

**CORONAVIRUS :  
FORCE MAJEURE? HARDSHIP?  
DEFERRAL OF OBLIGATIONS? SOME PRACTICAL ELEMENTS  
ADVICE FOR THE ANALYSIS AND REDACTION OF CLAUSES**

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1.- Coronavirus has had devastating effects on our economy and the impact of this pandemic on contract law has been as virulent as the coronavirus itself.

It is appropriate to introduce this study by recalling the milestones of the coronavirus phenomenon in view of the change in circumstances.

Outbreak of the virus in Wuhan province, Hubei. On 31 December 2019, the authorities announced for the first time clustered cases of pneumonia of unknown origin; all 41 infected people had attended the Huanan food market.

Then the virus spread throughout China, crippling trade with China. It then spread from China to the rest of the world, but we will not go into detail in this study.

Hard-hit Europe has taken containment measures; these have been taken at the state level. The containment measures were initiated in Belgium on 13 March 2020. On 17 March, Luxembourg triggered the state of crisis that allowed it to take quick legislative decisions and close all construction sites.

Given the scale of the pandemic, these measures have been strengthened, including the closure of many businesses and border control.

Finally, the virus is temporary; thus, the containment was, at the time of writing of this article, gradually lifted in Wuhan province.

2.-The problems that can arise are legion. We will limit ourselves to a few examples.

You are committed to delivering goods that come from China; Chinese factories are closed because of coronavirus.

You have received an order to close your European factory; you cannot provide as a result of this closure.

You had to perform on the spot abroad; Or your flight is cancelled.

A framework contract for the delivery of goods has been concluded; you were due to deliver by March 30 and are unable to deliver because of the corona; the buyer had paid a 30% down payment; can he recover the deposit as a result of the force majeure?

3. We will study successively force majeure (chapter I) and hardship or unpredictedness in a second stage. (Chapter II).

## **CHAPTER I. FORCE MAJEURE**

3.- After giving the definition of force majeure, we will first consider whether the coronavirus crisis espouses the conditions of force majeure and then focus on drafting the clauses. we will discuss the containment measures (up to 3) the effects of force majeure ('4)we will end with advice on the analysis and drafting of the force majeure clauses ( '5)

### **§1. DEFINITION**

4.- Force majeure exempts the debtor from an obligation when circumstances arise with the following characteristics:

- be unaccountable to the party who invokes it.
- be unforeseeable and unavoidable.
- irresistibly result in an impossibility to carry out the contractual obligation.

It has the effect of dissolving the contract if the obstacle is final and suspending it if the obstacle is temporary.<sup>1</sup>

HYPOTHESIS			REGIME	
Circumstances		Effects	Notification	Circumstances
Unaccountable	Unpredictable	Impossibility of execution	Unaccountable	Unpredictable

### **§2. CONDITIONS OF APPLICATION.**

#### **2.1. Non accountable to the party that invokes it**

5.- Force majeure must be external to the party that invokes it. It is often felt that an external cause is not necessarily required and that the disruptive event must simply not be attributable to the party who invokes it. This applies, for example, to the case of the disease (in the case of coronavirus), it is a disease but its cause is directly external to the party that invokes it since it is a virus that comes from abroad and spreads at an impressive rate).

What if several faulty and unaccountable causes contribute to non-execution? For example, the seller was scheduled to deliver on November 30; it is more than two months behind

<sup>1</sup> See not. L. CORNELIS, *Algemene theorie van de verbintenis*, Antwerp, Intersentia, 2000, 649, No. 518

schedule and then invokes the coronavirus crisis. In this case, the seller will remain responsible<sup>2</sup>. Let us take another example: under a framework long-term supply contract, the seller had to contractually keep a stock of 1,000 cases from China; he had not kept such a stock and claimed the shortage of parts because he could no longer buy from China because of the coronavirus. The buyer may rightly refuse the application of force majeure; indeed, his contractual fault, the failure to maintain sufficient stock, contributed to the non-performance of the sales contract.

## 2.2. Unforeseeability

6.- The notion of unforeseeability is all relative; thus the pandemic was envisaged in 2013 in a report of the German<sup>3</sup> parliament; Bill Gates explained in a conference in 2015 that we were not prepared for the next pandemic; does this mean that the current coronavirus pandemic was predictable? we must refer to the prudent and diligent man placed under the same circumstances and there we will all agree that this pandemic and its effects were not foreseeable.

Based on the evidence mentioned above, the existence of the virus had to be relied upon as early as January 15, 2020. In other words, this event had to be taken into account by the parties in their contractual negotiations as of that date. The buyer will not be able to avail himself of the unpredictability of the coronavirus at this time.

It is important, to distinguish the *unforeseeability of the event* on the one hand, and the *unforeseeability of its effects on the contract* on the other hand. If the event is foreseeable but its effects on the contract are not, the debtor will still be able to avail himself of the unpredictability. Let's resume the development of corona. Who could have foreseen on 15 January, when the coronavirus could be taken into account by the contracting parties, that it would experience such a spread on other continents and especially in Europe?

Let's take the following example. You commit on February 5, 2020 to make a product delivery for April 1, 2020; you know coronavirus and its effects in China at this time, but you did not know that your factory had to be closed on 18 March 2020 under the Belgian ministerial decree; therefore, you can always avail yourself of the unpredictability of the measures decreed by the Belgian government, as they were unpredictable on 5 February 2020.

## 2.3. Impossibility to perform the performance.

7.- You, an intermediate Belgian supplier, are committed to selling goods; the only supplier is from China and the Chinese company is closed. You are clearly in a force majeure situation. But if *alternative* supply opportunities are present, the debtor must resort to them. Let's take the previous example; An Argentinian supplier can supply the same goods; you, an intermediate Belgian supplier, have to turn to this other supplier. If the price is substantially higher, then you will have to see if you can invoke the hardship in such a hypothesis, which we will analyze later.

The impossibility must be reasonably assessed. <sup>4</sup> The Court of Cassation has had the opportunity on several occasions to state it.<sup>5</sup>

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<sup>2</sup> See on this issue, D.PHILIPPE, *Changing circumstances and upheaval of the contractual economy*, 1986, Bruylant, p.621.

<sup>3</sup> Report on risk analysis in civil protection, 3.1.2013, German Bundestag 17th parliamentary term, printed matter 77/12051.nr 2.3., p5. (comment appréhender une pandémie en se référant au SARS)

<sup>4</sup> A. VAN OEVELEN, 'Force majeure and imprevisión in Belgian contract law', *TPR* 2008, 608, nr. 5; R. CABRILLAC, *Law of Obligations in Private Law Series*, Paris, Dalloz, 2002, 110, nr. 154; X. GODS, *Scope and Limitations of the Convention-Law in M. FONTAINE, Contractual Obligations*, Brussel, Editions of the Young Bar 1984, 188; J. HEENEN, "The responsibility of the shipping company and the notion of force majeure," notes Cass. April 13, 1956, *RCJB* 1957, 94,

<sup>5</sup> Cass. May 13, 1996 *Not.* 455 and Cass. September 21, 1991, *R.W.* 1991-91, 682.

On the other hand, what if the impossibility is the result of another standard to be met? Let's take a simple example. You have to deliver goods that come from Russia; Russia is under embargo following the events in Ukraine; you are unable to deliver as a result of the embargo and it is a *fait du prince* constituting force majeure; therefore the standard to be met takes precedence over the contractual commitment.

What if there is a conflict of standards; What if the standard to be respected is the protection of life and health covered by Article 2 of the European Convention on Human Rights which urges you not to carry out while the containment measures allow you to continue working? The protection of life and health should in principle take precedence, and this hypothesis will be returned to the study of containment measures later.

8.- The *mere fact of running out of liquidity* is not a case of force majeure and it is written that the debts of sum of money do not fall under the scope of force majeure by referring to the adage *genera non pereunt*.

In a judgment of 28 June 2018,<sup>6</sup> the Court of Cassation confirms that financial incapacity cannot constitute a case of force majeure, even if this incapacity is due to external circumstances which constitute a case of force majeure for the debtor. We will nuance the effects of this judgment in the following paragraph with respect to the impossibility of use.

It is not our ambition to take up here all the measures that have been taken by the banks and by the public authorities to help businesses.

But let us remember that under section §1244 of the Civil Code, the judge may grant the unfortunate and in good faith debtor terms and time. It seems pretty obvious to us that this article will be able to find application in the wake of the coronavirus crisis.

#### **2.4. Various questions: evidence; lease; jurisprudence.**

9.- The burden of proof rests with the debtor who invokes force majeure and the debtor will be well advised to retain all the evidence of force majeure.

10.- Lease agreement.

What if a store has to close? The tenant refuses to pay on the grounds of force majeure; the owner counters by saying that the lack of liquidity is not a case of force majeure as stated above; it will then be necessary to refer to Article 1722 of the Civil Code, which states that the lease is void in the event of a loss of the rented thing; the impossibility of use may give rise to the application of this article because it can be equated with the loss of the rented thing. On the other hand, it can be considered that if the tenant is deprived of enjoyment, the landlord does not fulfil his obligations to make available the rented property as contractually agreed, the tenant being then entitled to suspend the payment of rents.

Reading the lease may prove valuable in the search for the solution to this question; in fact, the use of the property rented at a particular destination (e.g. clothing store) is often expressly provided for; force majeure will then be more easily applied since the property can no longer be available as stipulated in the contract.

*Jurisprudence.*

11.- Of course, the case law is not yet very present. One example is a judgment of the Colmar Court of Appeal of March 12, 2020.<sup>7</sup>

A foreigner appeals a first-degree order. He cannot appear at the hearing; the court recognizes a case of force majeure in these terms:

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<sup>6</sup> Cassation 28 June 2018, C.17.0701.N/1.

<sup>7</sup> 6th, foreigners, judgment 20/01098, published at Dalloz, doctrine.

"The appellant, Mr. A X, could not be brought to the hearing at the Court of Appeal, because of the exceptional and insurmountable circumstances, of the character of force majeure, related to the ongoing epidemic of Covid-19; in effect, we were informed in the morning that a foreigner detained at the Geispolsheim CRA with symptoms of the virus was being screened and had been in contact with the staff of the Order of Malta during an hour-long interview. The staff of this association is therefore subject to a 14-day confinement. However, the concomitant presence in this centre of this person and Mr. To X, who himself was also assisted by the staff of the Order of Malta in drafting his act of appeal; therefore the person concerned is also likely to have been in close contact with the foreign person who may be affected by this virus. Therefore, these exceptional circumstances, resulting in the absence of Mr. A X at today's hearing, are of the character of force majeure, being external, unpredictable and irresistible, given the time required to rule and the fact that, within that time, it will not be possible to avert the absence of a risk of contagion and to have an escort authorized to take Mr. X to the hearing. In addition, the Geispolsheim CRA indicated that it did not have any equipment to hear Mr. A X in the context of a video conference, which it follows that such a solution is also not possible for this audience. Accordingly, the hearing takes place in the absence of Mr. To X, that Master F G-H, a lawyer at the Colmar bar, who was *ffi* committed to the law, agreed to represent."

We have resumed this judgment because it is very recent and it illustrates the exceptional situation in which we find ourselves, although the facts do not concern contract law.

### **§3. THE FAIT DU PRINCE**

12.- As noted in the introduction, the pandemic required state intervention in different parts of the world. They have taken various measures to prevent the spread of the virus, which have a substantial impact on the economy and on contracts.

Under Belgian law, we have, to date, different successive ministerial orders, on 13, 18, 23 and 27 March and 3 April 2020, relating to the containment following the coronavirus. Other orders will follow Here, Let's take Articles 2 and 3 of the March 18, 2020 order:

"Art. 2. *Telework at home is mandatory in all non-essential enterprises, regardless of size, for all staff members whose duties are appropriate. For functions to which telework at home cannot apply, companies must take the necessary measures to ensure compliance with the rules of social distance, the maintenance of a distance of 1.5 meters between each person. This rule is also applicable for employer-organized transportation. Non-essential companies unable to comply with the above measures must close.*

Art. 3. *The provisions of Article 2 do not apply to businesses in the crucial sectors and to essential services covered by the annex to this order. However, these companies and services are required to implement, as far as possible, the telework system at home and the rules of social distance.*"

In Luxembourg, total containment has been in place since March 17th. In many countries, a distinction is made between essential and other services.

13.- Essential services can therefore be provided during periods of confinement. However, the rules of telework and social distancing must be respected, but unlike non-essential services, where possible. Given the importance of health and the dangers of contamination, the concept "as far as possible" must be interpreted in the sense that the best efforts must be made to respect the rules of telework and social distancing.

#### **§4. EFFECTS**

14.- The first step is to *inform* the co-contractor of the force majeure event and its effects on the contract. This is not expressly provided for by law but may be based on article 1134, paragraph three, of the Civil Code, which provides for the good faith implementation of the conventions.

Notification can be preventive; for example, coronavirus occurs but may pose risks to the performance of the contract; the contractor is directly notified even if the execution of the contract is still possible. It can be circumstantial; it comes at a time when the contract is impossible to perform. If it is circumstantial, it must also be detailed: the debtor must explain why he invokes force majeure. Since communication between contractors is essential, we can only advise preventive notification.

As the law is silent on notification and its forms, its necessity and content will be left to the judge's discretion.

15.- Force majeure results in the dissolution of the contract if it is final and the suspension of the contract if the effect is temporary. It will result in the dissolution of the contract if, although the effect of the event is only temporary, the duration of the suspension causes the performance of the obligation to lose interest.

The force majeure operates for the future, and therefore *ex nunc*, unlike the termination by fault or annulment of the contract which operate in principle *ex tunc*. Force majeure therefore has no retroactive effect. This effect *ex tunc* is considered an application of the broader figure of the caducity of the convention because of the disappearance of its object.<sup>8</sup>

This tradition is, however, disputed, as part of the doctrine considering that there is no reason to subject dissolution by application of risk doctrine and termination for wrongful non-performance to two different regimes.<sup>9</sup> We believe that it makes sense for force majeure to operate *ex tunc*; indeed, it is by the impossibility of performance that the contract ceases its effects; there is no justification for nullifying the past that has been properly executed; in the event of annulment, for example, the contract was flawed at its conclusion; the resolution

16.- Is it possible to estimate that the contract can be dissolved before its performance has been made impossible (anticipatory breach)?

The case law does not rule on this issue, but the possibility of terminating the contract even before the breach is verified is recognized in the draft reform of Belgian contract law, in the Vienna Convention on International Sale in Articles 71 and following. What can be done when the debtor is at fault in the above assumptions must also apply in case of force majeure. A solution that guarantees the effectiveness of the contractual relationship must be found and it is not useful to enclose one of the parties in a meaningless contractual relationship.

17.- What are the effects of force majeure on the parties' performance in a synallagmatic contract?

The doctrine of risk is being applied. Authors have the habit of quoting the adage "*Res perit creditor*": the thing perishes at the creditor's risk. In other words, the creditor cannot claim anything from his co-contractor.

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<sup>8</sup> VANDEN BERGHE, O., "Chapter 4 - Force majeure" in *De duur en het einde van handelscontracten beheren - Gérer la durée et la fin des contrats commerciaux (Manage the duration and end of trade contracts)* Ghent, Larcier Publishing House, 2009, p. 61-62

<sup>9</sup> F.GLANSDORFF, "Force Majeure," *J.t.*, 2019/18, n° 6772, p. 355-358.

However, there are three exceptions to this principle:

- When the debtor was already put in default;
- When the parties have; by a contrary clause, extended the debtor's liability to the case of force majeure;
- Where the debtor is bound, as a result of a particular legal provision to act in case of force majeure.

For the effects of force majeure on a *synallagmatic* contract, we will also turn to risk doctrine. It will be necessary to distinguish between whether the other party's obligations are extinguished or not.

If the co-contractor remains required, it will be said that the loss of the contract is for him: the burden of risk falls on him.

If, on the other hand, this co-contractor is also relieved of its commitments, it will be said that the loss of the contract is for the debtor of the obligation extinguished because of the external cause: the burden of risk then falls on that debtor.<sup>10</sup> Practically, if the seller is unable to deliver for force majeure, he is released while the buyer is also exempt from paying the price.

In practical terms, quid in the event of a sale with a down **payment?** The seller cannot deliver given the force majeure finding its cause in the coronavirus. The buyer has made a 30% down payment? Is he entitled to a refund of this down payment?

Based on the principles set out above, we have seen the supplier is released from its obligation to deliver, and based on risk doctrine, the customer should not pay the price. However, if expenses have already been advanced by the seller, the seller will be able to keep them.<sup>11</sup>

## **§5. TIPS FOR CONTRACT DRAFTING A FORCE MAJEURE CLAUSE**

18.- Beautiful studies have been devoted to these clauses and it is not the subject of this brief study to carry out a new analysis of the clauses but simply to show how to apprehend the coronavirus crisis through these clauses.

Since this pandemic, the force majeure clause will no longer be drafted as before.

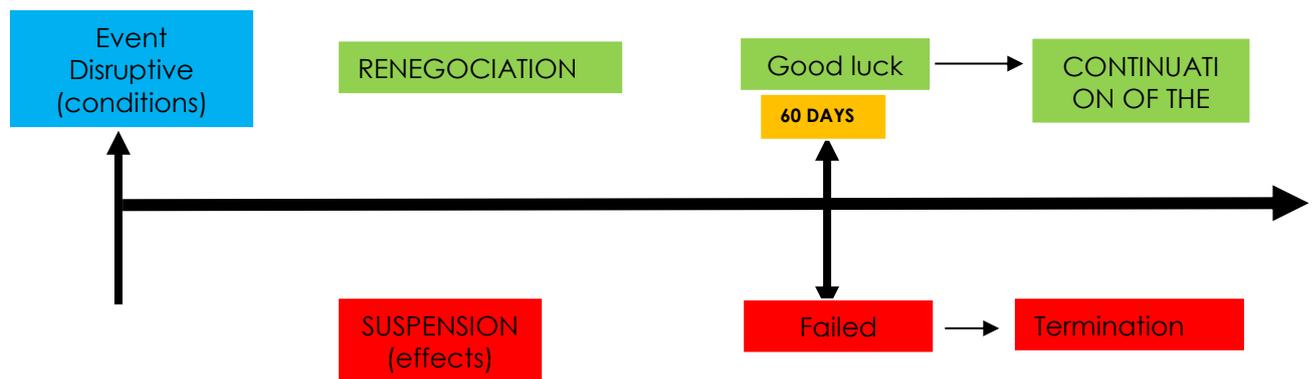
Let us recall the structure of the force majeure clause which corresponds to that of the concept of force majeure that we have taken up in the table above, but the renegotiation is put in the spotlight.

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<sup>10</sup> Wéry, P., "Subsection 3 - The Foreign Cause of Liberation, Risk Theory and Unpreedmental" in *Bond Law - Volume 1*, Bruxelles, Éditions Larcier, 2011, p. 538-562

<sup>11</sup> See. for the application of similar principles in terms of conditions Precedent B.KOHL, "Chapter I - The Building blocks of the sale" in *The sale of real estate*, Bruxelles, Éditions Larcier, 2012, p. 7-27

Timeline 1.



It is known that, in addition to defining the concept and its conditions of application (externality, unforeseeability and impossibility of performance) the clause often sets out the circumstances that may give rise to the invocation of force majeure and it is certain that the term pandemic will now be included.

Let's take the following clause:

- "No Party shall be liable for any failure to perform its obligations where such failure is as a result of Acts of God (including fire, flood, earthquake, storm, hurricane or other natural disaster), war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation, terrorist activities, nationalisation, government sanction, blockage, embargo, labour dispute, strike, lockout or interruption or failure of electricity [or telephone service], **pandemic** and no other Party will have a right to terminate this Agreement under Clause 19 (Termination) in such circumstances."

We added the pandemic to the earlier clause. The advantage of inserting the circumstance will be to avoid discussion on whether coronavirus constitutes a hypothesis of force majeure; some believe that previous areas of death (H1N1) are not a case of force majeure, so the current pandemic is not in itself a case of force majeure.

19.- To proceed with the analysis of components of the clause that have caught our attention in the context of this pandemic.

- *Notification*

The following clause can be taken:

"The party invoking the force majeure case should, immediately after the occurrence, send an express and recommended notification to the other party."

A notification is important, as we have seen, for the fluidity of communication between contractors; this notification, as we have seen, may take place in a preventive manner, which is not expressly provided for in this clause. This preventive notification is important in the case of covid 19, given the evolutionary nature of this pandemic on the contract. Just look at the various ministerial orders that have been issued in Belgium.

We no longer believe it is appropriate in the digital age to require a recommended mail notification.

Another more comprehensive clause:

*"The Contractor shall forthwith notify the Buyer as soon as the said Special and Excepted Risks have ended."*

*"The termination of the force majeure shall similarly be notified."*

*"The affected Party shall also provide notice to the other Party of*

- i. *with respect to an ongoing Force Majeure Event, the cessation of the Force Majeure Event, and*
- ii. *the affected Party's ability to recommence performance of its obligations under this Agreement*

*as soon as possible, but in any event, not later than seven (7) days after the occurrence of each of (i) and (ii) above or, where the affected Party has (acting reasonably) vacated the Site, or its relevant property, as the case may be, as a result of such Force Majeure Event, not later than seven (7) days after the date it becomes or should have become aware of such occurrence."*

- *Effects; Renegotiation.*

*"The contracting parties are momentarily untied, totally or partially, from their obligations in the case of force majeure having the unpredictability and being beyond the will of the parties, which is responsible for the party availing itself of the written proof of the force majeure nature of such a case within thirty days.*

*If, due to force majeure, one of the parties is prevented from fulfilling its contractual obligations for a period of more than three months, the contracting parties meet to determine the conditions for the continuation of the contract or the termination of the contract."*

We can only stress the importance of renegotiating the contract. If the contract is concluded now, a specific provision for Covid 19 may also be provided, if its influence on the contract can be apprehended now.

Among the elements of the renegotiation is the deferral of payment obligations.

Thus, the return of the deposit in the event of force majeure can be foreseen if, as a result of the covid-19, the performance cannot take place.

## 20.- Booking clause.

A contract may provide that machines are reserved for the contractor to carry out work. It is feared that the co-contractor will not provide the raw materials plans and other instructions intended to carry out this work. These must be supplied by a subcontractor who is in a containment situation and cannot deliver the raw materials.

One can foresee for years the contract signed these kinds of hypotheses.

Some elements in the drafting of the clause:

- First, as soon as the first forebodings of difficulty of execution appear, the contractor must be notified
- A time limit for cancellation of reservations to reallocate the machines must be stipulated;
- If force majeure is not proven, a penalty may be provided for the booking fee.

- If force majeure is proven, a renegotiation can be planned with indications of the risks to be borne on both sides.

- *Masks or respirators. Delivery*

A renegotiation can be planned if the number of masks ordered does not arrive due to a force majeure caused by coronavirus. Clauses can also be inserted about respirators.

For the buyer, it will be the clause providing penalties in case of delay that will be preferred but in the head of a Belgian seller who is intermediate, it will be the force majeure clause that will be required to exempt him from liability if the masks do not arrive from his foreign supplier.

The two clauses can be combined: no liability for the first fortnight and then penalty clause beyond that period.

- *Obligation to limit one's own damage:*

*"In the event of force majeure, the contracting parties are required to make every effort to remove and/or lessen the difficulties and damage caused, in which case the other party will be constantly kept informed of the situation. Otherwise, the defaulting party may be claimed damages by the other party. ».*

We can only insist on the appropriateness of providing in the contract a renegotiation clause in case of force majeure; this will allow the parties to better develop alternative solutions; for example, if the goods cannot come from China, a supply from Argentina may be considered and a price renegotiated; the survival of the contract is at stake.

- *During the suspension:*

*« Buyers shall be at liberty to procure from other suppliers any deficiency of deliveries caused by the operation of this clause. »*

If the suspension causes the contract to lose its usefulness, it can be foreseen that the contract will be dissolved. Thus, you order goods on February 1 in China; you had to insert these goods into a product to be delivered absolutely for the first of March, you cannot make the delivery on March 1st as the products did not arrive from China; therefore the force majeure will have a final effect since the delivery of the product has lost all utility for the final buyer.<sup>12</sup>

In addition, the post-suspension or post-confinement period may also be provided; the suspension may have changed the supply conditions at the time.

- *Damage/costs*

*"For delays and non-performance of obligations due to force majeure, neither party can claim penalties, interest or any other compensation or participation in the injury suffered by the party because of force majeure."*

This clause is quite obvious, but it avoids any discussion.

Sometimes during the suspension period, costs are incurred; for example, the seller carries out transport or stores goods; it will be useful to predict who will bear the costs of transportation or storage.

## **CHAPTER II HARDSHIP or IMPREVISION**

### **§1. DEFINITION**

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<sup>12</sup> See D.PHILIPPE, Temporary force majeure and the suspension of contractual obligations, in *The law of obligations in the company*, La Chartre, 2017, pp.219 to 243.

21.- The doctrine of unforeseen circumstances is intended to have the adjustment of the contract admitted when circumstances with these characteristics arise:

- be unaccountable to the party that invokes it;
- be unpredictable and unavoidable
- irresistibly lead to an upheaval in the contractual economy.

Hardship leads to renegotiation of the contract

Hypothesis			REGIME	
Circumstances		Effects	Notification	Circumstances
Unaccountable	Unpredictable	Frustration of purpose Excessively expensive Disruption of the contractual economy	Unaccountable	Unpredictable

## **§2. CONDITIONS OF APPLICATION**

22.- The hardship or impracticability will also be very common in the coronavirus crisis; indeed, the difficult circumstances in which the coronavirus entails us, will often make it much more difficult to perform the contract; for example, as a result of containment measures (telework, containment measures) the execution of your services has become excessively difficult; you will be able to avail yourself of the unpresidedness; it is not expressly recognized in Belgian<sup>13</sup> law and it is therefore highly recommended to arrange it contractually as we will explain.

Let's take the example outlined above. You cannot source from China and you use force majeure; there is an alternative source of supply in Argentina but the cost is twice as high and choosing that source of supply would lead to an important loss for you; you can invoke the hardship to renegotiate the contract.

For the application of this doctrine, we can refer to what we have outlined on the unaccountableness and unpredictability in terms of force majeure. The upheaval of the contractual economy is different from the impossibility that finds application in force majeure. Indeed, execution should not be impossible but excessively onerous. This is the case in the aforementioned example of supply to Argentina.

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<sup>13</sup> We are not going to repeat what we have already written and we refer to the most recent article in D. PHILIPPE, La théorie de l'imprévision, p. 467, in *Reforming contract law*, Comparative analysis around Luxembourg law, Larcier, 2020, under the direction of P. ANCEL - A. PRUM,

The effect of the unforeseen circumstances doctrine is the adjustment of the contract and not the suspension or dissolution. Thus, in the example mentioned above, the price difference between the Argentine product and the Chinese product can be shared between parties, for example, in half.

### **§ III. TIPS FOR CONTRACT REDACTION**

23.- A short clause can be put forward:

*"In the event of a fundamental change in circumstances that place an unfair burden on one of the parties arising from this Protocol, the parties will consult with each other to jointly find fair adjustments to that agreement."*

It does not mention circumstances, and therefore not the pandemic. If you write a clause with exemplative circumstances, you will naturally have to include the pandemic from now on. Thus, one can take the following clause

*"If owing to changed circumstances **such as** changes in monetary values or discriminatory Governmental action or regulations, **pandemics** or differential customs duties unduly discriminating against the origin from which A is then supplying to B, the continued operation of which is causing undue hardship to either party, that party shall have the right to require the other party to participate in a joint examination of the position with a view to determining whether revision or modification of the provisions hereof is required and if so what revision or modification would be appropriate and equitable in the circumstances "*

If the contract is concluded now, a specific provision for Covid 19 may also be provided, if its influence on the contract can be apprehended now. Thus, it can be expected that if the contractually planned source of supply is dried up, the parties will renegotiate in order to find another source of supply and share the costs.

The post-containment situation can also be accurately predicted. It is possible that the performance of the contract will be much more difficult and that a renegotiation will have to be undertaken between contracting parties.

### **CONCLUSIONS**

24.- There is no doubt that coronavirus is and will be invoked to discharge its obligations in a wide range of situations. We will witness a firework display of interrogations. One can only advise to ensure a judicious reaction of the clause, thus allowing to control, at least in part, uncertainty.