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Cancellations of business contracts under French law due to Coronavirus : How to anticipate, manage, negotiate the relationship supplier /client - partner?

The news is full of cancellations or postponements of contracts due to the bans on gatherings and the containment decided by the government.

Faced with this kind of situation, how can we react, find solutions and also learn from these cancellations to plan for the future?

Some practical tips for contractors.

1. The risk is inherent to the business.

We cannot escape the risks inherent to the business and in particular the risk of cancellation due to force majeure.

Risks of storm, marine pollution (Erika) or land pollution (Lubrizol), natural disaster, flooding, epidemic (SARS 2003, H1N1 2009, Ebola 2014, COVID 19), major fires (Australia and California), volcanic eruption (Indonesia), blocking of access (locks, bridges), not to mention terrorist attacks or the yellow vests movement in France, make regular headlines.

Every party to the event must be aware of the risk.

The contract is performed in the interest and at the risk of the parties.

It is therefore necessary to think together about the difficulties that may arise in order to anticipate solutions in the event of cancellation.

2. Inform the other party from the start

This is the purpose of negotiating the contract and the general terms and conditions to prevent the contract being characterised as a standard form contract and the significant imbalance (article 1171 of the French Civil Code), conditions which must be accepted (Article 1119 of the French Civil Code).

Draw the partner's attention to the risk of cancellation so that they cannot blame the other partner of not informing them of a determining element of the contract (article 1112-1 of the French Civil Code).

3. Be properly insured and ask your partner to be insured

The supplier's insurance

Of course, all companies are insured for their professional liability, for their social agents, for and for classic risks that can arise in the course of the business such as fire, flooding, vandalism, car accident,...etc.

But what about the consequences of the non performance of the contract? Here are some ways to negotiate one's policy.

- What risks can be covered for non performance of the contract?
- What risks are excluded?
- If there is cover, is it only a reimbursement of expenses or of losses actually incurred?
- What about refunds from clients who have paid installments?
- Negotiate an excess, a cap, a refund if there is no damage
- Plan for waivers of recourse from customers and their insurers
- Plan for partners to be additionally insured by paying a premium

Partner's insurance

- Imperatively request that clients insure themselves for their indirect damage (transport, marketing, travel expenses, loss of profit).

And this enables to contractually limit the organiser's liability.

The situation of insurance in the coronavirus period.

An article published in *Les Echos* (French economic newspaper) on 09/03/2020 provided an update on the situation with interviews from authoritative brokers relating to cancellation of events: Marsh, Gras-Savoye, Siaci Saint Honoré, Axa.

"On the French market, 80% of events are insured 6 months in advance" [Gras Savoye].

And in case of cancellation, they benefit from the reimbursement of their costs.

But corporate events are not always guaranteed in the event of cancellation because it was not provided for.

Since January 2020, there is now a provision for exclusion for coronavirus in policies.

4. Use of the contractual arsenal.

The reform of French contract law that has been in place since 1 October 2016 has provided for a number of provisions in this area, not all of which are public policy.

Are public policy, only:

- Pre-contract information requirement (article 1112-1 of the French Civil Code)
- Provision of essential obligation under the contract (article 1170 of the French Civil Code)
- Significant imbalance in a standard form agreement (article 1171 of the French Civil Code)
- The judge's assessment of the amount of the criminal clause (article 1231-5 of the French Civil Code)

It is therefore possible to provide for contractual arrangements or to waive the application of the other provisions.

But if we don't waive them, they will apply automatically!

Limit liability and couple it with a cancellation insurance policy

For example, we can limit the liability to 50% and insure up to 50%, or to limit the liability up to the insurance coverage. Limitation authorised by article 1231-3 of the French Civil Code.

Subject to fulfilling one's essential obligation (article 1170 of the French Civil Code), of course.

Organise the termination / cancellation of the contract

The buyer wants to pay when he receives the goods and the supplier to be paid in advance.

How can these two imperatives be reconciled in the event of cancellation of the contract by one of the parties or in case of force majeure?

Provide a compensation table, by cancellation date:

- In the event of a wrongful cancellation by the supplier on such a date, he owes such amount

- In the event of a wrongful cancellation by the buyer on such a date, he owes such amount
- In the event of cancellation for force majeure, no refund or limited refund, in connection with the insurance cover.

Cancellation of contracts under Vienna Convention (Convention on Contracts for the International Sale of Goods)

Exemption : Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

- (a) he is exempt under the preceding paragraph; and*
- (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.*

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

Effect of Avoidance : Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Force Majeure Clause by ICC (International Chamber of Commerce)

The standard form of the ICC 2003 clause provides for epidemic as case of force majeure

« 3 [e] act of God, plague, epidemic, natural disaster... »

Force majeure in contracts under French law

Definition

Art 1218 of the French Civil Code: "There is *force majeure* in contractual matters where an event beyond the debtor's control, **which could not reasonably be foreseen** at the time of the conclusion of the contract and **whose effects cannot be avoided** by appropriate measures, prevents the debtor from carrying out its obligation.

If the impediment is **temporary**, the performance of the obligation is suspended unless the resulting delay justifies the resolution of the contract.

If the impediment is **final**, the contract is resolved as of right and the parties are released from their obligations under the terms and conditions of articles [1351](#) and [1351-1](#).»

Art 1351 of the Civil Code: "The impossibility of performing the service frees the debtor proportionally when it comes from a case of force majeure and is final, **unless he had agreed to do so** or had been previously put on notice.

Article 1218 of the French Civil Code is not public policy.

Two criteria:

Unpredictability: Some authors will tell you that everything can now be predicted, that there are studies on all subjects, and that as a result nothing is more unpredictable. One can answer that forecasters can be wrong which makes the reality unpredictable.

The storm can be predicted for ages but is still considered a case of force majeure.

Irresistibility: the debtor of the obligation must be unable to do anything to save the situation.

Several consequences:

- Exoneration of the liability of the supplier to whom damages cannot be claimed for non-performance of the contract unless he contractually planned to bear the cost of consequences
- In the event of an outright cancellation, the contract being "cancelled", each party theoretically finds itself in the state in which it was before the conclusion of the contract: the supplier no longer has to deliver the goods, and the buyer can request the return of the instalments paid.
- Suspension or postponement: who will bear the costs strictly related to this situation (all budget items are allocated)?
- Cascading cancellation of the chain of contracts for the supplier (supplier's contracts)

Case law

Unpredictability is appreciated on the day the contract is signed

Irresistibility is assessed on a case-by-case basis, particularly in relation to the link between force majeure and the promised performance

Decisions made in situations similar to the coronavirus epidemic

The courts have treated Ebola as a case of force majeure (Court of Appeal of Paris 17 March 2016), but refused it for absence of causal link with the decline of activity of a company or when the virus had not made the performance impossible (Court of Appeal of Paris 29 March 2016) or when the virus is recurrent (Court of Appeal Nancy 22 November 2010) or been announced for some time (Court of Appeal Besançon 8 January 2014)

But in the case of Covid 19, we have:

- The virus
- + the World Health Organization's publication of 30 January 2020 which called the coronavirus epidemic a "public health emergency of international concern"
- + the French Minister of Economy's statement of 28 February 2020 stating that coronavirus will be "considered a case of force majeure for businesses"
- + the ministerial decree banning gatherings of more than 5,000 people in a closed environment of 4 March 2020, and 100 later on.
- + the confinement of persons by decree of 16 March 2020 which provides for a restricted list of cases where one can leave home.

There is therefore a reasonable chance that the coronavirus will be considered a case of force majeure if the contract was signed before the 30 January 2020.

How to contractually formalise?

Add cases of force majeure to the usual list (war, natural cataclysm or social unrest), such as IT failure for example (Court of cassation 17 February 2010), or administrative ban on its business

activity. However, the situations involved must meet the criteria of unpredictability and irresistibility.

Provide for payments made to not be refunded.

If the contract implies "successive performance", i.e. it runs over a long period of time with the partial delivery of goods, the buyer will have received a partial consideration before the cancellation.

Each party can keep the costs incurred on the date of the cancellation and no refund will be made.

Suspension of the performance

The cost of a suspension may remain the responsibility of the party who initiates the cost or can be shared by the parties.

Cascading cancellation of the chain of contracts for the supplier and buyer (supplier 's contracts)

The supplier booked in advance a lot of raw materials. If the seller was aware of the contract with the customer, the purchase of raw materials can be cancelled without any penalty (art 1186 of the French civil code)

Partial contractual non-performance and price reduction

One of the possibilities offered by contract law is to request a price reduction in the event of "imperfect performance of the benefit", the amount of which may be arbitrarily decided by the judge in the event of disagreement (article 1223 of the French Civil Code).

As this text is not a matter of public policy, the parties may waive any request for a price reduction or arrange the reduction by contract.

Penalty clause

The contract may provide that the party who has not executed the contract will pay the other a certain amount as damages. But the judge may automatically reduce or increase the penalty, and this text is public policy (Article 1231-5 of the French Civil Code).

Unpredictability clause/hardship

This clause, different from force majeure in that it deals only with the financial aspect, allows for a price revision in the event of an excessive increase in the cost of the manufacturing.

The question is at what point the performance of the contract becomes "excessively expensive for a party that had not agreed to take the risk"? It is then necessary to provide financial criteria for triggering the re-negotiation mechanism provided for by the text, with the possibility of intervention by the judge and/or cancellation of the contract in case of disagreement (article 1195 of the French Civil Code).

This text is not a matter of public policy and can be waived or contractually arranged.

Brutal breakdown of established relationships

Art L 442-6.5° of the French code of commerce provides for a minimum notice period of 18 months to terminate a contract which had a long duration. Exception in case of force majeure.

In conclusion

Between insurance cover and contract negotiation a balance must be found between the parties, this is the purpose of negotiating the original contract. In the event of a conflict, the proposals mentioned will bring the points of view closer together.

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