

French Law: COVID-19, MAE clauses, *Force Majeure* and Hardship

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The COVID-19 pandemic and related lockdowns and other preventive measures may make it difficult or impossible to perform contractual obligations. For contracts governed by French law, the nonperformance of obligations for reasons attributable to the pandemic would first have to be addressed on the basis of any material adverse events stipulations that would be broad enough to cover pandemic risks and their effects. In the absence of any such provisions, French law offers statutory *force majeure* and hardship (*imprévision*) provisions that may provide guidance on how to deal with situations arising from the outbreak.

Enforcement of Material Adverse Events Clauses

- A contract may include a material adverse change (“MAC”) clause under which a party may have the right to cancel or terminate the contract. This clause is often found in agreements the performance of which is likely to extend over a period of time. It is common in M&A and financial transactions, usually to cover any situation arising between the signing of agreements and the completion of the transactions.
- This MAC clause is typically intended to give one party (usually the purchaser or lender in an M&A or financial transaction) the ability to terminate the agreement in case certain designated events or circumstances arise that have (or are reasonably likely to have) a material adverse effect on the business, financial condition, prospects or results of operations of one of the parties, the target company or the borrower.
- The parties may freely define in their agreement the circumstances that would be considered a material adverse event in the particular situation. 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. In most cases, this consists of finding what makes good commercial sense in light of the nature of the transaction at issue.

Force Majeure

- Article 1218 of the French Civil Code provides that a *force majeure* event justifies suspension or termination of a contract, even if the contract does not contain any provision in that respect. Three conditions must be met for an event to qualify as a *force majeure* event:
 - **The event must have been beyond the control of the debtor.** This means that the event that prevents performance must not be attributable to the party claiming *force majeure*. An important factor in considering whether an event is attributable to a party is whether this event is external to this party. Externality is not, however, a necessary factor: courts have ruled that a disease affecting a party may be beyond that party's control. Early commentaries about the current COVID-19 pandemic suggest that the prevailing view tends to be that the pandemic and related lockdowns may qualify as events beyond the control of debtors, since these events are external to them.
 - **The event in question was not foreseeable to the parties at the time of the conclusion of the contract.** French courts do not easily find that a pandemic is an event that one could not foresee. For instance, in a ruling on a contract concluded in the context of the Chikungunya pandemic that spread in French overseas territories back in 2014, courts found that the pandemic was foreseeable given that it had started before the conclusion of the contracts at issue. But courts adopt a case-by-case approach, focusing on the circumstances surrounding the conclusion of the contract. For instance, for a pandemic, they would take into account the geographic area and the climatic conditions to evaluate whether the parties could foresee the pandemic. In the case of the COVID-19 disease, the date and place of the conclusion of the contract will be critical to determine whether the pandemic and the related governmental measures were foreseeable.
 - **The event must be irresistible.** The party claiming *force majeure* must prove that the event made it impossible to perform the contract in a manner that was not preventable. French courts look into whether the effects of the *force majeure* event could have been avoided by appropriate measures; for example, through the use of alternative suppliers not affected by the event in question. French courts, again, assess this condition based on the facts of each case and evaluate whether performance was actually impossible, as opposed to excessively onerous, which may rather trigger *hardship* scenarios (see below).
- If the impossibility to perform the contract is temporary, performance of the obligation shall only be suspended, unless the resulting delay justifies termination of the contract. 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.

- Contractual terms may alter statutory *force majeure* rules and provide that a party will still have to perform its obligations even if a *force majeure* event occurs, in which case nonperformance would result in contractual damages.
- 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.

Hardship (*Imprévision*)

- Under Article 1195 of the French Civil Code, a party to a contract entered into on or after October 1, 2016 may ask its co-contractor to renegotiate the contract if a change of circumstances, unforeseeable at the time of the conclusion of the contract, renders its performance excessively onerous and if that party did not agree to bear the risks of such a change of circumstances. There is no requirement that a contract include any specific wording for the parties to be able to claim hardship under this article.
- If the other party refuses or if the negotiation fails, then the parties may either terminate the contract at a date and under conditions that they agree on, or they can agree to request a judge to adapt the contract to the new circumstances. If the parties do not reach an agreement within a reasonable period of time, then either party may request a judge to revise the contract or to terminate it, at a date and under conditions to be determined by the judge. Pending the negotiation, the parties must continue to perform the contract.
- In cases where the COVID-19 pandemic and subsequent measures do not meet the conditions to qualify as *force majeure* events, but these events make it more onerous for a party to perform its obligations under a contract, the party may therefore be able to claim the benefit of the statutory hardship provision.
- Parties may agree to set aside statutory hardship provisions. A party loses the right to claim hardship under article 1195 of the Civil Code if the party has agreed (in the contract or separately) to bear the risks of an excessive cost of performance due to an unforeseeable change of circumstances.
- The wording of the contract is critical here: if the contract is silent on this point, then it should be interpreted in favor of the debtor, *i.e.*, a judge is likely to take the

view that the debtor has not agreed to bear the risks of such unforeseeable change of circumstances, making the performance of the contract excessively onerous.

- Parties may also have specifically adapted (if not waived) the statutory hardship provision to their particular situation: for example, by defining what an unforeseeable change of circumstances is, or what the excessively onerous performance of the contract means. This is particularly useful given that the statutory hardship provision has only been recently brought into the French Civil Code and that French courts have not yet given clear guidance on the interpretation of this provision.
- In addition, like in the case of *force majeure*, there may be questions of whether the COVID-19 pandemic and related preventive measures were “unforeseeable” to the parties to contracts entered into at a time when it was public knowledge that COVID-19 had started spreading.

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Please do not hesitate to contact us with any questions.

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