



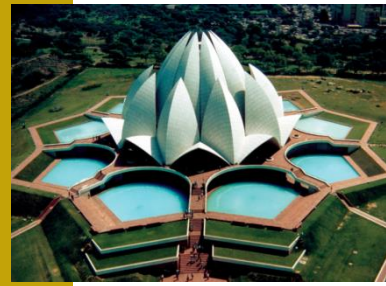
UGGC LAW FIRM



THE IMPACT OF COVID-19 ON INTERNATIONAL CONTRACTS

A MULTI-JURISDICTIONAL ANALYSIS

FRANCE • MOROCCO • BRAZIL •
CHINA • HONG-KONG • INDIA •
BELGIUM



April 2020



Contents

Foreword	3
FRANCE	4
Introduction – Legal Background	5
1. DURING THE LOCKDOWN PERIOD	6
2. AFTER THE END OF THE LOCK DOWN PERIOD	12
MOROCCO	15
Introduction – Legal Background	16
1. DURING THE LOCKDOWN PERIOD	17
2. AFTER THE END OF THE LOCK DOWN PERIOD	23
BRAZIL	25
Introduction – Legal Background	26
1. DURING THE LOCKDOWN PERIOD	26
2. AFTER THE END OF THE LOCK DOWN PERIOD	28
CHINA	30
1. DURING THE LOCKDOWN PERIOD	31
2. AFTER THE END OF THE LOCK DOWN PERIOD	34
HONG-KONG	37
Introduction – Legal Background	38
1. DURING THE LOCKDOWN PERIOD	39
2. AFTER THE END OF THE LOCK DOWN PERIOD	43
INDIA	46
Introduction – Legal Background	47
1. DURING THE LOCKDOWN PERIOD	47
2. AFTER THE END OF THE LOCK DOWN PERIOD	51
BELGIUM	53
Introduction – Legal Background	54
1. DURING THE LOCKDOWN PERIOD	56
2. AFTER THE END OF THE LOCK DOWN PERIOD	58
About us	61
Let us stay connected	62



Foreword

Dear Clients, Dear Friends,

The outbreak of covid-19 pandemic throughout the globe has created an unprecedented situation for all companies and individuals, as in the course of this year's first quarter, half of humanity underwent mandatory confinement and business closures.

Considering this exceptional context and the variety of situations experienced by our clients on a global scale regarding the performance of their contracts, it seemed to us appropriate and timely to organize a webinar addressing the most salient features of covid-19 induced legislations and their impacts on commercial contracts.

To assist companies having global operations, we opted to extend the scope of this webinar to all jurisdictions in which UGGC Law Firm is having presence or direct work capacities, namely: France, China, Hong-Kong, Brazil, Morocco, Belgium, and India.

The webinar took place on April 30th, 2020, thanks to your participation, and we are now pleased to release the present booklet which contains more detailed answers to the questions discussed during the webinar.

We hope that this will address all questions you may have in the management of your commercial contracts and remain at your disposal in case of further queries.

With our best regards,





FRANCE

By Michel Ponsard, Edouard Heliot, Ali Bougrine and Fabien Gagnerot



Introduction – Legal Background

In order to deal with the administrative or jurisdictional consequences of the outbreak of the Covid-19 epidemic, Law n°2020-290 of March 23rd, 2020, has allowed the Government to take measures as of March 12th, 2020, designed to adapt, interrupt or suspend any limitation periods on account of which (i) a right would be deemed void, lapsed, limited, unenforceable, forfeited, or (ii) an approval, authorization or measure would be terminated or cease, to the exception of limitations applying to deprivation of liberty and penalties.

This Law and numerous support measures adopted by the French Government have been passed after the European Union¹ specifically approved the support of companies by the French Government.

On the basis of this Law n°2020-290, the Government issued many ordinances among which Ordinance n°2020-306 of March 25th, 2020 published in the Official Journal on March 26th, 2020, amended by Ordinance n° 2020-427 which have an impact on certain provisions of the contracts, penalty clauses, termination clauses and termination and renewal of agreements.

Chronology – Chronological landmarks of the main measures adopted by French Government:

28 February 2020: the pandemic in France enters “stage 2”.

14 and 15 March 2020: adoption of two decrees related to measures for the mandatory closure of businesses "that are not essential to the life of the Nation". The exceptions concerned pharmacies, grocery stores, banks, gas-oil stations, tobacco sellpoints and newspaper offices.

16 March 2020: date of the beginning of the confinement of the population.

23 March 2020: adoption of emergency law to deal with the covid-19 pandemic (No. 2020- 290).

24 March 2020: the state of health emergency is declared for a period of two months (i.e. until 24 May 2020), which may be extended by law or reduced by regulation (decree issued by the Council of Ministers).

31 March 2020: adoption of decree n°2020-378 on the payment of

¹¹¹ Communication of the European Commission, 13 March 2020 ; Communication of the European Commission of 19 March 2020 authorising France to support French companies ; Communication of European Commission of 19 March on State aid temporary framework on the basis of article 107.2 b) ; 03 april 2020, amendment of the State aid temporary framework ;



leases, water, gas and electricity by small companies for professional premises whose activity is affected by Covid 19.

14 April 2020: extension of the lockdown period till May 11th, 2020, at this date schools, shops will re-open except restaurants, bars, discos, festivals and sport associations activities.

1. DURING THE LOCKDOWN PERIOD

1.1 Can the company stop payments to the other party?

In principle, no

However, depending on the matter at hand, some exceptions may apply, either as a result of the measures adopted by the Government, either through the common application of French contract law:

1. **Force majeure:** If the contracting party invoke Covid-19 situation as a force majeure event, the contract may be suspended and the parties are authorised not to perform the obligations arising therefrom (see 3.1 below on force majeure),
2. **Non-performance of one party justified by the other party's failure to perform**

Article 1219 of the Civil Code provides that "*A party may refuse to perform his obligation, even though it is due, if the other party does not perform his own obligation*".

Conditions:

- (a) There must be a **contract with mutual obligations**;
- (b) A **sufficiently serious non-performance** (it need not be complete non-performance, but it must render the contract unbalanced by affecting an essential obligation);
- (c) The obligations must be **interdependent**;
- (d) The party relying on the defence of non-performance must be of **good faith** (i.e. he must not have contributed to the non-performance complained of); and;
- (e) Be **proportionate**.

However, it is to be noted that article 4 of Order n°2020-427 (amending Orer 2020-306) paralyses the enforcement of termination provision or penalty clause for non-performance of an obligation (cf. Q.1.2 infra).

1.2 Can the company postpone the payments?

In principle, payments falling due may not be postponed by virtue of the lockdown.



However:

1. The possibility of redefining contractual clauses by mutual agreement of the parties, without third party intervention, should not be underestimated: the debtor of the obligation can get in touch with his creditor and inform him as soon as possible of the actual situation he is faced with. On the basis of the contractual provisions, the debtor may attempt to negotiate with his creditor.

It is worth remembering that French Government also encourages the economic actors to show solidarity.

2. The Ordinance n°2020-306 as amended by Ordinance n°2020-427 establishes a so-called **legally protected period** (*période juridiquement protégée*) running from 12 March 2020 to 24 June 2020, whereby **penalty clauses, termination clauses and/or clauses providing for forfeiture** as a penalty for failure to fulfil an obligation within a specified period shall be deemed not to have commenced or taken effect if that period has expired during the legally protected period.

Therefore, the effects of these clauses are postponed after the end of the legally protected period for a period equal to the time elapsed between 12 March or the date of birth of the obligation, whichever is the latest, and the end of the time granted to perform the obligation or to pay. The postponement runs from the date on which the periodic penalty payments and clauses should have taken effect or should have been effective under the contractual stipulations. For instance, if a party gives 10 days as from the 20th of March to the other party to remedy to a breach of agreement, failing which the agreement will be terminated, the termination date will be on July 4th, instead of March 30th, in the absence of remedy by the other party.

If such clauses are contractually in effect before March 12th, their effect is suspended during the legally protected period. For instance, if a party notifies the other party on the 10th of March to pay a stipulated penalty for breach (e.g. for late deliveries), the other party will have to pay the penalty as from the 2nd of July (2 days before the legally protected period and 8 days after the end of such period).

If the term expiry to perform an obligation is after the end of the legally protected period, the initial term will also be postponed to the time last between March 12 or the date of birth of the obligation, whichever is the latest and the end of the legally protected period. For instance if a party has from the 1st March 6 months to deliver a good (i.e. for the 1st September), the penalty clause for delay will be applicable at a date taking into account the duration of the legally protected period, (i.e. from March 12 to 24 June, i.e. 3 months and 12 days), that is to say on December 12.

This being said, under article 4 of Ordinance n°2020-306 amended by Ordinance n°2020-427, there shall be no postponement for obligation of



payments falling due after the legally protected period. This means for instance that if the due date of a payment is set on the 15th of July, there will be no postponement to pay.

It is however important to stress that the presentation report of Ordinance n°2020-427 to the President explicitly states that the parties remains free to adapt or waive to such rules of postponement by a specific provision in their agreement.

Eventually, the potential postponement of contractual obligations does not mean that such obligations are cancelled. At the end of the legally protected period, defaulting parties could be liable for their non-performance, unless it can be justified contractually or legally.

- In this regard, the provisions of ordinary law remain applicable, if necessary, if the conditions are met, in particular in the case of force majeure as provided for in article 1218 of the Civil Code.
- 3.** Smaller companies² eligible for the solidarity fund financed by the State and the Regions may be able to benefit from the right to postpone payment of lease, water, electricity and gas bills as under:
- when due on a quarterly basis, rent and charges may be called upon on a monthly basis instead; and/or
 - the collection of rents and charges is suspended as of April 1, 2020, and for subsequent periods of cessation of activity imposed by the decree;
 - at the time operations resume, suspended rents and charges will be subject to deferred payment or spread without penalty or interest on arrears and adapted to the situation of the companies in question.

1.3 Is it compulsory or advisable to renegotiate the contracts?

The obligation to renegotiate the contract may be compulsory in two situations:

- the contract contains a hardship clause according to which parties have a duty to renegotiate the terms of the contract in good faith in case the obligations of one party become significantly more onerous than could have been anticipated when the contract was entered; or

² Article 1st of the Decree n°2020-371 of 30 March 2020 defines the beneficiary businesses as:

Individuals and legal entities under private law that are French tax residents and that carry on an economic activity, hereinafter referred to as "companies", meeting the following conditions:

- They began their activity before February 1, 2020;
- They have not filed a declaration of cessation of payment by March 1, 2020;
- Their workforce is less than or equal to ten employees. This threshold is calculated in accordance with the terms and conditions set forth in Article L. 130-1 I of the French Social Security Code;
- The amount of their sales recorded during the last fiscal year is less than one million euros;
- They are not controlled by a commercial company within the meaning of Article L.233-3 of the French Commercial Code;



- - the contracts is concluded or renewed, expressly or tacitly, after 1 October 2016 and do not specifically exclude the application of provisions of article 1195 of the Civil Code related to the unpredictability (*imprévision*), in which case a party may require the other party to renegotiate the contracts on account of the occurrence of circumstances that (i) were unpredictable at the time of entering into the contract and (ii) make the performance of the agreement excessively onerous for the requesting party.

In any case, if one party can no longer comply with its contractual obligations, it is definitely advisable to enter into discussions with the co-contractors to redefine the terms and conditions of the contracts (reduction or delays for payment partial early termination of the agreement, etc...)

As there is a doubt on the qualification as force majeure event of the health crisis, it could be wise to search a negotiate solution to this situation. Under the Ordinance n°2020-427, it is not possible to terminate an agreement for non-performance of his obligation by a party when this absence of performance occurred between March 12th and June 24th.

Accordingly, there is a kind of paralysis of contractual relationships during this period and nobody can foresee how the situation will be after the end of the health crisis when an economic crisis will probably ensue. Therefore it could be wise for all parties to try to negotiate an adaptation of the agreement.

1.4 Are penalty clauses still valid?

Penalty clauses remain valid but may not be implemented during the legally protected period (running from 12 March 2020 to 24 June 2020) and shall be deemed not to have commenced or taken effect if that period has expired during the legally protected period.

For instance, if a penalty clause is supposed to be triggered during the legally protected period on the 20th of March (i.e. 8 days after the beginning of the locking period), the clause will be activated - and the payment will fall due – eight days after the end of the legally protected period fixed at June 24th, i.e. on the 2nd of July.

Specific case of Public procurement contracts: The Minister of Economy, following a meeting with the social partners at the Ministry of Labor on 28 February 2020, had announced that the coronavirus will be considered a case of force majeure for companies and specified that, for all State public contracts, **penalties** will not be applied in the event of late delivery.



1.5 Can a party terminate a contract during the lockdown period?

Article 4 of Ordinance n°2020-326 (amended by Ordinance n°2020-427) only prevents the termination of contracts in case of non-performance of an obligation during the legally protected period.

Hence, it remains possible to terminate a contract during the legally protected period, as long as such termination is not based on non-performance.

Furthermore, article 5 of Ordinance n°2020-326 provides that when an agreement stipulates that it may be terminated or renewed in the absence of termination notice within a specified period falling within the legally protected period, the parties will be entitled to terminate or to refuse to renew the agreement up to August 24th, 2020. For instance, if a party has to decide to renew or not an agreement on the 20th of March, it will have until August 24th to decide whether to renew or not the agreement.

1.6 How do you manage MAC Provisions in acquisitions?

Typically, the absence of occurrence of a "material adverse change" (MAC) is a condition to closing under an acquisition agreement, and a condition to funding under facility agreement.

The implementation of a MAC clause will depend on its terms and conditions.

That being said, a standard MAC provision generally includes three parts:

- (i) first, a MAC is defined as any event, development or condition having, or reasonably likely to have, a material adverse effect on the business, financial conditions or results of the target.
- (ii) second, the provision typically excludes specific events such as general economic downturns, conditions existing generally within the company's industry and other broad categories of market credit conditions.
- (iii) third, the purchaser should not have been aware of the events prior to the signing of the agreement.

That being said, it is obvious that the measures taken by the governments are likely to negatively and adversely affect any company's business and that therefore, the purchaser can decide not to finalise the agreement depending on the financial consequences for the target.

In case of litigation, two main issues will arise :

- (i) to know whether the Covid, which appeared in China at the end of 2019, was imprevisible or not for the purchaser. On a worldwide basis, the WHO declared the Covid a pandemic on January 30th, 2020 and in France, the health emergency was declared on 24th of March 2020. So everything will depend on the signing date of the agreement.



- (ii) regarding the materiality threshold, the caselaw generally requires that the change was « material » and had « durational significance ». A material change is one that is severe, not a blip (e.g. decline in earnings of 30/40%) and for a period measured not in months but in years.

1.7 Is a party required to renew an agreement when the renewal occurred during the lockdown period?

No. Under article 5 of the **Ordinance n°2020-306**:

- when an agreement stipulates that it may be terminated or renewed in the absence of termination notice within a specified period, and that
- such period of time expires between 12 March 2020 and June 24th,

• such period of time to terminate or renew the agreement shall stand extended till August 24th.

In this context, Ordere n°2020-306 only extends the time to refuse to renew or to terminate an agreement, being provided that the parties remain free to renew or terminate it. Such faculty remains itself subject to compliance with the provisions of article 4 of Ordinance n°2020-306 amended by Ordinance n°2020-427 which suspend the effect of termination clauses during the legally protected period (cf. Q.1.2. supra).

1.8 How can a party be protected against the other party during the lock down period trying to take advantage of the exceptional circumstances?

During the legally protected period, agreements may be considered as "suspended" when it comes to termination clauses and yet are supposed to continue to be performed. This represents an unprecedented situation as a non-defaulting party will hardly be able to claim the performance of the agreement in courts, which are mostly closed except for very important and urgent matters.

It is clear however that a party still have two possible courses of actions to protect itself from the absence of performance of the other party.

The first option lies in the “*exception d’inexécution*” under article 1219 of the French civil code, whereby “*a party may refuse to perform his obligation, even though it is due, if the other party does not perform his own obligation*”. This principle, which would logically benefit to the party expected to perform its obligations chronologically after the other party, can even be applied for the party supposed to perform its part first, provided that it is obvious that the other party will not perform its obligation later on.

The second option is that the breach made during the lock down period will create a liability for the defaulting party, so that there is a kind of leverage to



convince the other party to perform its obligations, even if this liability will need to be assessed after the lock down period.

1.9 Is it possible to file an action during the lock down period?

It is not impossible in principle but practically very difficult.

On March 14th, 2020, a circular adopted by the Ministry of Justice concerning pending criminal and civil litigations postponed all hearings for listed matters. Some hearings were also plainly cancelled, with the Courts proposing to the parties to submit their claims and arguments only in writing. Whenever possible, hearings are conducted through video-conference.

For new matters, the activity is mostly limited to emergency cases. In accordance with Ordinance No.2020-304 of 25 March 2020 adapting the rules applicable to the *Tribunal Judiciaire* ruling in non-criminal matters, only civil and commercial litigation with an extremely urgent nature can be filed, i.e. mainly emergency proceedings (*référés d'heure à heure*), it being specified that in our opinion, the urgency requirement should be assessed in the current circumstances with greater scrutiny than in normal times.

As of date, it is however still possible to file an insolvency application or request the appointment of a receiver in case of financial difficulties. Hearings are held by skype, or zoom mainly.

As the de-confinement approaches, it is now also possible to file a regular claim before the commercial courts for a hearing listed at the end of May (in most commercial courts which will reopen as from May 11th).

2. AFTER THE END OF THE LOCK DOWN PERIOD

2.1 Is the company liable for non-performance of the contract during the lockdown period? Can “Force Majeure” apply?

The company may not be liable for non-performance of the contract during the legally protected period, subject to the provisions of the contract on the force majeure as well as the specific context related to the non-performance of the contract.

The first check shall be to look at the agreement, ascertain the presence of a force majeure clause, and the scope of the contractually-listed force majeure events. A particular attention is to be given to a possible **contractual definition, limitation or exclusion of force majeure** (e.g. whether epidemics, pandemics, infections or governmental restrictions are covered/excluded by the clause and whether exceptions are provided for). When a clause does not explicitly list epidemics and approaching notions as force majeure events, an interesting alternative could consist in arguing that the force majeure event lies in the emergency law or regulations passed because of the pandemic ("*fait du Prince*") rather in the pandemic itself.



Under French law, force majeure is a legal remedy open to both parties, so in the absence of any force majeure clause, the aggrieved party will need to rely on provisions of **Article 1218** of the Civil Code: "*There is force majeure in contractual matters when an event beyond the debtor's control, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects cannot be avoided by appropriate measures, prevents the performance of his obligation by the debtor*".

Three Criteria to be deemed as a force majeure event

(a) Unforeseeability which is to be assessed at the time of conclusion of the contract.

For contracts concluded after the first administrative measures (transition to stage 2 on 28 February 2020), un-foreseeability might not be accepted.

(b) Irresistibility which shall make the performance of the contract impossible and not simply more expensive.

The obstacle does not need to be absolute, but must entail to the impossibility of continuing to operate under the same conditions as before (one can think of the restaurant that remain open for take away or delivery).

(c) outside the debtor's control which does not raise any issues in the Covid-19 situation.

The chronology of the facts and the date of conclusion of the contract are therefore essential elements to characterize the existence of an event of force majeure affecting the contract.

Legal effects: If the **obstacle is definitive**, the contract is automatically terminated and the parties - and not only the debtor - are released from their obligations. If the **obstacle is temporary**, the performance of the obligation may be suspended. The obligation must be performed as soon as the impossibility has ceased. There is, however, a mitigation to this solution. Paragraph 2 of Article 1218 of the Civil Code in fact specifies that the obligation is suspended '*unless the delay which would result from it justifies the termination of the contract*'.

2.2 Is there any possibility to lessen a party's liability in such case if Covid-19 is not a force majeure event?

It can only be assessed on a case-by-case basis, depending *inter alia* on the following:

- the clauses regarding re-negotiation provided for in the contract;
- the supporting measures adopted by the Government;

The question of application of article 1195 of the civil code can be addressed.



“If a change in the circumstances unforeseeable at the date of conclusion of the agreement make the performance of the agreement too expensive for a party which did not accept to bear such risk, this party can request a renegotiation of the agreement to the other party. This party continues to perform its obligation during the renegotiation. In case of refusal or failure to find an agreement, parties can decide to terminate the agreement at the date and conditions on which they agree or request on a common agreement to request the judge to do so. In absence of agreement in a reasonable time, the judge can at a party request adapt the contract or terminate it at the conditions he stated.”

So it seems that such provision of the civil code is not completely appropriate in the current crisis since it can take a long time to find a solution and the claiming party is supposed to continue to perform its obligations.

2.3 What risks can we foresee at the end of the lockdown period?

It seems likely that the end of the legal lock down period will lead to a lot of litigations and renegotiations of the agreements.

All obligations suspended during the lock down period will be applicable again and the question of the liability for non-performance of the agreement will be addressed. Some companies, depending on the behaviour of the other party during the lock down period, may also decide to terminate their agreement.

The deterioration of the financial situation of the companies will also even increase the risks of litigation and termination of agreements between parties.

It is thus very important to also foresee what could happen with contractual parties to anticipate the risks and try to negotiate if possible any adaptation of the contracts.

*



MOROCCO

By Ali Bougrine



Introduction – Legal Background

11 March 2020: - The creation of an Economic Watch Committee to monitor the financial and social impacts of the Coronavirus and to identify accompanying measures.

This committee is responsible for closely monitoring the evolution of the economic situation through rigorous monitoring and evaluation mechanisms and for identifying appropriate measures in terms of support for the affected sectors.

17 March 2020: - Creation of a special fund for the management of the pandemic, endowed with an envelope of 10 billion dirhams, mobilized from the general state budget.

19 March 2020: - Declaration of a state of public health emergency and restriction of movement in the country from Friday 20 March.
- The deployment by banks of the measure to extend credit maturities (consumer and buyer loans) in favor of employees affected by the Coronavirus crisis decided by the Economic Watch Committee.

20 March 2020: - Entry into force of the state of health emergency in the Kingdom.
- Identification of the list of commercial activities and vital services that must continue their activities to meet, throughout this period, the needs of citizens.

21 March 2020: - Private and public transportation are prohibited from interurban traffic.
- Royal Air Maroc suspends its local flights.
- The ONCF announces the suspension of local trains from Monday, March 23rd.

23 March 2020: - Approval of the decree-law related to provisions applicable to the "state of health emergency".

24 March 2020: - Suspension of all-time limits for civil status declarations until the end of the state of health emergency.
- Publication of the Decree-Law on the state of health emergency in the official bulletin.

26 March 2020: - Implementation of the decision of Economic Watch Committee to grant a monthly lump-sum allowances of MAD2,000 net for employees affiliated to the CNSS from companies which are facing financial difficulties further to the total or partial cessation of activities.

27 March 2020: - Launch of "Damane Oxygène", a new mechanism to support companies.



As part of the implementation of the measures decided by the Economic Watch Committee in order to mitigate the effects of the crisis induced by the COVID-19 and its impacts on companies, the Ministry of Economy, Finance and Administration Reform has set up a new guarantee mechanism called "DAMANE OXYGENE".

This new guarantee product concerns the mobilization of financing resources in favor of companies whose cash flow has deteriorated due to the decrease of their activity. It covers 95% of the amount of the credit and thus enables banks to quickly set up exceptional overdrafts to finance the working capital requirements of target companies. Mainly intended to small businesses.

- Postponement of tax due dates for companies whose turnover is less than 20 MDH from 31 March until the end of June 2020.

29 March 2020: - New measures adopted by Bank El Maghrib to support the economy and the banking system and especially a set of new monetary and prudential policy measures to support access to bank credit for the benefit of both individuals and businesses:

- the possibility of recourse by banks to all available refinancing instruments in dirham and in foreign currency;
- the extension to a very wide range of securities and bills accepted by Bank Al-Maghrib in return for the refinancing granted to banks;
- the extension of the duration of these refinancing.

14 April 2020: - The postponement of the deadlines for tax returns for individuals who wish to do so, from the end of April to 30 June 2020.

- The exemption from income tax, any additional compensation paid to employees (affiliated to the CNSS) by their employers, up to a limit of 50% of the average net monthly salary.

- Cancellation of penalties for delays in the performance of public contracts considering such delays to be cases of force majeure.

18 April 2020: - Morocco has decided to extend the state of health emergency until 20 May.

1. DURING THE LOCKDOWN PERIOD

1.1 Can the company stop payments to the other party?

By principle, companies are not allowed to stop payment to the other party (unless the parties agreed so of course).

But, two situations must be distinguished in the current context of the lockdown period:



1. Specific derogatory measures adopted by Governments

The Government did not adopt specific measures allowing companies, even in the activities sector significantly impacted by COVID-19 crisis to stop/postpone payment of rents, or some other charges/bills (subject to social security charges to the CNSS under certain conditions).

However, it should be noted, that the Decree-Law No. 2.20.292 of 24 March 2020 relating to the "state of health emergency" in Morocco has provided in its article 6 for the suspension of all time limits provided for in the laws and regulations in force until the day after the lifting of the state of health emergency (until 20 May 2020, unless further extended).

However, the Decree-Law does not provide for an exhaustive list of the time limits concerned but they should cover all legal and regulatory time limits in the broadest sense, whether in social, judicial or even tax matters (legal formalities, prescription, foreclosure, appeals, etc.).

2. No specific derogatory measures adopted – application of the ordinary legal means provided by law

The contracting party who is willing to escape from his payment's obligation may rely on different potential legal grounds:

(i) Force majeure

Definition of Force Majeure under Moroccan Law -Article 268 of the Dahir on Obligations and Contracts (DOC) refers to both force majeure and fortuitous event, but Article 269 of the DOC defines only force majeure. However, these two expressions can, in our opinion, be considered as being similar.

Article 269 of DOC defines force majeure as "any event which man cannot prevent [...] and which makes the performance of the obligation impossible."

The same Article provides that "force majeure is not considered to be an avoidable cause if the debtor does not justify that he exercised all due diligence to prevent it.

A cause is also not considered to be force majeure if it was due to a previous fault of the debtor."

Three criteria to be deemed as a force majeure event are to be met as well - In order to avoid his contractual liability, the debtor who invokes force majeure must prove that the non-performance is attributable to an insurmountable, unpredictable and external event.

Article 269 above gives some examples of events which may constitute a case of force majeure. In the first place, it mentions natural catastrophes, floods, droughts, storms, fires, locusts, to which could be added earthquakes, volcanic eruptions and lightning.



It also mentions acts of war such as enemy invasion, to which could be added civil wars, revolutions and riots.

Finally, this article mentions the act of the Prince, i.e. the decision of the public authority which impedes the performance of the contract, such as mobilization, requisition or conscription into the armed forces.

The examples provided by Moroccan law are obviously not limitative, so that any event may constitute a case of force majeure provided that it is unpredictable, irresistible and external to the debtor.

Moreover, not all the examples provided by Article 269 necessarily constitute cases of force majeure: if they do not meet the conditions of unpredictability, irresistibility and exteriority, they could not constitute a cause for exemption.

As under French Law, Moroccan provisions related to force majeure are not public policy provisions so that the definition of force majeure may have been adapted by the parties to a contract, who have thus been able to specify its scope and define an exhaustive list of cases constituting force majeure events or, on the contrary, cases that would not constitute force majeure events.

Therefore, in order to determine whether COVID-19 can be validly invoked by a party to stop payment it will be necessary to carefully study the stipulations of the contract concerned, to pay particular attention to the date of conclusion of the contract as well to the impact of COVID-19 on the contracts. In this respect, the party willing to invoke force majeure to stop payment need to be able to prove that COVID-19 has irresistible effect in order to claim the discharging effect resulting from force majeure.

Among Moroccan case law on force majeure, we did not identify restrictive case law position as the one hold by French court that prohibits the debtor of a payment obligation from invoking his discharge on the legal ground of force majeure.

(ii) As a defense for non-performance of its contractual obligation by its co-contracting

The party may be allowed to stop payment on the legal ground of the « exception for failure to perform » provided by article 235 of the Dahir on Obligations and Contracts which provides that "A party may refuse to perform his obligation until the performance by his cocontracting party of his correspondent obligation".

Depending on the interpretation of the judges that will, with no doubts – face many cases on this topics, a company whose business was closed (and which does not eligible to specific measures provided by Moroccan government regarding notably the payment of the business lease) might potentially rely on this provision to justify the lack of payment.

As a matter of fact, the debtor of the rents does no longer receive the consideration for these rent payments, so that, the latter does not enjoy premises



open to the public, enabling him to carry on his activity, as provided for in the lease. The upcoming courts decisions will surely bring some lighting on that.

(iii) The obligation to renegotiate the contract

The obligation to renegotiate the contract should the concerned contract contain a hardship clause according to which parties have a duty to renegotiate the terms of the contract in good faith in case the obligations of one party become significantly more onerous than could have been anticipated when the contract was entered; or

If one party can no longer comply with his contractual obligations to make payment, and the contract provides for a hardship clause that may be applied in this COVID-19 crisis, this party might be allowed to postpone payment and enter into discussions with his co-contractors to redefine the terms and conditions of the contracts (reduction or delays for payment partial early termination of the agreement, etc....).

It is worth noticing that Moroccan law does not provide for an application of the unpredictability theory. As provided in article 1195 of the French Civil Code.

Therefore, unless, the contract provides for a hardship clause and this clause is likely to cover the current crisis COVID-19, Moroccan contracting party will not be able to stop payment by opposing to his co-contractor an obligation to renegotiate the terms and conditions of the contract.

1.2 Can the company postpone the payments?

Apart from the ever-going possibility to jointly agree on a payment delay with one's creditor, a postponement may be imposed on the parties depending on the applicability of the force majeure, the possibility to invoke the suspension of the performance of the obligations and/or the hardship clauses.

Moroccan government has also permitted the following measures:

(i) The postponement of the deadlines for the payment of social and tax instalments such as:

- postponement of tax due dates for companies whose turnover is less than 20 MDH from 31 March until the end of June 2020;
- cancellation of penalties for delays in the performance of public contracts considering such delays to be cases of force majeure.

(ii) The extension of time limits during the period of health emergency.

The Decree-Law No. 2.20.292 of 24 March 2020 relating to the "state of health emergency" in Morocco has provided in its article 6 for the suspension of all time limits provided for in the laws and regulations in force until the day after the



lifting of the state of health emergency (until 20 May 2020, unless further extended).

However, the Decree-Law does not provide for an exhaustive list of the time limits concerned but they should cover all legal and regulatory time limits in the broadest sense, whether in social, judicial or even tax matters (legal formalities, prescription, foreclosure, appeals, etc.).

1.3 Is it compulsory or advisable to renegotiate the contracts?

In the absence of any clause, such as hardship clauses, that may impose a renegotiation upon the occurrence of a material change upon the initial balance of the agreement, no renegotiation can be forced on the parties for private transactions.

Nevertheless, if one party can no longer comply with its contractual obligations, it is advisable to enter into discussions with the co-contractors to redefine the terms and conditions of the contracts (reduction or delays for payment partial early termination of the agreement, etc....).

1.4 Are penalty clauses still valid?

Penalty clauses remain valid under Moroccan Law unless the suspension of the performance of the agreement is legally founded.

Specific case of Public procurement contracts: The Moroccan government has announced on the 14th April the cancellation of penalties for delays in the performance of public contracts considering such delays to be cases of force majeure.

1.5 Can a party terminate a contract during the lockdown period?

There is no prohibition in such and obviously, *in abstracto*, a contract may be terminated during the lockdown for breach of contract (unless excused by application of the force majeure clause) or if the performance of the contract has become impossible (whether by the application of a force majeure clause or by virtue of the frustration of the contract).

A thorough analysis of the contract is naturally paramount to establish the merits of such termination.

1.6 How do you manage MAC Provisions in acquisitions?

Typically, the absence of occurrence of a "material adverse change" (MAC) is a condition to closing under an acquisition agreement, and a condition to funding under facility agreement.



The implementation of a MAC clause will depend on its terms and conditions.

That being said, a standard MAC provision generally includes three parts:

- (i) first, a MAC is defined as any event, development or condition having, or reasonably likely to have, a material adverse effect on the business, financial conditions or results of the target;
- (ii) second, the provision typically excludes specific events such as general economic downturns, conditions existing generally within the company's industry and other broad categories of market credit conditions;
- (iii) third, the purchaser should not have been aware of the events prior to the signing of the agreement.

That being said, it is obvious that the measures taken by the governments are likely to negatively and adversely affect any company's business and that therefore, the purchaser can decide not to finalise the agreement depending on the financial consequences for the target.

In case of litigation, two main issues will arise:

- (i) to know whether the COVID-19, which appeared in China at the end of 2019, was imprevisible or not for the purchaser. On a worldwide basis, the WHO declared the COVID-19 a pandemic on January 30th, 2020 and in Morocco, the health emergency was declared on 19th of March 2020. So everything will depend on the signing date of the agreement;
- (ii) regarding the materiality threshold, the case law generally requires that the change was « material » and had « durational significance ».

1.7 Is a party required to renew an agreement when the renewal occurred during the lockdown period?

The Decree relating to the establishment of a state of health emergency in Morocco provided in Article 6 for the suspension of all legal and regulatory deadlines for the period from March 20 to the day after the lifting of the state of health emergency (i.e. May 20th).

However, the Decree-Law does not provide for an exhaustive list of the time limits concerned we are of the opinion that they should cover all legal and regulatory time limits in the broadest sense, so that a party should not be obliged to renew an agreement during lockdown period.



1.8 How can a party be protected against the other party during the lockdown period trying to take advantage of the exceptional circumstances?

This represents an unprecedented situation as a non-defaulting party will hardly be able to claim the performance of the agreement in courts, which are mostly closed except for very important and urgent matters.

It is clear however that a party still have two possible courses of actions to protect itself from the absence of performance of the other party.

The first option lies in the “*exception d'inexécution*” under article 235 of the DOC, whereby “*a party may refuse to perform his obligation, until the performance of the correspondent obligation by the other party*”.

This principle, which would logically benefit to the party expected to perform its obligations chronologically after the other party, can even be applied for the party supposed to perform its part first, provided that it is obvious that the other party will not perform its obligation later on.

The second option is that the breach made during the lockdown period will create a liability for the defaulting party, so that there is a kind of leverage to convince the other party to perform its obligations, even if this liability will need to be assessed after the lockdown period.

1.9 Is it possible to file an action during the lockdown period?

All courts were closed, and the hearings have been suspended until further notice except for the handling of **essential litigation involving persons prosecuted in detention, summary proceedings or investigation files**.

2. AFTER THE END OF THE LOCKDOWN PERIOD

2.1 Is the company liable for non-performance of the contract during the lockdown period? Can “Force Majeure” apply?

The company may not be liable for non-performance of the contract during the legally protected period subject to the provisions of the contract on the force majeure as well as the specific context related to the non-performance of the contract.

The first check shall be to look at the agreement, ascertain the presence of a force majeure clause, and the scope of the contractually-listed force majeure events.

A particular attention is to be given to a possible **contractual definition, limitation or exclusion of force majeure** (e.g. whether epidemics, pandemics, infections or governmental restrictions are covered/excluded by the clause and whether exceptions are provided for).

When a clause does not explicitly list epidemics and approaching notions as force majeure events, an interesting alternative could consist in arguing that the force



majeure event lies in the emergency law or regulations passed because of the pandemic ("*fait du Prince*") rather in the pandemic itself.

2.2 Is there any possibility to lessen a party's liability in such case if Covid-19 is not a force majeure event?

It can only be assessed on a case-by-case basis, depending *inter alia* on the following:

- the clauses regarding re-negotiation provided for in the contract (if any);
- the invocation of the exceptional circumstances despite COVID-19 is not a force majeure event;
- the exceptional restrictive measures adopted by the Government.

2.3 What risks can we foresee at the end of the lockdown period?

It seems likely that the end of the legal lockdown period will lead to a lot of litigations and renegotiations of the agreements.

All obligations suspended during the lockdown period will be applicable again and the question of the liability for non-performance of the agreement will be addressed. Some companies, depending on the behaviour of the other party during the lockdown period, may also decide to terminate their agreement.

The deterioration of the financial situation of the companies will also even increase the risks of litigation and termination of agreements between parties.

It is thus very important to also foresee what could happen with contractual parties to anticipate the risks and try to negotiate if possible any adaptation of the contracts.

*



BRAZIL

By Guilherme Poggiali, Daniel Manucci and Gabriela Greco de Marco Leite



Introduction – Legal Background

Brazil is a Federative Republic comprised of 26 states and one federal districts. Coronavirus guidelines and laws are issued by federal, state and municipal governments. In the matter of public health, none of them have precedence over the other level, meaning that laws issued in the three spheres of government have to coexist at the same time.

Chronology - Brazil main preemptive measures to fight coronavirus and main facts regarding the crisis:

06 February 2020: Government issues the first law mandating quarantine for subjects coming from China

26 February 2020: first Covid-19 case reported

11-20 March 2020: state authorities start suspending classes and mandating shut down of commerce and restricting circulation of people

17 March 2020: first death by Covid-19 reported

22 March 2020: federal government flexibilizes labor laws, relaxing rules for home office, reduction of salaries and suspension of contracts

early April 2020: Government grants a half-minimum wage payment to informal workers, frees up money from social funds and start distributing them to the most affected people, emergency credit lines opened to small businesses.

April 2020: it is estimated that up to 70% Brazilians are in their houses, but in this last week of April, there is general talks of reopening business gradually – a sign that the economic effects are being felt more severely.

April 2020: Brazilian President is urging for the economy to be prioritized, creating a political crisis with most governors and mayors, who defend that public health and isolation measures should be the priorities.

1. DURING THE LOCKDOWN PERIOD

1.1 Can the company stop payments to the other party?

Labor contracts can be suspended by mutual agreement between employer and employee and, alternatively, salaries and work hours can be reduced in up to 70% while the crisis last.



Under Brazilian Law, the crisis is clearly a Force Majeure event, especially due to lockdown and isolation measures imposed by the government, but the effects must be demonstrated and the exemption of liabilities can only be applied in the exact extent of the impacts.

1.2 Can the company postpone the payments?

If it can demonstrate impossibility of making payments due to situations arising from the coronavirus crisis, there is a good chance it can postpone payments through negotiation and perhaps even judicially.

1.3 Is it compulsory or advisable to renegotiate the contracts?

Unless the contract contains a clause according to which parties have a duty to renegotiate the terms of the contract in good faith in case the obligations of one party become significantly more onerous than could have been anticipated when the contract was entered (hardship clause), parties have no obligation to renegotiate contracts.

If one party can no longer comply with its contractual duties, it is definitely advisable to enter into discussions with the co-contractors to obtain reduction or delays for payment or agree on the terms of early termination of the agreement.

1.4 Are penalty clauses still valid?

The application of the terms of the penalty clauses will depend on their terms. Generally speaking, penalty clauses remain valid.

1.5 Can a party terminate a contract during the lockdown period?

Employment contracts – yes

Commercial contracts: as a rule, no. Force majeure should be declared, its effects must be proven, and only after every other measure is tried and the performance is rendered impossible by the crisis can a contract be terminated without penalties. It is a case-by-case analysis, though, and negotiation is always recommended.

1.6 How do you manage MAC Provisions in acquisitions?

The application of the terms of the MAC Provisions will depend on their terms. A standard drafting refers to events which have a disproportionate effect on the target's business in comparison to similar businesses operating in the same



industry. Such drafting is unlikely to allow buyer to withdraw from a transaction.

1.7 Is a party required to renew an agreement when the renewal occurred during the lockdown period?

The application of the terms of the renewal clauses will depend on their terms. Force majeure can be applicable to excuse a party from renewing on the same terms, but each case must be analyzed individually.

1.8 How can a party be protected against the other party during the lock down period trying to take advantage of the exceptional circumstances?

First of all, proof of the impacts of the crisis must be provided. If the crisis impacts both sides of the contract, an equity solution is advisable. Judges will possibly be sensitive to good faith (and bad faith) approaches on negotiations and will likely try to balance commercial disputes rather than granting total success to one side.

1.9 Is it possible to file an action during the lock down period?

Brazilian courts are physically closed and all deadlines are suspended. However, most courts operate fully electronically, so the judicial system is working, albeit in a slower pace. It is possible to obtain injunctions with relative speed, but the course of ordinary lawsuits should be slower in this period.

2. AFTER THE END OF THE LOCK DOWN PERIOD

2.1 Is the company liable for non-performance of the contract during the lockdown period? Can “Force Majeure” apply?

In Brazil, Covid-19 is a force majeure event, as Brazilian Law puts emphasis on inevitability over predictability. However, the impacts should be thoroughly demonstrated by the affected party, in order to excuse itself from liabilities.

2.2 Is there any possibility to lessen a party’s liability in such case if Covid-19 is not a force majeure event?

N/A



2.3 What risks can we foresee at the end of the lockdown period?

From a legal point of view, one can anticipate that creditors which have not actively claimed payment of the amounts due to them during the crisis commence actions after, once businesses start recover. It emphasizes the importance to reach agreements for reduction or delays for payment now. Parties that feel they had unfair treatment by the other during the crisis can attempt legal measures to recover losses.

*



CHINA

By Zhen Huang



1. DURING THE LOCKDOWN PERIOD

1.1 Can the company stop payments to the other party?

Unless mutually agreed, a party may invoke the “Force Majeure” event or the “Change of Circumstances”, or the principle of fairness in order to stop payment to the other party.

For Employment Agreement:

- ⇒ If an employee cannot return to work because of quarantine or any other governmental mandatory emergency measure, the employer will have to pay the employee her/his regular remuneration during the period of infection, quarantine or emergency measure.
- ⇒ If an employee cannot return to work because her/his is affected by the outbreak, the employer would have to pay the employee her/his regular remuneration during one month. Afterwards, the employee will be able to pay living allowance to the employee.

1.2 Can the company postpone the payments?

Unless mutually agreed, a party may invoke the “Force Majeure” event or the “Change of Circumstances”, or the principle of fairness in order to postpone the payment.

On February, the legal affairs commission of NPC confirmed that the non-performance of a contract due to COVID – 19 could be considered as “Force Majeure” event, since it meets the three conditions of the “Force Majeure”, i.e. unforeseeable, unavoidable and insurmountable.

Following to such confirmation, certain high courts have published the guidelines for the resolution of disputes due to COVID-19, especially guidelines recommending the rejection of claims for termination of the contract, due to late payment of a party affected by COVID-19.

1.3 Is it compulsory or advisable to renegotiate the contracts?

On June 11th, 2003, the Supreme Court issued the Notice on Handling the Trial and Enforcement of People's Courts during the Prevention and Control of Severe Acute Respiratory Syndromes.

According to the Notice, the Supreme People's Court consider that SARS shall be dealt with the principle of fairness as stipulated in Article 5 in the Contract law and handle properly as a “Force Majeure” event.

Consequently, it is strongly recommended to renegotiate the contract in case of failure to perform the obligation due to the COVID – 19 for the two main following reasons:



1.3.1. In the case of the breach is deemed to a “Force Majeure” event.

The article 118 and 119 of the Contract Law provides that:

The non-defaulting party has the obligation to *"take the appropriate measures to prevent further losses"*, and *"... shall take the appropriate measures to prevent the losses from increasing; where the other party's failure to take appropriate measures results in additional losses, it cannot demand compensation for the additional losses."*

Any reasonable expense incurred by the other party in preventing additional losses shall be borne by the party in breach."

Therefore, if the non-defaulting party refuses to renegotiate the contract, it could be considered by the Court as having failed to take the appropriate measures to prevent further losses and be ordered to pay.

1.3.2. The COVID-19 could be deemed as a “Change of Circumstances”

The novel coronavirus outbreak may be deemed to constitute a change in circumstances.

According to the Article 2 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Contract Law of the People's Republic of China, the “Change in circumstances” is interpreted as follow:

"Where a party to a contract petitions the court to modify or rescind the contract on the grounds that the continued performance of the same is patently unfair to the party or the purpose of the contract will not be realized due to occurrence of any material change in circumstances that was unforeseeable, not caused by force majeure, and not a commercial risk after the conclusion of the contract, the court shall decide whether the contract shall be modified or rescinded according to the principle of fairness on a case-by-case basis."

In such cases, courts may order the affected contract to be modified or rescinded upon the request of either party and according to the principle of fairness on a case-by-case basis.

The parties then have every interest in renegotiating in good faith rather than allowing the judge to interfere with the contract.

1.4 Are penalty clauses still valid?

In the event of the COVID-19 should be regarded as a “Force Majeure” event, the affected party may claim that the deposit penalty rule does not apply, provided the party proves a causal relationship between the force majeure event (in this case, the novel coronavirus outbreak) and the failure in performing under the contract.



1.5 Can a party terminate a contract during the lockdown period?

Unless mutually agreed, a party may invoke the “Force Majeure” event or the “Change of Circumstances”, or the principle of fairness in order to terminate the contract during the prior notice.

For Employment Agreement:

If the employee cannot go to work because of the period of medical treatment, the medical observation period or the quarantine period or the emergency measures taken by the government because of the COVID-19, the employer shall not terminate employment contracts during this period and the Employment Agreement will be automatically extend until the expiration of this period.

When the quarantine period expired, the employer could terminate the Employment Agreement, but shall pay to the employee compensation.

1.6 How do you manage MAC Provisions in acquisitions?

During the lock down period, the buyer may want to exit the MAC, and the seller may propose exceptions to the MAC. How this will be handled will be on case by case basis. But the principle of fairness will take effect.

1.7 Is a party required to renew an agreement when the renewal occurred during the lockdown period?

In PRC, most agreements stipulate that a contract renewal should be negotiated in advance or automatically renewed if either party has no objection. Neither party is obliged to renew the contract.

1.8 How can a party be protected against the other party during the lock down period trying to take advantage of the exceptional circumstances?

A party may invoke the “Force Majeure” event or the “Change of Circumstances”. Otherwise, a party may also claim the principle of fairness. Based on this principle, during the SARS outbreak, some courts have support both parties to reasonably share the losses affected by the epidemic.

1.9 Is it possible to file an action during the lock down period?

Yes, during the lock down period in many areas the courts accepted actions through online platforms. There have even been online trials in some cities. Now most of the courts have resumed to normal work.

In addition, if a claim cannot be filed due to the outbreak, the prescriptive period shall be suspended.



2. AFTER THE END OF THE LOCK DOWN PERIOD

2.1 Is the company liable for non-performance of the contract during the lockdown period? Can “Force Majeure” apply?

I. Does COVID-19 constitute a “Force Majeure” event?

Firstly, the company must prove that the COVID-19 constitutes a “Force Majeure” event according to the provisions of the contract or to the Law.

Assuming the contract contains a “Force Majeure” provision, and “infectious disease” or “atypical pneumonia” is explicitly listed as one type of “Force majeure”, then the parties have a contractual basis to claim that the novel coronavirus constitutes a “Force Majeure” event.

If there is no "Force Majeure" provision in the contract, the parties may nonetheless claim that the outbreak of novel coronavirus constitutes a force majeure event based on the following legal provisions and judicial practices.

Pursuant to Article 180 of the General Provisions of the Civil Law and Article 117, paragraph 2 of the Contract Law, force majeure refers to "objective circumstances that **are unforeseeable, unavoidable and insurmountable**".

Generally speaking, the novel coronavirus outbreak may constitute a force majeure event, based on the views of PRC courts on judicial practice when handling cases during the 2003 SARS epidemic.

"... Disputes arising from the impossibility to perform a contract directly due to administrative measures taken by the government and relevant departments to prevent or control the SARS epidemic, or failure to perform a contract due to the impact of the SARS epidemic, shall be properly dealt with in accordance with Article 117 of the force majeure provision and Article 118 of Contract Law of the People's Republic of China."

Compared with the previous SARS incident, China has adopted stricter restrictions on traffic and public places, and extended vacations and other measures to contain with the epidemic, which are more likely to impact contractual performances.

Moreover, although neither the Supreme Court nor the Central Government of China has yet issued any document interpreting current 2019-nCoV incident from legal perspective, some provinces and national departments and associations of different industries, such as the Ministry of Culture and Tourism and the China Council for the Promotion of International Trade, have already defined the epidemic incident as force majeure in their departmental documents. Situation will have to be monitored from this angle as well.



Nevertheless, it must be analyzed on a case-by-case basis and for example on the following key factors whether:

- The outbreak will inevitably lead to a failure to perform the contract or the frustration of the purpose of the contract;
- The claiming party itself is also at fault;
- The failure in performing the contract during the outbreak resulted from delayed or improper performance by the claiming party;
- The measures for preventing and controlling the outbreak of novel coronavirus taken by relevant Government;
- Etc.

Companies should assess the actual and potential impact of outbreaks on contract performance as early as possible by reviewing their contractual obligations. For example, due to the extension of vacations, products supply, construction project and transportation service may fail to meet the deadline under the contract and constitute breach (or even material breach) of contract.

It should also be verified how the force majeure clause are drafted and whether the stipulations exclude the outbreak of virus from unforeseeable force majeure event after the SARS, H1N1, H5N1, Ebola and other epidemics.

II. What are the corresponding legal consequences?

The “Force Majeure” is a statutory exemption from liability, which means that the affected party is exempted from liability for failure to perform as long as the party can prove that the failure resulted from the force majeure event.

As far as the legal consequences, they should be analyzed from the following two perspectives.

First, the parties may have agreed in the contract on the relevant legal consequences, then, the parties should perform in accordance with such terms.

Second, PRC law has provisions on the legal consequences of force majeure events and the application depends on the specific circumstances of each case.

- ⇒ Parties may claim partial or full exemption from contractual liability: the party claiming such exemption is required to prove that there is a causal relationship between the novel coronavirus outbreak (as a force majeure event) and **its failure to perform the obligations.**
- ⇒ Parties may claim rescission of the contract: the party claiming rescission would be required to prove a causal relationship between the novel coronavirus outbreak (as a force majeure event) and **the frustration of the purpose of the contract.**



⇒ Parties may claim inapplicability of the deposit penalty rule: the affected party may claim that the deposit penalty rule does not apply, provided the party proves a causal relationship between the force majeure event (in this case, the novel coronavirus outbreak) and **the failure in performing under the contract.**

During SARS crisis in Hong Kong, we observed that some adjustments to financial undertakings such as rental fees claimed by tenants were successfully based on sanitary reasons or administrative decisions or bans. Termination of long-term contract may be rejected by court as the situation does not change the purpose of the contract.

We also observed that the court were not supporting force majeure claims when the period of time was short and did not significantly changed the obligations as the parties had initially reasonably contemplated them at the time of the signature of the contract.

2.2 Is there any possibility to lessen a party's liability in such case if Covid-19 is not a force majeure event?

It seems that there is no other possibility to lessen a party liability for the past than the "Force Majeure".

As a matter of fact, the novel coronavirus outbreak may be deemed to constitute a change in circumstances. However, change in circumstances is not a statutory exemption from liability. The parties are only entitled to claim for the modification or rescission of the contract by claiming a change in circumstances, and the court has discretion to decide whether the contract should be modified or rescinded.

The effect on the party's liability of the "Change in circumstances" will be only for the future of the contractual relationship.

2.3 What risks can we foresee at the end of the lockdown period?

We can already notice from our clients the following requirements:

- Early termination (or on the contrary the extension) of the commercial agreements:
Ex: a supplier decides to stop production of certain products; thus, the object of the contract no longer exists. It will be necessary to negotiate the conditions for terminating the contract, as well as all related financial issues, such as the down-payment already made;
- The renegotiation of the business targets to be achieved such as the sale of minimum quantity under the agreements;
- Is it mandatory to accept a formal request of negotiation from the other party?
Can I force my partner to have a third party perform its obligations?
- Negotiations in the event of substantial price increase with a view to obtaining resolution or other solutions.



HONG-KONG

By Maëva Slotine





Introduction – Legal Background

There is no lockdown period in Hong Kong. However, it is not business as usual for a number of reasons, including the Government measures related to Covid-19 and the lockdowns in other jurisdictions with whom Hong Kong usually has intensive human and economic interactions such as Wuhan in China (PRC) and most European countries.

Hong Kong is a Special Administrative Region of the People's Republic of China (PRC). Hong Kong Basic Law was adopted on 4 April 1990 by the Seventh National People's Congress of the PRC and came into force on 1 July 1997. The region has a high degree of autonomy and enjoys executive, legislative and independent judicial power, including that of final adjudication.

The laws in force in Hong Kong are the Basic Law, the laws previously in force in Hong Kong (before 1 July 1997), and the laws enacted by the legislature.

Chronology – Chronological landmarks of the main measures adopted by the Hong Kong Government:

26 January 2020: declaration of Emergency Response Level for the severe respiratory disease associated with a novel infectious agent which entailed:

- suspending flights and trains to Wuhan indefinitely;
- canceling major Chinese New Year events;
- extending health declaration policy to all of city's entry points.

Other immediate measures:

- Disneyland and Ocean Park (two prominent amusement parks in Hong Kong) announce their shutdown until further notice;
- Government shuts school and universities in Hong Kong. Initially up to 17 February 2020, the measure was extended until 16 March 2020 then until 20 April 2020 at least.

4 February 2020: eight out of the eleven points of entry in Hong Kong shut.

16 March 2020: mandatory quarantine for visitors from Europe and other countries.

25 March 2020: closure of Hong Kong border to all incoming non-residents arriving from overseas; all returning residents are subject to a compulsory quarantine and are controlled by tracking devices.

28 March 2020: closure of entertainment venues (e.g. fitness rooms, cinemas, etc.) and further restrictions in restaurants (e.g. table 1.5 meters from each other's, no more than 4 people sit in one table, customers must wear a mask when not eating).

3 April 2020: closure of businesses selling only drinks for two weeks.



7 May to 15 June 2020: students can return to school but classes will not resume for children in the first two years of kindergarten for the rest of the academic year.

Economic hardship – With the number of tourists in Hong Kong divided by ten (approximately) and the lockdown measures in PRC and now in Europe and the United States, Hong Kong economy is suffering and the Government is regularly announcing measures to support residents and SMEs.

1. DURING THE LOCKDOWN PERIOD

1.1 Can the company stop payments to the other party?

The answer is no.

Salaries and payments to suppliers remain due according to their terms.

Any employer who does not pay its employees' salaries within seven days from the day they become due, is liable to a fine of HK\$350,000 (about EUR40,000) and to imprisonment of three years. Furthermore, if the wage offence is committed with the consent or connivance of, or be attributable to any neglect on the part of any director, manager, secretary or other officer, such person shall be guilty of the same offense. Besides, interest on late payment of wages is due by the employer (Cap. 57 Employment Ordinance, Section 25A, Section 63C and 64B.).

In Hong Kong, there are no legal provisions to support companies facing a temporary reduction of business and employers remain bound by the provisions of the employment agreements. Reductions of working hours and salaries need to be agreed by each employee individually, as an amendment to the terms of their employment agreement, notwithstanding the fact that measures are adopted for all employees of a company – and most of the time by managers and directors as well.

In face of the Covid-19 epidemic, the Government of Hong Kong announced on 8 April 2020 several relief measures including an HK\$80 billions Employment Support Scheme (ESS) in order to help employers to maintain employment and to support salary payment for six months in two tranches (1st tranche: June, July and August 2020; 2nd tranche: September, October and November 2020). All employers who have been making Mandatory Provident Fund (MPF) contributions or have set up Occupation Retirement Schemes (ORSO) are eligible. Employers must commit to not make workers redundant during the subsidy period and to spend 100% of the subsidy on paying wages for their employees. For employees aged between eighteen and sixty four the amount of the subsidy will be based on 50% of the wage paid on a “specified month” (any month between January and March 2020 selected by an employer) with a wage cap at HK\$18,000 per month, meaning a maximum subsidy of HK\$9,000 per month and per employee. Specific provisions are implemented for employees aged sixty five and above. Eligible employers may submit online applications via



the ESS Online Portal (www.ess.gov.hk) starting from 25 May 2020 until 14 June 2020.

A company which does not pay its suppliers according to the terms of payment agreed would be in breach of the terms and the co-contractors would be entitled to (i) contractual remedies and/or (ii) common law remedies.

Contractual remedies are likely to include:

- Penalties;
- Late payment interests;
- The possibility (but not the obligation) for the other party to terminate the contract.

Common law remedies – damages being the most relevant here – would require the other party to start a claim in Court against the company to obtain a judgment.

1.2 Can the company postpone the payments?

A company can only postpone payments if such postponement has been agreed with the co-contractor.

Otherwise the company would be in breach of the terms and the co-contractors would be entitled to (i) contractual remedies and/or (ii) common law remedies.

1.3 Is it compulsory or advisable to renegotiate the contracts?

Hardship clause: a clause according to which parties have a duty to renegotiate the terms of the contract in good faith in case the obligations of one party become significantly more onerous than could have been anticipated when the contract was entered.

Unless the contract contains such hardship clause, parties have no obligation to renegotiate the contract.

If one party can no longer comply with its contractual duties, it is definitely advisable to notify the other party as soon as possible to:

1. Explain the consequences of the situation (in proportion of relevant indicators: - 50% turnover for instance);
2. Initiate discussions with a view to obtain reduction or delays for payment or agree on the terms of early termination of the agreement.

1.4 Are penalty clauses still valid?

The application of penalty clauses will depend on their terms. Generally speaking, penalty clauses remain valid.



1.5 Can a party terminate a contract during the lockdown period?

There is no lockdown in Hong Kong, and no exceptional measures taken by the Government affecting contractual terms (except for government own real estate tenants) .

This reality is especially harsh for fixed term contracts, such as commercial leases for retail businesses which have seen their turnover reduced by 30-50% or more for many months. The rent remains due at the agreed rate until the end of the term. For a tenant company which is no longer able to pay its lease, the only way out is to negotiate with the landlord the best possible terms for an early termination of the lease. The earlier the discussion the better (before any monthly rent is unpaid).

In addition to the ESS mentioned in Q1.1, the Government of Hong Kong has announced a number of proposals to cover various sectors including notably the real estate sector. The Government announced initially 50% rental concessions for tenants and hirers of government premises, increased to 75% for the period from April to September. The Government has also made several public appeals to private landlords to likewise provide rent concessions to their tenants.

For any contract, you need to look at the termination clause. A typical termination clause in Hong Kong will provide for:

- Termination without cause subject to 2-3 months' notice (the duration of the notice shall be defined in the contract).
- Termination for cause with immediate effect in case of breach of the agreement by the other party, for instance in the absence of payment or if a notification to remedy a breach has not been followed upon.

1.6 How do you manage MAC Provisions in acquisitions?

MAC Provisions are found in investment and share purchase agreements. The application of the terms of the MAC Provisions will depend on their terms.

A standard MAC Provision includes three parts:

- (i) A definition: any event, reasonably likely to have a material adverse effect on the business, financial conditions or results of the target.
- (ii) A list of carved out events (i.e. events to which the clause does not apply). A standard drafting refers to events "*which have a disproportionate effect on the target's business in comparison to similar businesses operating in the same industry*".
- (iii) A condition that the purchaser should not have been aware of a MAC event prior to the signing of the agreement.

There are likely to be two points of discussions for investment and share purchase agreements where investors or purchasers want to rely on a standard MAC Provision to withdraw from the transaction:



1. Whether the target is more affected than similar businesses operating in the same industry (subject to the drafting of the clause);
2. Depending on the date of signature of the agreement, whether the purchaser was aware of the MAC event (on a worldwide basis, the Hong Kong Government declared the Emergency Response Level on 26 January 2020, the WHO declared the Covid-19 a pandemic on 30 January 2020).

Days before the lockdown's measures were announced in France and other Western countries (mid-March 2020), we were assisting a target company owner to negotiate the sale of his shares and were instructed to include Covid-19 related restrictions measures in the list of carved-out events. Obviously, the potential buyer was not prepared to agree to such carve out and he eventually withdrew his offer.

Now that the lockdown's measures are in place and some countries are considering easing restrictions, some entrepreneurs and investors identify opportunities and they are not specifically requesting Covid-19 related restrictions measures in the list of carved-events.

1.7 Is a party required to renew an agreement when the renewal occurred during the lockdown period?

The application of the renewal clauses will depend on their terms.

In Hong Kong, automatic renewal clauses are most frequent, and the non-renewal will depend on timely prior notification of termination at the end of the current term.

1.8 How can a party be protected against the other party during the lockdown period trying to take advantage of the exceptional circumstances?

Creditors, including landlords tend to have different views on “protection of their interests” than debtors, including tenants.

In Hong Kong so far based on our clients' experience, the first group tend to have a short-term view and prefer receiving the payments due without reduction or with a temporary reduction whereas the second group tend to have a mid-term or long term view and either:

- (i) terminate the contracts (if chances of recovery are too low, i.e. overheads cannot be reduced sufficiently to adapt to the new business environment); or
- (ii) need to negotiate reductions for the next six to twelve months (to have a chance to recover profits).

A company entering into discussions with its co-contractors need to be clear on their objectives and those of the other party and look for a middle ground.



In Hong Kong, the biggest challenge for many businesses seems to be commercial leases discussions. Landlords have yet to factor in that:

- (i) rents post protests and coronavirus may never be as high as before, and
- (ii) the number of candidates' tenants is likely to drop.

So far, real estate prices remain high and they tend to be the ultimate decision factor for Hong Kong landlords.

1.9 Is it possible to file an action during the lockdown period?

There is no lockdown in Hong Kong, but the Courts have been off and on since 26 January 2020.

Taking in consideration reduced opening hours of the registries of all Courts in Hong Kong, it remains possible, in April 2020 to:

- file a claim with the Labour Tribunal for breach of the Employment Ordinance (Cap. 57), for instance for non-payment of salaries within seven days from their due date;
- file a claim with the Small Claims Tribunal (maximum amount of HK\$75,0000);
- file a writ of summons or statement of claim with the District Court or the High Court;
- apply for the winding up of a debtor, for instance after the three weeks delay for payment of the amount claimed in a Statutory Demand has not been paid.

2. AFTER THE END OF THE LOCKDOWN PERIOD

2.1 Is the company liable for non-performance of the contract during the lockdown period? Can “Force Majeure” apply?

There is no lockdown in Hong Kong, but the measures taken by the Government have resulted in a general reduction of the economic activity and Hong Kong is strongly affected by the level of international economic exchanges.

Under Hong Kong law, a contract may be discharged on the ground of frustration when some supervening event (outside the parties' control) occurs which makes performance of the contract impossible, illegal or transforms the obligation to perform into a radically different obligation from what was originally envisaged by the parties. If a contract has been frustrated it is automatically discharged, regardless of the intentions of the parties.

In Hong Kong, the coronavirus is not considered as a frustrating event based on a case law made further to another coronavirus inducted crisis, i.e. SARS in 2003. A



tenant of a two-year lease was forced to move out of his flat due to a ten day isolation order. Sued for non-payment of rents, he invoked the doctrine of frustration in order to terminate the agreement. The Hong Kong Judge stated that:

“The outbreak of SARS may arguably be an unforeseeable event, however such supervening event did not, in my judgement, significantly change the nature of the outstanding contractual rights or obligations from what the parties could reasonably have contemplated at the time of the execution of the tenancy agreement.”

Non-performance of a contract is justified in the occurrence of a force majeure event. To find out if this applies, it is necessary to note that:

- Force majeure in Hong Kong is defined by the contract: check the terms of your contracts.
- The standard drafting of force majeure clause includes epidemic or pandemic.
- If a force majeure clause provides that the relevant triggering event must "prevent" performance, the relevant party may have to demonstrate that performance is actually impossible as opposed to difficult. The words "hinder" and "delay" have a wider scope but do not extend to events which make performance significantly more onerous.
- Notification to the other party is often required as soon as practically possible. A standard notification shall be made in writing and contain the following information:
 - o The force majeure event;
 - o The date on which it started;
 - o Its likely potential duration;
 - o The effect of the force majeure event on the party's ability to perform any of its obligation under the agreement.
- Many force majeure clauses contain an obligation to mitigate.

The conclusion is that force majeure clauses (if any) are unlikely to apply.

Thus, in short, the company is liable for non-performance of the contract.

2.2 Is there any possibility to lessen a party's liability in such case if Covid-19 is not a force majeure event?

Look for:

- Hardship clauses (see Q1.3).
- Hong Kong Government supporting measures (there are new measures announced almost every week).



- Alternative options to reduce costs such as early termination of contracts with inflexible creditors/landlords, to enter into new contracts on more favorable terms.

When a company reaches a point where it could be insolvent, the directors need to be aware that their fiduciary duties also require them to take into account the interests of the creditors of the company. Directors may incur personal liability if they breach their duties or commit offences such as fraudulent trading or unfair preference. To lessen the risk, it may be necessary for the board of directors to resolve to cease trading and commence winding up proceedings.

2.3 What risks can we foresee at the end of the lockdown period?

There is no lockdown in Hong Kong, but the economy is in recession due to the double effect of the protests since May 2019 and Covid-19.

From a legal point of view, one can anticipate that creditors which have not actively claimed payment of the amounts due to them during the crisis commence actions after, once businesses start recover.

Many contracts in Hong Kong contain a clause of non-implied waiver, i.e. the fact that a breach is not immediately notified to the party in breach does not mean anything.

To reduce the risk of litigation, one can only emphasize the importance to reach agreements for early termination, reduction or delays for payment **now**.

**



INDIA



By Edouard Héliot and Fabien Gagnerot



Introduction – Legal Background

India is a common law jurisdiction, politically organized as a federation of States and Union Territories under the Constitution.

Chronology – Chronological landmarks of the main measures adopted by Indian Government:

11 March 2020: India suspended visas for travellers, including visa-free travel from 13 March until 15 April, except those on diplomatic, official, employment and project visas.

19 March 2020: no schedule international commercial aircraft allowed to land in India for one week.

22 March 2020: "Janata curfew" for 14 hours in effect in India.

24 March 2020: announcement of national confinement for 21 days.

14 April 2020: extension of national confinement till May 3rd, with relaxation for certain areas from April 20th onwards.

1. DURING THE LOCKDOWN PERIOD

1.1 Can the company stop payments to the other party?

In principle, the answer is no.

At this stage, payments due in the course of a contractual relationship, be it an employment or a commercial relationship, are not excused or interrupted in the frame of the ongoing lockdown in India.

However, due consideration must be paid to (i) the drafting of the contractual terms and in particular to the presence of force majeure (cf. our comments under Q.2.1 infra), material adverse effect (MAE), material adverse change (MAC) or hardship clauses and to (ii) the various policies issued by the central or local government.

For employment contracts, the salaries of all employees remain in principle due. On March 20th, 2020, the Ministry of Labour and Employment issued an advisory letter to all employers' association requesting not to terminate employees and to operate deduction on wages, employees of a non-operational business being deemed in this regard to be "on duty".

The Ministry of Home Affairs has on March 29th, 2020, ordered all State/Union Territories to take measures so that "all employers, be it in the industry or in the shops and commercial establishments, shall make payment of wages of their workers, at their work places, on the due date, without making any deductions, for the period that the establishments are closed during the lockdown". State or Union Territories-specific orders or advisory ensued, e.g. in Delhi where the



government ordered on March 22nd, 2020, that "the employees of private establishments (including temporary/contractual/outsourced etc.) required to stay at home in view of this order shall be treated as "on duty" and be paid in full. As the legal nature of such local provisions (legally binding or simply on an advisory basis) may vary from State to State and for certain category of workers, an opinion is to be sought on a case-to-case basis before implementing any pay cuts.

For commercial rents, no specific moratorium has been implemented.

1.2 Can the company postpone the payments?

Apart from the ever-going possibility to jointly agree on a payment delay with one's creditor, a postponement may be imposed on the parties depending on the applicability of force majeure clauses suspending the payments for the duration of the force majeure event (cf. Q.2.1 infra).

It is also to be mentioned that the Reserve Bank of India has permitted all commercial bank to grant a moratorium of three months on payment of all instalments on term loans falling due between March 1st, 2020 and May 31st, 2020, as well as defer the recovery of interest falling due on cash credit/overdraft granted by such banks.

1.3 Is it compulsory or advisable to renegotiate the contracts?

In the absence of any clause - such as hardship clauses - that may impose a renegotiation upon the occurrence of a material change upon the initial balance of the agreement, no renegotiation can be contractually imposed on the parties.

Considering the risk of litigation attached to the activation of a force majeure clause or to claims of frustration, renegotiations can be advised in case for instance payments can no longer be maintained, or in the presence of performance bonds or other payment guarantees.

1.4 Are penalty clauses still valid?

Penalty clauses valid under Indian law remain enforceable, unless the performance of the agreement is suspended by application of the force majeure clause.

1.5 Can a party terminate a contract during the lockdown period?

Depending on its wording, a contract may be terminated during the lockdown for breach of contract (unless excused by application of the force majeure clause) or if the performance of the contract has become impossible (whether by the application of a force majeure clause or by virtue of the frustration of the



contract). A thorough analysis of the contract is naturally paramount to establish the merits of such termination.

Particular caution is to be exercised for employment agreements, considering the various advisory letters and orders issued by the central/local governments in India on this question, urging or ordering employers not to terminate any employee/worker as the case may be. Further precautions are yet advised for 'workmen' in the industrial sectors, who are subject to a particular set of provisions for their retrenchment or lay-off.

1.6 How do you manage MAC Provisions in acquisitions?

The impact of a MAC clause for an acquisition in India will naturally depend on its wording and on the definition of what should be considered as having a "material adverse effect" on the target company.

It must be reminded in this regard that the outbreak of Covid-19 in itself is not enough to justify the application of a MAC clause in any acquisition protocol: in a common drafting of a MAC clause, it shall be up to the buyer to demonstrate that the pandemic had indeed a direct material adverse effect on the patrimonial and business situation of the company.

This is not always the case, depending on the nature of the business, on the continuity of the activity during the lockdown, etc.

It could also prove particularly difficult for the buyer to demonstrate the materiality criteria in the acquisition timeframe: whether the MAC clause is drafted in general terms, e.g. "the absence of any material adverse event affecting or likely to affect negatively and durably the company's operations and/or financial situation", or triggered by precise figures, e.g. through a negative impact of a certain percentage on the turnover, the potential adverse consequences on the operations or financial situation by virtue of the pandemic may very well be (i) temporary or (ii) undeterminable at this point.

Eventually, it must also be noted that if MAC clause are most commonly present as condition precedents to the closing of an acquisition, it can also be added as a warranty under which the Seller guarantees that no MAC event has occurred: considering the above mentioned difficulties, it would thus be relevant for buyers engaged in recent transactions to look at warranty provisions and assess whether keeping a guarantee under the representations and warranties may be preferable to stepping out of an acquisition process.

1.7 Is a party required to renew an agreement when the renewal occurred during the lockdown period?

The application of the terms of the renewal clauses will depend on their terms.



In India, automatic renewal clauses are most frequent, and the non-renewal will depend on timely prior notification of termination at the end of the current term.

1.8 How can a party be protected against the other party during the lockdown period trying to take advantage of the exceptional circumstances?

Being in a creditor position can prove itself complicated in India considering that (i) debtors may be tempted to excuse themselves from performing the agreement – rightly or wrongly so – through a force majeure clause / doctrine of frustration and that (ii) the availability of most judicial remedy is tempered with by the pandemic outbreak and the suspension of most courts (as detailed below). In parallel, debtors relying on force majeure or frustration may put themselves at risk for after the crisis is through, Indian courts may very well prove them wrong, thus imposing more liabilities on them.

The party in waiting of the performance of an agreement by the other party may also invoke section 39 of the Indian Contract Act, 1872, whereby "*when a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance*".

Further, for agreements that will be renegotiated in this period, the parties with less bargaining power may have certain options to challenge the new agreement, for instance by invoking the absence of a free consent as defined in the Indian Contract Act, 1872, more particularly so under section 16 that pertains to the "undue influence" of one party onto another. One may also think about solutions pertaining to competition law and the notion of abuse of dominant power under the Competition Act, 2002.

1.9 Is it possible to file an action during the lockdown period?

Indian High Courts (to which most commercial contracts give jurisdiction) are closed by virtue of the pandemic.

In Delhi, for instance, the High Court and all subordinate courts have suspended their operations since March 23rd, 2020, and only allow fresh matter of "extreme urgency" on commercial matters.

Hearings are conducted through video-conference and pending matters previously listed before the Court have been adjourned. As the situation unfolds, the court slowly accepts more matters: on April 26th, 2020, Delhi High Court has for instance extended its operations to interim measures under arbitration proceedings.



2. AFTER THE END OF THE LOCKDOWN PERIOD

2.1 Is the company liable for non-performance of the contract during the lockdown period? Can “Force Majeure” apply?

Force majeure is not implied under Indian law and has to be contractually provided for: the application of force majeure clauses will depend naturally on the content of the clause, particularly on the scope of events that may trigger its application and on the resulting impossibility of performing the contract.

In the context of the Covid-19 outbreak, certain ministries or government bodies invoked force majeure clauses as applicable: e.g. the Ministry of Finance vide an office memorandum dated February 19th, 2020, stated that force majeure clause present in government procurement contracts shall apply as the Covid-19 would qualify as a "natural calamity". Even if such announcement may serve to interpret in favor of the general applicability of force majeure clause in private contracts, it may also be noted that the Life Insurance Council (regulatory body for the life insurance industry) has ruled out the application of force majeure clauses in life insurance contracts, in order to protect the "fundamental need for life insurance in every household".

Should a force majeure clause be deemed applicable, the agreement may be most commonly either terminated, either suspended (thus keeping due payments on abeyance) depending on the content of the clause.

In the absence or inapplicability of a force majeure clause, section 56 of the Indian Contract Act, 1872 also provides for the doctrine of frustration of contracts whereby a contract to do an act which becomes impossible to perform after it has been made becomes void when the act becomes impossible. A thorough review of such contract is however necessary before enforcing such claim of frustration.

2.2 Is there any possibility to lessen a party’s liability in such case if Covid-19 is not a force majeure event?

In the absence of any contractual remedy (hardship, renegotiation, MAC/MAE, force majeure), it is advisable for debtors who cannot or opt not to perform the contract to maintain a bona vide effort to mitigate the damage that may be created by their non-performance.

2.3 What risks can we foresee at the end of the lockdown period?

At the end of the lockdown period, we will most likely face a significant increase in legal actions from creditors attempting to obtain payments that were *de facto* suspended during the lockdown or from parties who had to accept the renegotiation of their contracts during the lockdown under less favorable terms.



The main issue for the courts will undoubtedly be to interpret the variety of force majeure clauses present in commercial contracts.

**



BELGIUM

By Jean-Nicolas Goossens





Introduction – Legal Background

Background

Belgium is a federal State, composed of Communities and Regions. They are on equal footing and have powers and responsibilities for different fields. Since 12 March 2020, Belgium has been in the “federal phase of crisis management” which means that all main decisions will be taken by a management team comprised of the Prime minister, the competent Ministers and the Ministers-Presidents.

A law of 27 March 2020, gave special power to the executive to contain the further spread of the new coronavirus (Covid-19) by decisions taken by Royal Decrees.

Lockdown Period

Lockdown measures were decided as from March 18 and were extended by meeting of 15 April 2020 until 3 May 2020.

Announced by 24 April, Belgium will lift its lockdown, in several phases, targeted as follows

Phase 1 A : May 4, Phase 1 B : 11 May, Phase 2 : 18 May and Phase 3: 8 June, at the earliest.

Most relevant containment measures are similar to them taken by other countries

1) Citizens are required to stay at home

2) Companies - irrespective of their size - are obliged to organise working from home for every position where this is possible, without exception.

- If this is not possible for certain employees, social distancing will be strictly respected. This rule applies both to the performance of work and to transport organised by the employer. If companies cannot meet these obligations, they must shut down.
- If the authorities find that the social distancing measures are not being complied with, first a heavy fine will be imposed on the company; in the event of non-compliance after the fine has been imposed, the company will have to shut down.
- These provisions do not apply to key industries and essential services. However, they will have to ensure that the social distancing rules are respected as much as possible.

3) Non-essential shops and retail outlets will remain closed, except for food shops, pharmacies, pet food shops and newsagents.



4) Public transport should be organised in such a way as to ensure social distancing.

5) Non-essential travel outside Belgium is prohibited

6) Outdoor markets are shut down.

The Council of Ministers had adopted « financial » measures in support of business, such as:

1. Temporary unemployment due to force majeure and for economic reasons;
2. Entitlement to replacement income for self-employed persons (droit passerelle/overbruggingsrecht/bridging right)
3. Payment plan for employers' social security contributions, for VAT, withholding tax, personal income tax/corporate tax
4. Reduction of tax prepayment for self-employed persons and postponement of or exemption from payment of social security contributions for self-employed workers
5. Flexibility in the performance of federal government contracts

At the time being several Royal Decrees with “legal” measures has been taken or are announced

The unprecedented situation of pandemic gives rise to specific temporary legislation and incessant evolution of legal measures: for example

Royal Decree n° 4 with various provisions on condominiums and company and association law in the fight against the Covid-19 pandemic this for example possibility of postponing of the general shareholders meetings, the general shareholders meetings by written

Royal Decree No. 2 concerning the extension of limitation periods and other time limits for legal proceedings and the extension of procedural time limits and promote the written procedure before the courts and tribunals

The introduction of a temporary moratorium till 17 May 2020 on company bankruptcies. During this difficult period, any company that is struggling to pay off its debts as a result of covid-19, is protected from pre-judgment attachment and executive attachment, bankruptcy and court-ordered dissolution.

These decree n°15 targets companies hard hit by the crisis, which was nevertheless in good health until March 18.

Concretely:

- these companies are protected against foreclosure;
- - they may not be declared bankrupt at the request of their creditors (but at the request of the public prosecutor, or with the agreement of the debtor himself);



- current contracts cannot be terminated due to default of payment;
- the debtor is not temporarily obliged to file a declaration of bankruptcy;
- the judge of the undertaking shall decide whether a debtor may benefit from the suspension if the latter invokes it as a defence.

This reform does not apply to businesses that were already bankrupt.

1. DURING THE LOCKDOWN PERIOD

1.1 Can the company stop payments to the other party?

The fact that the Royal Decree n° 15 provides that temporary current contracts cannot be terminated due to default of payment does not mean that this « legal stay regime » does affect the obligation to pay debts, in principal, interest and incidental.

Companies that are measuring or are not affected by the economic impact of the Covid-19 are expected to meet their commitments.

1.2 Can the company postpone the payments?

Independently of the Royal Decree 15 and existing contractual terms, the possibility of postponing payments depends if the Covid-19 situation is evidenced as “force majeure” which suspends or not the contract.

In case of suspension, the effect is temporary and should justify postponed payments.

1.3 Is it compulsory or advisable to renegotiate the contracts?

There is no doubt that Covid-19 is and will be invoked to discharge its obligations.

Agreements concluded before the Covid-19 situation, do generally not apprehend or do not foresee all the possible consequences as a result of a pandemic situation.

We can only stress the importance of renegotiating the contract.

1.4 Are penalty clauses still valid?

Generally speaking, penalty clauses remain valid.



For agreements obtained by public tender, the Belgian federal authorities will not apply penalties and sanctions for late execution if the default or delay originates in the covid -19.

This announced flexibility is not automatic and requires for example a formal and timely notification.

1.5 Can a party terminate a contract during the lockdown period?

If the notice period began before the covid measures, normally the contractual obligations are unchanged during the notice period.

However, if commitments cannot be met because of “force majeure” the notice period will be suspended or if the performance is definitely impossible the notice period will terminate anticipatively.

1.6 How do you manage MAC Provisions in acquisitions?

The main difficulty concerns the situation of provisions signed before the lockdown period.

Standard drafting refers to events which have a disproportionate effect and till now does normally not specifically mention pandemics.

The upheaval of the contractual economy and the effect of the unforeseen circumstances recommend the negotiation of an adjustment.

If the agreement is concluded now, a specific provision for pandemic may be provided.

1.7 Is a party required to renew an agreement when the renewal occurred during the lockdown period?

Most frequently situation concerns automatic renewal clauses and the non-renewal is a question of timely prior notification of termination at the end of current term.

Depending of the terms of the agreement the lock-down period has normally no influence on automatic renewal.

A specific situation could be : force majeure happened before renewal.

If the conditions of force majeure are met, one of the consequences could be the dissolving the contact before term of renewal.



1.8 How can a party be protected against the other party during the lock down period trying to take advantage of the exceptional circumstances?

Different measures have been taken by the authorities (see Introduction).

Non-essential shops and retail outlets are currently closed. The tenant refuses to pay his rent on the grounds of force majeure (impossibility to use): the landlord defends that the lack of liquidity is not a case of force majeure.

Both parties have arguments and in absence of negotiation, the exceptional situation (even if the facts do not concern the contract law) will probably be submitted to Court.

The judge has a certain power of appreciation and discretion and may also grant the unfortunate and good faith debtor terms and time.

1.9 Is it possible to file an action during the lock down period?

Taking in consideration the Royal Decree n° 2 and 15 it remains possible to introduce an action.

2. AFTER THE END OF THE LOCK DOWN PERIOD

2.1 Is the company liable for non-performance of the contract during the lockdown period? Can “Force Majeure” apply?

The covid 19 is not qualified as such as “force majeure” event. The measures taken by the authorities can be.

In absence of specific contractual clauses, the most frequently questions concern the fulfilment of the conditions of application of force majeure; this is in Belgium summarized

- Be unaccountable to the party who invokes it;
- Be unforeseeable and unavoidable;
- Impossibility perform or to carry out the contractual obligations.

Force majeure results for the future, in the dissolution of the agreement, if it is final and the suspension of the agreement, if the effect of force majeure is temporary.

If the conditions of force majeure are met, based on the doctrine of risk, the creditor could not claim anything from the other party.



2.2 Is there any possibility to lessen a party's liability in such case if Covid-19 is not a force majeure event?

In absence of specific contractual clauses, a (preventive) information of the other party by notification of detailed effects or risks (as a result of containment measures) on the execution of the contract should be advised. This preventive notification could provide evidence of good faith and promote the negotiation of an adaptation of obligations.

2.3 What risks can we foresee at the end of the lockdown period?

It is recommended to take into account the present experience for contract drafting of a force majeure clause.

**

Disclaimer

This document does not constitute a legal opinion and should not be construed as such.

Any use or modification for commercial purposes is prohibited.

The sole purpose of this document is to provide general information on the impact of Covid-19 on international contracts as of April 30th, 2020: it is non-exhaustive, will not be updated and should not be used as an answer or basis for action on a legal issue, which should always be presented to a qualified lawyer from the concerned jurisdiction.

About us

Together, covering all areas of law

With over 120 lawyers among the best specialists in their respective fields, UGGC Law Firm' ambition is to meet all of its clients' requirements whatever their problems and the business sectors in which they operate.

Together, providing a legal offer with high added value

Developed around a concept encouraging teamwork, UGGC Law Firm has managed to create real synergy between its various teams.

Each and every day we associate our experiences and our competences to offer our clients high technicity services.

UGGC Law Firm's expertise is regularly recognized by reference guides of the profession (Legal 500, Chambers & Partners, etc.).

Together, wherever you need

To assist our clients globally, UGGC Law Firm is covering Europe, South America, Africa and Asia through our own offices, dedicated desks and exclusive partnerships in France, Belgium, Brazil, Morocco, China, Hong-Kong and India.



UGGC LAW FIRM

Let us stay connected



Michel Ponsard
Partner
Paris
m.ponsard@uggc.com



Zhen Huang
Partner
Shanghai
z.huang@uggc.com



Maëva Slotine
Partner
Hong Kong
mslotine@slotine.hk



Ali Bougrine
Partner
Paris and Casablanca
a.bougrine@uggc.com



Jean-Nicolas Goossens
Partner
Brussels office
jn.goossens@uggc.com



Edouard Héliot
Partner
Paris / India Desk
e.heliot@uggc.com



Guilherme Poggiali
Partner
Brazil
guilherme.poggiali@manucciadv.com.br



Fabien Gagnerot
Senior Associate
Paris / India Desk
f.gagnerot@uggc.com



UGGC LAW FIRM