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Client Alert Commentary

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Impact of COVID-19 on French Law Governed Contracts: Update

Companies may consider reassessing their options regarding contract enforcement in light of the recent court decisions handed down and regulatory measures adopted.

Key Points:

- A number of French courts have considered that quarantine and lockdown measures may qualify as force majeure events, yet parties to a commercial dispute may not rely solely on this case law.
- Companies may consider the availability of the specific measures adopted to prevent businesses from failing as a result of the outbreak and the related regulatory constraints.
- As French courts start to resume full judicial activity, litigants should keep in mind the adaptations made necessary by the health crisis, including with regards to the computation of statutes of limitations and the organisation of hearings.

On 9 May 2020, the French Parliament voted to extend the duration of the state of health emergency until 10 July included, acknowledging the persistence of COVID-19 in France.1 Meanwhile, the ongoing restrictions to freedoms of movement, enterprise, and assembly continue to disrupt businesses' operations and commercial relationships. Consequently, parties to a French law governed contract may have to invoke, or face situations in which the other party to the contract might invoke, the existence of a force majeure event, a hardship situation (imprévision), a contractual non-performance (exception d'inexécution), or the lapse of the contract (caducité). (See Latham's 25 March Client Alert Impact of COVID-19 on French Law Governed Contracts.) In addition, parties may seek the protection of the COVID-19-specific measures adopted by the French government.

French courts' appreciation of the force majeure exemption

A force majeure event is defined as one (i) that is beyond the control of the debtor, (ii) that could not reasonably have been foreseen when the contract was signed and (iii) the effects of which could not be avoided through appropriate measures. The event must prevent the debtor from performing his/her/its obligation and not simply render that obligation more onerous, less profitable, or more difficult. Therefore, the force majeure exemption may not be relied on for obligations to pay a sum of money.

If the obstacle is temporary, the performance of the obligation is only suspended (unless time was of the essence) and the defaulting party may not be held liable for the suspension. If the obstacle is permanent, the contract is terminated and the parties are discharged from their respective obligations and exempt from any liability.

An analysis of pre-COVID-19 French case law shows that courts have so far refused to characterise epidemic outbreaks as force majeure events, holding them to be either foreseeable, avoidable or irrelevant to the performance of the contract in the circumstances of the dispute.

At present, parties will most likely rely on the quarantine and lockdown measures that have been ordered by the authorities to prevent the outbreak from spreading (which may be qualified as a *fait du prince*) rather than COVID-19 itself. Judges will perform a case-by-case assessment taking into account the characteristics of the COVID-19 health crisis, the regulatory measures taken to limit its spread, and the circumstances of the dispute at stake. The Conseil d'Etat recently emphasised this necessity for a case-by-case assessment of the availability of the force majeure exemption.[2]

So far, several decisions handed by various courts of appeal have recognised such regulatory measures as force majeure events, including (i) foreign authorities' decisions to temporary suspend transfers of illegal aliens and/or to cancel international flights as part of their response to the health crisis, preventing the French administration from transferring an illegal alien placed in administrative custodies to a foreign country in due time and (ii) measures taken by the administration and/or by courts to avoid physical contacts during the epidemic, preventing retained parties from physically attending a judicial hearing. [3] However, these force majeure events were only admitted for the purpose of the application of immigration law or of provisions related to involuntary hospitalisations.

At the time of writing, the authors identified only one decision issued by French courts on the application of force majeure to contract law matters. On 22 May 2020, the summary judge of the *Tribunal de commerce de Paris* granted force majeure to Total Direct Energie on its *Accès Régulé à l'Electricité Nucléaire Historique* (ARENH) contracts for nuclear supply with EDF.[4] Total Direct Energie had sought to invoke the force majeure clause provided in its ARENH contracts due to the COVID-19 outbreak, which had pushed prices in the French electricity market far below those specified in the existing agreements. However, the force majeure may have been granted by the judge primarily in consideration of the wording of the force majeure clause stipulated in the ARENH contracts, rather than in consideration of the conditions set out in Article 1218 of the French civil code.

Opportunity to invoke COVID-19-specific remedies

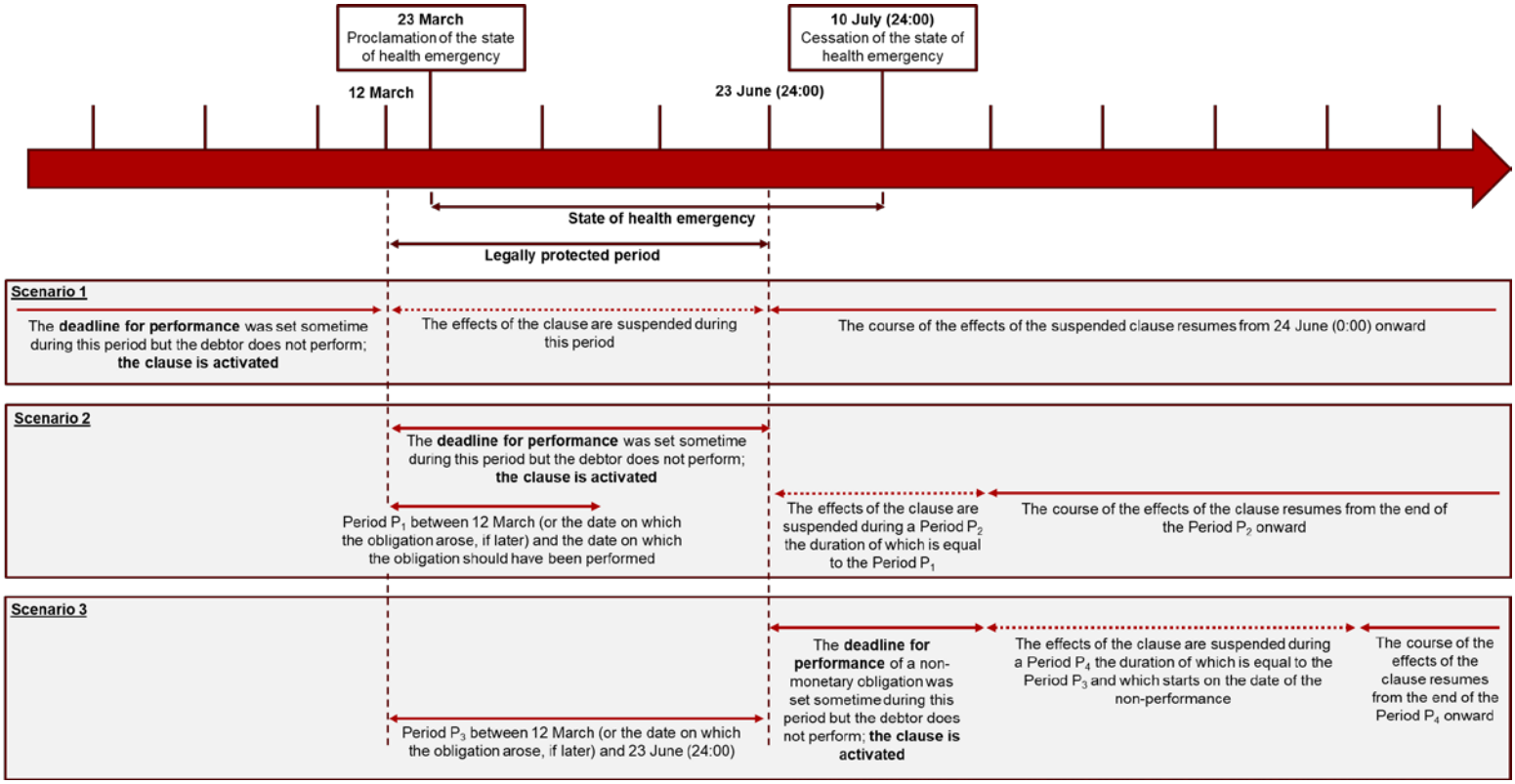
Since mid-March, the French government has adopted a number of measures to prevent businesses from failing as a result of the health crisis and the related regulatory constraints. Inter alia, ordinances based on Law No. 2020-290 dated 23 March 2020 provided rules specific to (i) the termination of certain touristic travel and holiday contracts (Ordinance No. 2020-315 dated 25 March 2020), (ii) the payment of rent, water, gas, and electricity bills relating to the business premises of companies whose activity is strongly affected by the spread of the COVID-19 epidemic (Ordinance No. 2020-316 dated 25 March 2020) and (iii) the execution of contracts subject to the French Code of Public Procurement and public contracts that are not covered by said code (Ordinance No. 2020-319 dated 25 March 2020).

Regarding the latter, contrary to what the French Minister for Economy and Finance had announced,[5] the ordinance does not qualify the COVID-19 outbreak as a force majeure event, although the ad hoc mechanism adopted is evidently influenced by the force majeure regime. Ordinance No. 2020-319 states:

- Obligations that cannot be performed on time without placing a manifestly excessive burden on the private party will benefit from an extension of the applicable deadlines.

- If the obligations borne by the private party cannot be performed altogether by the latter, in particular because “he/she/it does not have sufficient resources” or because “their mobilisation would place a manifestly excessive burden on him/her/it", the administration may conclude another contract with a substitute if time was of the essence; however, the administration will not apply contractual penalties nor invoke the liability of the private party holding the original contract.

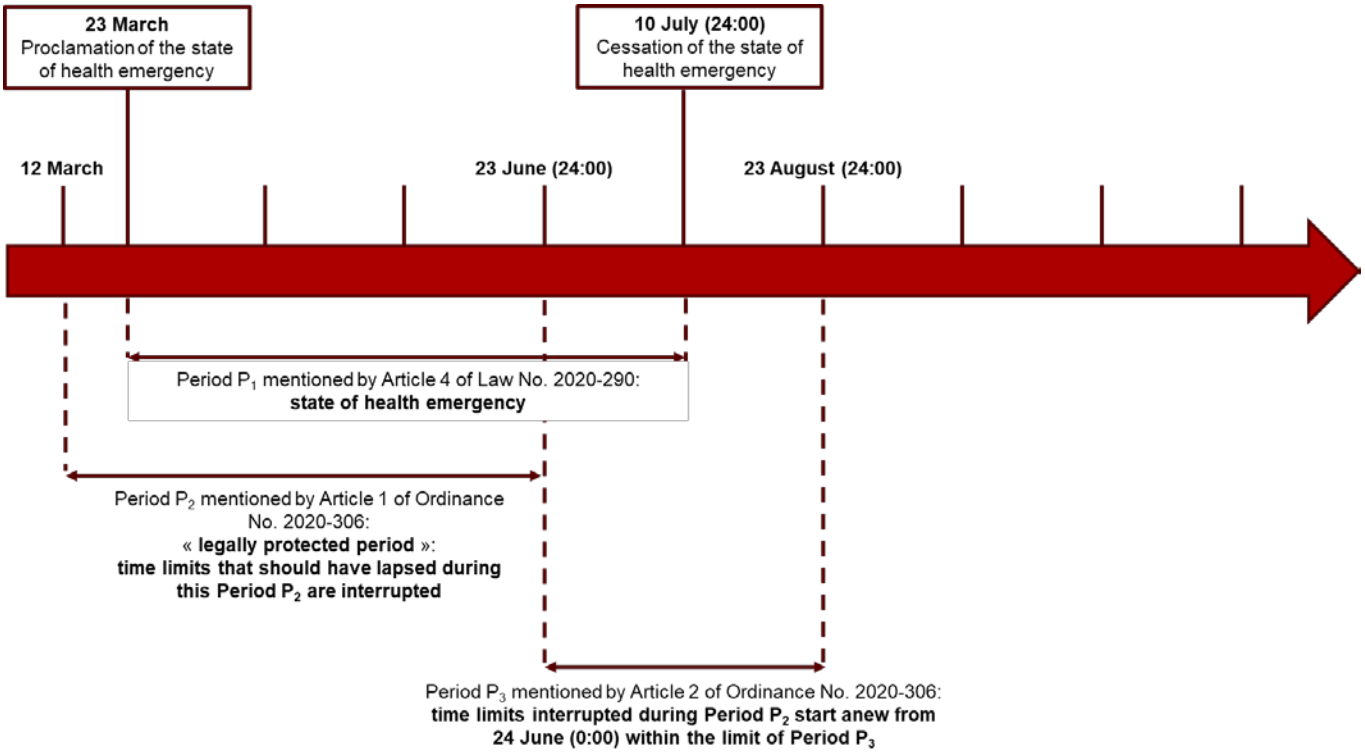
These ordinances do not provide a general exemption mechanism for non-performance or delayed performance. On the contrary, according to the Report submitted to the President of the Republic on Ordinance No. 2020-306, contractual obligations must be performed “on the date provided for in the contract”. Yet, Articles 1 and 4 of the aforementioned Ordinance No. 2020-306 (as successively amended by Ordinance No. 2020-427 dated 15 April 2020 and Ordinance No. 2020-560 dated 13 May 2020) allows for the suspension of certain periodic payments ordered by way of penalty (*astreintes*), contractual penalty clauses (*clauses pénales*), termination clauses (*clauses résolutoires*) and forfeiture clauses (*clauses prévoyant une déchéance*), and establishes specific arrangements for calculating the date from which theses clauses take effect (see the scheme below).



Enforcing contractual obligations at times of disputed judicial activity

In the immediate aftermath of the French President and Prime Minister’s announcements on 12 March, the Ministry of Justice announced that all courts and tribunals would be authorised to implement their service continuity plans. Consequently, from 16 March onwards, judicial activity has been drastically reduced and all non-essential hearings have been postponed to a later date.

In order to preserve claimants' rights while judicial activity was partially on hold, Ordinance No. 2020-306 dated 25 March 2020 adapted the rules for computing statutes of limitations in the context of the current health crisis, as follows:



In addition, pursuant to Article 3 of Ordinance No. 2020-306 dated 25 March 2020 (as last amended by Ordinance No. 2020-560 dated 13 May 2020), a number of administrative or jurisdictional measures, the term of which expires during the aforementioned "legally protected period", are automatically extended until three months after the end of that period. This provision concerns, inter alia, interim measures (*mesures conservatoires*), measures of inquiry and investigation (*mesures d'enquête et d'instruction*), and measures relating to conciliation and mediation proceedings (*mesures de conciliation ou de médiation*).

From 11 May 2020 onwards, courts and tribunals have lifted their service continuity plans and taken considerable steps towards resuming full judicial activity, with the adaptations made necessary by the health crisis. In particular, they took note of the measures made possible by Ordinance No. 2020-304 dated 25 March 2020 as amended by Ordinance No. 2020-595 dated 20 May 2020 and now actively encourage parties to accept that (i) proceedings be carried out without hearing pleadings for oral arguments (*i.e.*, that rulings be solely based on the parties' written submissions) or that (ii) hearings be held through videoconference or other means of electronic communication (including by telephone).[6]

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1 Law No. 2020-546 dated 11 May 2020, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041865244&dateTexte=&categorieLien=id.

2 On 17 April 2020, it denied, for lack of urgency, two professional associations' petition to overturn the decision of the Energy Regulatory Commission, which had opposed the activation of the force majeure provision in the contracts between alternative energy suppliers and EDF (Conseil d'Etat, 17 April 2020, No. 439945). Yet, its ruling is not grounded on an analysis of the force majeure clause but on the inadmissibility of the petition, for it lacked the urgency required for such proceedings. Interestingly, the court stressed that it will be up to each supplier seeking to activate said clause to demonstrate to the relevant administrative judge that its individual situation meets the conditions of the force majeure.

3 Douai Court of Appeal, 4 March 2020, No. 20/00395; Douai Court of Appeal, 5 March 2020, No. 20/00400 et al.; Colmar Court of Appeal, 12 March 2020, No. 20/01098; Colmar Court of Appeal, 16 March 2020, No. 20/01142 et al.; Bordeaux Court of Appeal, 19 March 2020, No. 20/01425 et al.; Colmar Court of Appeal, 23 March 2020, No. 20/01206 et al. ; Douai Court of Appeal, 23 April 2020, No. 20/00632.

4 Paris Commercial Court (summary judgment), 22 May 2020, No. 2020016407.

5 Declaration of the French Minister for Economy and Finance dated 28 February 2020, available at https://www.vie-publique.fr/discours/273763-bruno-le-maire-28022020-coronavirus.

6 Circular of the Ministry of Justice dated 5 May 2020 and available at http://circulaire.legifrance.gouv.fr/pdf/2020/05/cir_44967.pdf.