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IS THE COVID-19 PANDEMIC A CASE OF "FORCE MAJEURE" OR A CAUSE JUSTIFYING THE SUSPENSION OR THE REVISION OF CONTRACTUAL OBLIGATIONS?

Due to the COVID-19 health crisis, unprecedented government action is being taken at a European Union and worldwide level. Such measures affect the entire economic activity. The Luxembourg government, like many others, has taken drastic measures affecting citizens and businesses to manage the pandemic and address reduced economic activity.

In Luxembourg, the Government determined that only essential activities vital to interests of citizens should be maintained, including in particular activities relating to health, the provision of food and to the financial and insurance sectors. However, all handcraft, commercial and construction activities involving direct contact with customers have been required to close until further notice. The impact of these measures on such enterprises is for the most part a sharp termination of activity, if not an unbearable slowdown with an unknown duration.

This exceptional situation raises questions relating to the maintenance of contractual obligations between contracting parties: Could a party unilaterally decide put its obligations on hold? Could it oblige its counterparty to temporarily suspend the effects of the contract or even revise the terms of an agreement?

For contracts concluded under Luxembourg law, it will be a question of trying to restore a contractual balance, in the name of contractual freedom. Is it not our duty to determine the contractual balance extent in accordance with the good faith principle in order to match the parties' interests? Is it not the basis of contractual freedom to act in good faith?

This is an unprecedented situation and the legal tools available to businesses and individuals in response are limited. At first instance one might consider applying the "*force majeure*" theory in order to restore a contractual balance, this theory is limited, however, and it might be time to introduce contractual revision in Luxembourg law in the name of the principle of loyalty and good faith in the performance of agreements.

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1. Explanations of the "*force majeure*" theory

1.1. The concept of *force majeure*

To deal with a health crisis like the one we are experiencing, it is legitimate to ask the question of *whether force majeure* allows, under Luxembourg law, to counterbalance the imbalance of existing contractual relationships. In principle, *force majeure* should come to the aid of the economically weakest party or the party that is suffering as a consequence of the event.

In order to answer this question, it is necessary to define the concept of *force majeure*.

The Civil Code makes reference to *force majeure*, but does not define it. The reference to article 1148 of the Luxembourg Civil Code lays down the principle that "*there is no need for damages when, as a result of force majeure or a fortuitous event, the obligor has been prevented from giving or doing what he was forced to do, or did what he was prohibited from doing.* " Thus, in principle, the obligor of an obligation cannot be held liable since the non-performance of his obligation is due to a foreign cause. However, a foreign cause will not be enough to retain the qualification of *force majeure*. Other conditions must be met.

If *force majeure* is not contractually defined between the parties, then the latter must cumulatively fulfill three criteria, namely exteriority, irresistibility and unpredictability. The exteriority criterion means that the event must not be linked to the contracting parties, in other words, the event must occur outside the sphere to which the obligor must answer. The irresistibility means that the event must be insurmountable, and that the individual could not have acted otherwise. In other words, the event effects could not be avoided by appropriate measures. As for unpredictability, this criterion means that the event could not have been foreseen at the time of the conclusion of the agreement and that there was at that time no particular reason to believe that it would happen.

1.2. *Force majeure* characteristics in contractual matters

Establishing the exteriority condition does not pose any difficulty with respect to COVID-19. On the other hand, the conditions of irresistibility and unpredictability must be examined.

1.2.1. Irresistibility

Irresistibility generally takes the form of the impossibility of execution. Such impossibility must be total and final, as temporary or partial impossibility do not constitute a case of *force majeure*.

In contractual matters, irresistibility has a specific role characterising *force majeure*. If the latter (in combination with the exteriority and unpredictability criteria) exonerates the obligor, it is not because they would break any causal link between a "generating fact" and a "damage", but because the risk of an external event making execution impossible, is not normally insured by them, except legal or conventional warranty.

One must also distinguish between absolute impossibility of executing simple execution difficulties and circumstances which would make it more expensive for a party to execute.

A decision retains that French doctrine and case law tend to attenuate the rigor of the *force majeure* characteristics, provided that the obligor has taken all the measures required to avoid the realisation of an event.

1.2.2. Unpredictability

Unlike extra-contractual matters which determine unpredictability by reference to the day of the harmful event, contractual matter determine it at the time of the conclusion of the contract and not at the time of non-performance. The reason for this solution stems from the need to comply with the forecasts of the obligor, which only committed itself according to what was foreseeable at the time of conclusion of the agreement.

1.3. The French legal definition

From a comparative legal perspective, new article 1218 of the French Civil Code clearly defines *force majeure* in contractual matters as follows: "*There is force majeure in contractual matters when an event beyond the control of the obligor, which could not be reasonably provided for at the conclusion of the agreement and the effects of which cannot be avoided by appropriate measures, prevents the obligor's performance of his obligation. If the impediment is temporary, the performance of the obligation is suspended unless the resulting delay justifies termination of the agreement. If the impediment is final, the agreement is automatically terminated and the parties are released from their obligations under the conditions provided for in articles 1351 and 1351-1* ". This definition is in line with long-established French case law.

2. Can the COVID-19 situation and government response be described as force majeure?

2.1 A pandemic is not a case of *force majeure*

It is well known that an epidemic *alone* is not enough to constitute a case of force majeure. This was notably noted in the context of the dengue epidemic, the H1N1 virus or the Ebola virus. Thus, by application of the majority doctrine and a constant case-law, the irresistibility criterion will be lacking since the impossibility of executing the agreement is only temporary or partial, and that the contracting partner will have difficulties of execution or will be faced with circumstances that would make it more expensive. However, such events are not *force majeure* cases and the obligor will have to prove that it is absolutely impossible to meet its obligations due to the health crisis situation. To be exempt, the contractor will have to prove that it could not avoid the effects of the event by appropriate measures so that this event prevents execution.

The pandemic, however hard it may be, is not in itself sufficient to challenge the economics of contracts.

On the other hand, this pandemic combined with the strict measures decreed by Luxembourg and foreign governments to avoid the COVID-19 virus spread are likely to persist and could, at a given moment, allow the parties to suspend their contractual obligations [for/as] cases of *force majeure*.

2.2 Our approach is confirmed by a court decision on the COVID-19 pandemic

A decision recently rendered by the Colmar Court of Appeal has recently classified the risk of contagion by COVID -19 as *force majeure* (Colmar Court of Appeal, 6th ch., 12 March 2020, n ° 20/01098). A foreigner showing symptoms of this virus who was subject to administrative detention was unable to attend a hearing following his appeal. This person had been in contact with people likely to be infected with the COVID-19 virus and was subject of a 14-day containment order. The Court decided that: "*these exceptional circumstances, resulting in the absence of MG at today's hearing, are of the nature of force majeure, being external, unpredictable and irresistible, given the time limit imposed for ruling and the fact that, within this period, it will not be possible to ascertain the absence of risk of contagion and to have an escort authorized to drive MG to the hearing. In addition, the "CRA de Geispolheim" indicated that they did not have the equipment to hear Mr. G. during a videoconference, which means that such a solution is not possible for this audience either*. "

This decision demonstrates that the pandemic alone will not be enough to bring *force majeure*, but that it must be combined with other events making the execution of an obligation impossible.

3. Will the application of *force majeure* be sufficient to manage this crisis and the economy?

No, it is not a sufficient legal tool to redress the balance of an economy jeopardised by the termination of activities. Companies have followed the instructions of the Luxembourg government from the first day of the call for employees to stay at home and therefore productivity and profitability are in free-fall, without it being possible to have a correct estimate of the time that it will persist.

For example, opposing *force majeure* is not enough in the context as we know it today because even companies authorised to practice are suffering significant losses in turnover and have to continue to honor their commitments.

4. Is it time to introduce and benefit from the unpredictability theory in Luxembourg law?

4.1 The recent introduction of the unpredictability theory in French law

The aim here is to encourage the introduction into Luxembourg law of a major exception to the principle of the binding force of the agreement, namely the possibility of revising an agreement in the event of a change in unforeseeable circumstances which render execution excessively expensive for one of the parties.

Unpredictability is an exception to the principle of the binding force of agreements and a derivative with the execution in good faith which specifies that the conventions oblige not only to what is expressed there, but also to all the consequences which gives them the equity, usage or law.

If we refer to the French contract law reform, which entered into force on 1 October 2016, the unpredictability theory entered the French Civil Code, despite the great reluctance of judges. This theory has broadened the powers of judges, who are now able to substantially revise the terms and provisions of an agreement under certain conditions. The spirit of this reform, the frequent reference to the requirement of good faith expressed by case law and the consecration of the unpredictability theory, against actual prevailing case law, attest to this rise in power of the principle of good faith. Thus, "*does the creditor who demands the performance of his obligor's obligation behave like a contractor in good faith if his performance no longer corresponds to anything*? »(A. Rieg).

But we must go further by asking how the requirement of good faith is likely to lead to review. We know that whenever the creditor can, without sacrificing his interests, be useful to his obligor during the execution of the agreement, a cooperation obligation shall prevail. However, it is permissible to wonder whether this obligation to facilitate the execution of his contracting partner does not lead, in exceptional and hardly foreseeable circumstances, to questioning the initial link. We would then go from an obligation of cooperation (see the obligation of cooperation in the performance of the contract: JCP G 1988, doctr. 3318) to an obligation to renegotiate in order to resolve major difficulties or obstacles to the execution of the agreement (V. The duty of loyalty in the execution of the contract: LGDJ 1989).

In other words, the judge would have the power to intervene in contractual relations.

If judges remain reluctant to intervene in contractual relations, it does not prevent that "*the inspiration [of the French reform] is part of a deeply European movement - of German influence (R. Cabrillac, Droit comparé des contracts contract : LGDJ, 2nd ed., 2016, n ° 35. - On the absence, however, of a general principle of good faith in English law, VC le Gallou and S. Wesley, Business English law: Domat, 2018, n ° 517) in which good faith irrigates contract law: this is the case with the Unidroit Principles relating to international trade which retain a duty of good faith with an imperative character and the Principles of European law. Finally, the draft European Contract Code of the Pavia group, without making it a general principle, makes multiple references to it, as does the draft Common Framework of Reference (proposal for common guiding principles in European contract law association Henri Capitant and of the Society of comparative legislation founded on: liberty, security and loyalty: Common contractual principles, (D. Mazeaud and B. Fauvarque-Cosson: SLC, 2008, p. 17 s.)* ". (JurisClasseur Code Civil Articles 1103 and 1104 - Single fasc: contracts and obligations. Binding force of the contract. Good faith §12).

In the name of this principle of the binding force of the contract, does contractual freedom have no limits?

And if we continue to apply the rigid principle of the famous "*Canal de Craponne*" judgment of the French Court of Cassation of 6 March, 1876, the contractual situation remains frozen from its beginning to its termination, in application of the principle according to which: " *in no case, it belongs to the courts, however fair their decision may appear, to take into consideration the time and the circumstances to modify the agreements of the parties and substitute new clauses to those which have been freely accepted by the contracting parties* ". If this principle is not overturned, contractual relations remain frozen.

However, common interest of our society should be to rebalance the economic forces involved, in the case of exceptional circumstances and to be able to revise the terms of an agreement, as an alternative to its pure and simple realization for non-performance of one of the parties, or even the suspension of the agreement on the basis of the exception for non-performance.

4.2 Some Luxembourg advances on the interest of including unpredictability in agreements

In recent years, the doctrinal movement has tended to question this ban on contractual review. Luxembourg doctrine (*D. Spielmann and H. Dupong, "Some reflections on the theory of unpredictability", in The bicentenary of the Civil Code: a Luxembourg contribution, ed. Portalis, 2008, p. 150 et seq*.) rightly causes this principle to argue in favor of admitting the unpredictability theory. Also the Court of Cassation rendered in a renowned judgment dated 24 October 2013 a decision under which it ruled on the unpredictability theory. The Court of Cassation decided that "*the decision rejecting the unpredictability theory invoked to obstruct the execution of a sales agreement relating to building land is justified, as soon as the price increases between the conclusion and the execution of this agreement was entirely foreseeable*". Motivation rightly questions commentators. Would it be, implicitly, a wish of the Court of Cassation to open a door to the admission of the "*unpredictability theory*" to allow the judge to intervene in the contractual relationship? Commentators noted that the Court of Cassation had decided, as the Court of Appeal had done, that the conditions of the "unpredictability theory" had not been met in this case. "*Does this mean that, if we had been faced with a change in unforeseeable circumstances, the rejection of the unpredictability theory would not necessarily have been justified […] Nevertheless, if we certainly cannot draw from this decision that the Court wanted to consecrate the unpredictability theory, one can note with interest that it did not take the opportunity to reaffirm its rejection in Luxembourg. And, in the current context of questioning the traditional solution in France and in Belgium, this is, in itself, important information* "(Pascal Ancel, Professor at the University of Luxembourg; pasicrisie Tome 36 (2013-2014) 393.

This decision can only encourage the codification of the unpredictability theory into Luxembourg law.

5. What is the unpredictability theory?

At the current stage of the applicable regulations, reference should be made to French law to illustrate how it works in practice.

Unpredictability is defined under article 1195 of the French Civil Code as follows: "*If an unforeseeable change in circumstances at the conclusion of the agreement makes execution excessively onerous for a party who had not agreed to assume such risk, the latter may request a renegotiation of the agreement from his contracting partner. The party continue to perform his obligations during the renegotiation. In the event of refusal or failure of the renegotiation, the parties may agree to the termination of the agreement, on the date and under the conditions they determine, or ask the judge by mutual agreement to adjust it. Failing agreement within a reasonable time, the judge may, at the request of a party, revise or terminate the agreement, on the date and on the conditions he fixes*".

More precisely, according to French doctrine, three conditions are necessary to allow a party to act on the basis of article 1195 of the French Civil Code. "*The first condition is negative and relates to the suppletive nature of the unforeseen: the party invoking it must not have agreed to assume the risk. The text thus leaves it to the parties to arrange under conditions different from the legal text the conditions and effects of the unforeseen by clearly identified renegotiation or adaptation clauses. The second condition relates to the unpredictable nature of the change in circumstances invoked. The text does not require any upheaval, a change of circumstances - which may be gradual - being sufficient, and must in any case be unpredictable at the time of the conclusion of the contract. The party claiming the duration of the unforeseen event must demonstrate that not only did it not anticipate the difficulties to come, but that, in addition, they were not reasonably foreseeable. The third condition is due to the excessively expensive effect of the latter, which makes it possible to distinguish unforeseen from force majeure. In both cases, the disturbance affecting the contract is due to a change in circumstances after its conclusion, unforeseeable at the time of the conclusion of the contract. However, force majeure assumes that the new circumstances made the execution of the contract impossible, and not only more difficult (in the sense of "excessively expensive").*» JurisClasseur Synthesis Civil Code- Effects of the contract between the parties –Essential- August 27, 2019- Yves PICOD, Associate Professor of the Faculties of Law, Director of the Intermed Doctoral School, UPVD, Co-responsible of the CDED.

6. Conclusion

In conclusion, such a legal tool would allow this crisis to be managed contractually today, without prejudicing one or the other party if one takes the point of view of the general interest.

Therefore if Luxembourg law had this legal tool as it is integrated in the French Civil Code as during the reform of contract law in 2016 and allowing the revision of contracts, a health crisis which the entire world economy and the Luxembourg restrictive government measures resulting therefrom could constitute a new circumstance which was not foreseeable at the time of the conclusion of the initial agreement and which seriously disrupts the contractual economy.

Would it not be more effective to mitigate, or moderate the outright application of the termination of an agreement to a simple suspension or renegotiation of contractual conditions and obligations by accepting in Luxembourg law the unpredictability theory on the basis of the provisions of article 1195 of the French Civil Code, in particular with regard to circumstances within the framework of a pandemic and government measures pronounced to this effect?

The health crisis we are experiencing would be an opportunity to change Luxembourg legislation and try to maintain the economic balance currently in jeopardy.