything to save the situation.

Several consequences:

- Exoneration of the liability of the supplier to whom **damages cannot be claimed** for non-performance of the contract unless he contractually planned to bear the cost of consequences.
- In the event of an outright cancellation, the contract being "cancelled", each party theoretically finds itself **in the state in which it was before the conclusion of the contract**: the supplier no longer has to deliver the goods, and **the buyer can request the return of the instalments paid**.
- **Suspension or postponement**: who will bear the costs strictly related to this situation (all budget items are allocated)?

To give way to perform the contract after the pandemic (**Spain**)

- **Cascading cancellation** of the chain of contracts for the supplier (supplier's contracts)

The supplier booked in advance a lot of raw materials. **If the seller was aware** of the contract with the customer, the purchase of raw materials can be cancelled without any penalty (art 1186 of the French civil code).

Case law

Unpredictability is appreciated **on the day the contract is signed**.

Irresistibility is assessed on a case-by-case basis, particularly in relation to the link between force majeure and the promised performance.

Decisions made in situations similar to the coronavirus epidemic

The courts have treated Ebola as a case of force majeure (Court of Appeal of Paris 17 March 2016), but refused it for absence of causal link with the decline of activity of a company or when the virus had not made the performance impossible (Court of Appeal of Paris 29 March 2016) or when the virus is recurrent (Court of Appeal Nancy 22 November 2010) or been announced for some time (Court of Appeal Besançon 8 January 2014)

In China, they have precedents with the SARS.

And the Chinese Authorities may deliver a certificate of FM

But in the case of Covid 19, we have:

- The virus
- + the World Health Organization's publication of 30 January 2020 which called the coronavirus epidemic a "public health emergency of international concern"
- + the French Minister of Economy's statement of 28 February 2020 stating that coronavirus will be "considered a case of force majeure for businesses"
- + the ministerial decree banning gatherings of more than 5,000 people in a closed environment of 4 March 2020, and 100 later on.
- + the confinement of persons by decree of 16 March 2020 which provides for a restricted list of cases where one can leave home.

There is therefore a reasonable chance that the coronavirus will be considered a case of force majeure **if the contract was signed before the 30 January 2020**.

7) Look at your insurance policy

- **What risks are excluded?**

According to the main brokers, **since January 2020, there is now a provision for exclusion for coronavirus in policies**.

8) Hardship and force majeure

This clause is different from force majeure in that it deals only with the **financial aspect**.

9) Any public order applicable to international contracts?

To be checked at national level.

10) Contractual arsenal

Limitation of liability

Subject to fulfilling one's essential obligation (article 1170 of the French Civil Code), of course.

Modification of the contract

The judge can adjust the contract at his discretion or may review the contract.

If gross disproportion in the rights and duties between the parties.

Postponement of payments, if less than €50M turn over.

Partial contractual non-performance and price reduction

One of the possibilities offered by contract law is to request a price reduction in the event of "imperfect performance of the benefit", the amount of which may be arbitrarily decided by the judge in the event of disagreement (article 1223 of the French Civil Code).

Penalty clause

The judge may automatically reduce or increase the penalty, and this text is public policy (Article 1231-5 of the French Civil Code).

Brutal breakdown of established relationships

Art L 442-1 of the French code of commerce provides for a minimum notice period of 18 months to terminate a contract which had a long duration. **Exception in case of force majeure.**