

Impact of COVID-19 on contractual obligations: *force majeure* and case law

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Introduction

Due to the unprecedented health crisis brought about by COVID-19, many economic actors are facing the impossibility of fulfilling their contractual obligations or do not wish to honour them because they are no longer commercially viable.

As numerous contracts expressly include material adverse change clauses, parties will have to analyse whether the current situation is covered by these contractual provisions and how they will deal with this scenario.

In the absence of relevant specific clauses, what are the possibilities offered by Luxembourg law?

This article focuses on the legal concept of *force majeure*, which contracting parties may invoke to dissolve a contract or exonerate themselves from any liability towards their co-contractor.⁽¹⁾

Conditions

In order to be successful in this defence, a debtor must demonstrate that the following three cumulative conditions are met:

- the event in question must not have been foreseen;
- performing the agreed contractual obligation must be impossible; and
- the debtor must not have caused the event.

A 31 October 2018 Court of Appeal decision clarified these conditions. The case concerned a digital transmission contract for a TV channel. Due to a law change, the beneficiary of the service was no longer authorised to broadcast its TV channel and therefore decided to terminate the contract on this ground.⁽²⁾

Unforeseeability of event

The unforeseeability of the event must be assessed as of the date of signing the contract (ie, on that date, the event must not have been reasonably foreseeable).

Impossibility of performing agreed contractual obligation

'Irresistibility' is generally defined as an event that would cause a normally reasonable and diligent debtor in the same circumstances to default. The assessment is therefore an *in abstracto* assessment as it is aimed at an event that is normally irresistible. Any unavoidable event becomes *force majeure* only if it is insurmountable for the reasonable debtor. The courts will therefore conduct a detailed practical analysis to determine whether a reasonable debtor is not in a position to permanently comply with the contract's terms due to the unforeseeable event.

Debtor must not cause the event

The event must ultimately be imposed on the debtor, which must not have been the cause of it.

In this case, the Court of Appeal considered that the conditions of *force majeure* were met. As such, the contract for the provision of services was terminated without damages.

Case law

What further lessons can be learned from the available case law in the context of the largely

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unprecedented current situation?

Financial crisis and loan defaults

In one case before the Court of Appeal, (3) the debtor of a loan contract sought to have the loan's effects suspended on the grounds of *force majeure* on its part given the 2008 global financial crisis and the subsequent impact on its financial resources.

The Court of Appeal considered that a financial crisis cannot be assimilated to an event of *force majeure*. The court added that the obligation to repay the loan on the agreed due dates was purely a monetary obligation and thus did not meet the condition of impossible performance.

The Court of Appeal also ruled on the faculty left to the judges to grant moderate payment delays and to suspend the execution of the proceedings (Article 1244 of the Civil Code). The court thus specified that the extension of a payment term is an exceptional and optional means for unfortunate debtors only.

Notably, the court refused to grant the application, taking into account the fact that the debtor had not made a repayment proposal for many years.

State of war and force majeure

In various decisions relating to World War I, the Court of Appeal ruled on the following points.

Contract signed immediately before war

A party can request the termination of a contract for *force majeure* only if there is no fault on its part. In particular, a party which, on the eve of the war's outbreak, obliged himself to supply a quantity of products could not take advantage of the fact that the interruption of communications had prevented him from honouring his commitments; he was at fault for having sold short when he could not reasonably have expected to be able to obtain the goods in due time.(4)

Contract whose performance became more onerous or difficult because of war

One party argued that the state of war and its economic consequences constituted a case of *force majeure*. The courts rejected this claim on the ground that the debtor of the delivery obligation could not argue a real impossibility of the performance of its obligations, but only an aggravation of its ability to perform its obligations.(5)

Public authority decision provisionally affected tenant's turnover

This dispute concerned the termination of a lease contract due to the tenant's failure to pay rent. The tenant argued that it had been unable to pay the rent due to a case of *force majeure*, consisting of work carried out on the street where the business in question was located which had led to a drop in activity and therefore cash-flow difficulties. The Luxembourg District Court dismissed the application on the ground that the tenant had merely stated that it was temporarily impossible for it to fulfil its obligation to pay the rent.(6)

It is worth mentioning that the tenant had finally been able to pay the outstanding rent and that the district court therefore did not grant the lessor's application to terminate the lease contract.

Comment

The courts will certainly consider the current pandemic and related safety measures (ie, forced closures and containment measures) to be an unforeseeable event – at least with respect to contracts which were entered into sufficiently in advance of the spread of COVID-19.

In order to claim the dissolution of a contract, the impossibility of performance must be total and definitive. A temporary or partial impossibility will not constitute a case of *force majeure*. However, a temporary impossibility may lead to a temporary suspension of the agreed obligations.

Therefore, *force majeure* does not in principle relieve debtors that could theoretically comply with their contractual obligations but no longer wish to because their contracts have ceased to be commercially viable given the current situation.

These specific debtors could nonetheless find relief in the application of the legal unpredictability doctrine.

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Endnotes

(1) Luxembourg District Court, 7 July 2009, N°114440 and 120356.

(2) Court of Appeal, 31 October 2008, N°43712. The following *force majeure* clause was provided in the contract: "a party may terminate immediately the respective service order or where all service orders are concerned this agreement by written notice if the other party ... has been prevented due to a force majeure event from performing its material obligations with respect to such service order for sixty days or more."

(3) Court of Appeal, 8 May 2013, N°37384.

(4) Court of Appeal, 18 June 1915, JUDOC N°91502991.

(5) Court of Appeal, 24 March 1916; Court of Appeal, 26 November 1915; Court of Appeal, 1 December 1916.

(6) Luxembourg District Court, 7 May 2019, TAL-2018-07762.

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