**PRACTICLE DATA SHEET
SPECIAL EMERGENCY MEASURES covid-19
n°4**

**Continuity of commercial contracts**

**Subject: Contracts - Commercial**

**Theme: Continuity of commercial contracts**

**Date : 03/30/2020**

*The Covid-19 pandemic has significant consequences on economic activity, which raises the problem of continuity and execution of contracts, particularly commercial contracts.*

*Several issues are at stake:*

* *contractual deadlines that expire during the state of health emergency ;*
* *the claim of force majeure ;*
* *recourse to the contingency mechanism;*
* *the execution exception.*

**Contractual deadlines and deadlines during a state of emergency**

As a matter of principle, contractual time limits remain unchanged and each situation must therefore be carefully analysed to establish whether any of the following mechanisms can be invoked either to avoid non-performance or to mitigate the consequences of such non-performance.

However, among the emergency measures taken by the Government by Order of 25 March 2020, is the extension of certain deadlines (Order No. 2020-306 of 25 March 2020 *on the extension of time limits during the period of health emergency and the adaptation of procedures during the same period*). When their purpose is to punish a failure to fulfil an obligation within a given period, the following clauses are impacted:

* daily penalty ;
* penalty clauses;
* resolutory clauses;
* any clause providing for forfeiture.

When these deadlines expire during the state of health emergency, their effects are therefore postponed to one month from the end of the health emergency period (Article 4 of the said Order).

***Caution****: it is specified that the mechanisms described below are applicable to contracts concluded as of October 1, 2016.*

***The possibility of using these legal mechanisms for contracts concluded before that date needs to be examined in detail.***

***Caution****: as the consequences of misuse of these mechanisms can be very serious, it is strongly advised to seek the assistance of a legal professional.*

**Can Force Majeure be claimed?**

* **What does the notion of Force Majeure cover?**

Force majeure is defined by Article 1218 of the Civil Code as an event « **[1]** *out of the debtor's control,* **[2]** *which could not reasonably have been foreseen at the time of the conclusion of the contract and* **[3]** *which effects cannot be avoided by appropriate measures* ».

There are three conditions:

* exteriority [1];
* unpredictability [2];
* irresistibility [3].

Each situation must be analysed in detail to determine whether these conditions are met either for the pandemic itself (in the case of illness in a physical person, for example) or for mandatory containment measures.

* **What are the effects of Force Majeure?**

***With regard to the debtor who is unable to perform his obligation:***

A distinction must be made between two situations.

1. Either the impediment is temporary (mere delay), in which case the debtor's obligation is suspended;
2. Either the impediment is definitive, and the contract is automatically terminated. This is also the case if the impediment is only temporary but the consequences of the delay in performance are such as to justify such termination.

In any case, the contractual liability of the debtor cannot be engaged.

***With regard to the creditor to whom the Force Majeure is opposed:***

Here, the real difficulty arises when the impediment does not allow the contract to be terminated by operation of law (e.g. the case of a lessee under a commercial lease where the premises are temporarily inaccessible).

Is the creditor entitled to suspend the performance of his counterpart (“non-performance exception”)?

It is reasonable to believe that the creditor's obligation may also be suspended (since the debtor's default deprives the creditor of any consideration).

On the other hand, the text of the Civil Code does not allow the question to be decided with absolute certainty.

This is why, in all cases, a detailed examination of the situation will have to be carried out in order to assess the risk.

***Careful*** *with the contracts signed during the pandemic since, in this case, the pandemic could not be considered unforeseeable at the time the contract was signed. Thus, the debtor will certainly be deprived of the possible benefit of force majeure.*

**Does the theory of hardship allow for renegotiation?**

Article 1195 of the Civil Code obliges the parties to consider a renegotiation of contractual conditions when "*a change of circumstances* **[1]** *unpredictable at the time of the conclusion of the contract* **[2]** [which] *makes the execution excessively onerous for one party* **[3]** *who hadn't agreed to take the risk”*.

Provided that these three conditions are met, the party in difficulty may request a renegotiation from its co-contractor.

In the event of refusal or failure of such negotiations, the parties may by mutual agreement agree :

* that the contract will be resolved;
* to ask the judge to decide.

Finally, if no agreement is reached within a reasonable period of time, the party in difficulty may ask the judge to:

* revise the contract;
* terminate it according to the dates and conditions it will set.

***Careful*** *with contracts signed during the pandemic, since in this case the pandemic cannot be considered unforeseeable at the time of signing the contract. Thus, the debtor will certainly be deprived of the possible benefit of the hardship.*

**Can the aggrieved creditor suspend his own obligation?**

Irrespective of whether the non-performing debtor can rely on force majeure or not, and subject to the reservations expressed in the section on "Force Majeure", the creditor may consider raising a "non-performance exception".

By this mechanism, the aggrieved party suspends performance of its obligation. As soon as the debtor is again able to provide him with his consideration, performance of that obligation must resume.

This is possible as soon as the non-performance with which he is faced or which it is clear that he will be faced is "sufficiently serious". The non-performance contemplated must therefore be of a certain seriousness in order to be able to contemplate this defence of non-performance.

For legal security sake, it is preferable to resort to this mechanism only when the debtor's non-performance amounts to a total absence of consideration.

On the other hand, a simple notice is enough to implement it.

**Applicable texts (automatic translation):**

***Order No 2020-306 of 25 March 2020 on the extension of time limits during the period of public health emergencies and the adaptation of procedures during the same period :***

*«* ***Article 4***

*Periodic penalty payments, penalty clauses, termination clauses and clauses providing for forfeiture, where their purpose is to penalise failure to fulfil an obligation within a specified period, shall be deemed not to have commenced or to have taken effect if that period has expired during the period defined in Article 1(I).*

*Such periodic penalty payments shall take effect and be enforceable as from the expiry of a period of one month after the end of that period if the debtor has not performed his obligation before that time.*

*The duration of periodic penalty payments and the application of penalty clauses which took effect before 12 March 2020 shall be suspended during the period defined in I of Article 1*. *»*

***Article 1218 of Civil Code (“Force Majeure”)***

*« Force majeure in contractual matters occurs when an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and the effects of which cannot be avoided by appropriate measures, prevents performance of the obligation by the debtor.*

*If the impediment is temporary, performance of the obligation shall be suspended unless the resulting delay justifies termination of the contract. If the impediment is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided for in articles 1351 and 1351-1. ».*

***Article 1195 of Civil code (Hardship)***

*« If a change in circumstances unforeseeable at the time of the conclusion of the contract makes performance excessively onerous for a party who had not agreed to assume the risk, that party may request the other party to renegotiate the contract. It shall continue to perform its obligations during the renegotiation.*

*If the renegotiation is refused or fails, the parties may agree to terminate the contract, on the date and on the terms they determine, or request the court to adapt it by mutual agreement. If no agreement is reached within a reasonable period of time, the court may, at the request of one of the parties, revise or terminate the contract, on the date and under the conditions it shall determine. ».*

***Article 1220 of Civil code (“non-performance exception”)***

*« A party may suspend performance of its obligation if it is clear that its counterparty will not perform when due and the consequences of such non-performance are sufficiently serious for that party. Such suspension must be notified as soon as possible. ».*

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