

COVID-19: REAL ESTATE CONTRACT LAW IN FRANCE

Date: 31 March 2020

Real Estate Alert

By: Edouard Vitry

As COVID-19 continues to spread in France, leading the Government to announce a national lockdown, some important questions arise concerning the Force Majeure and the "unforeseeability" theory as regards to their applicability on contractual relations between private individuals.

More precisely, this lockdown led to the closure of restaurants and all 'non-essential' commerce, but will commercial tenants be able to invoke Force Majeure or unforeseen circumstances to stop paying their rents?

The law no.2020-290 regarding the state of emergency dated 23 March 2020, in order to deal with the COVID-19 epidemic authorizes the French Government to take, within three months, by decree, any measure "to deal with the economic, financial and social consequences of the spread of the COVID-19 epidemic and the consequences of the measures taken to limit that spread, and in particular to prevent and limit the cessation of activity of persons and legal entities engaged in economic activity and associations and its impact on employment."

Within this framework, the French Government will be able to take the following measures:

"Allowing the full deferral or spread out of the payment of rents, water, gas and electricity bills relating to professional and commercial premises and waiving financial penalties and the suspensions, interruptions or reductions in supplies that may be applied in the event of non-payment of these bills, for the benefit of microenterprises, within the meaning of Decree No. 2008 1354 of 18 December 2008 on the criteria for determining the category to which an enterprise belongs for the purposes of statistical and economic analysis, whose activity is affected by the spread of the epidemic".

Before the publication of this Decree specifying the scope of this measure, which would apply only to very small businesses (TPE) and would only concern the deferral of commercial rents, the provisions of the French Civil Code relating to (1) Force Majeure, (2) the renegotiation of the contract based on the unforeseeability concept and (3) the exception of non-performance may be implemented.

FORCE MAJEURE

Under the French civil law system, and according to the Article 1218 of the French Civil Code, in order to consider an event of Force Majeure, it must be unforeseeable, irresistible, and external.

The condition of exteriority is not in dispute insofar as the debtor is not the cause of the epidemic.

Nor does the condition of unforeseeability appear to present any particular difficulty: where the conclusion of the contract predates the outbreak of the epidemic, the parties could not foresee it, at least not in its present effects.

However, the condition of irresistibility needs to be further examined. Irresistibility means the absolute impossibility for the debtor to perform his obligation. That is why the fact that the performance of the obligation by the debtor has simply become more difficult is not sufficient for it to be considered irresistible.

The event and its consequences must be irresistible. Consequently, if the lessee, without being able to influence the occurrence of the event, had the possibility of avoiding its harmful consequences by implementing appropriate measures to avoid or limit the damage, he may not invoke Force Majeure.

In the present case, in view of the scale of the current health crisis and its consequences, the condition of irresistibility also appears to be fulfilled, so that Force Majeure should apply.

What is the position for Commercial Premises?

Concerning the commercial premises, the purpose of which is provided for in the lease, which can no longer be opened as a result of a ban imposed by the public authorities, the lessor is no longer able to meet his obligation to execute its obligation because of an event of Force Majeure; performance of the lease contract will therefore be suspended and the lessee will no longer have to pay its rent during the period of suspension.

This will be the case for establishments whose opening is prohibited (for the time being) until 15 April 2020 by order of the Minister of Health dated 15 March 2020 and that do not benefit from any derogation. The situation is more complicated in the event that the lessor complies with its obligation to deliver since the premises are not closed but the lessee can no longer pay the rent due to a drop in activity because of the COVID-19 epidemic.

The courts are reluctant to admit Force Majeure in similar situations on the ground that it is not impossible for the debtor to perform its obligation but that performance is simply made more difficult for the debtor in the circumstances. If the debtor were to prove that performance of the obligation was made impossible by the occurrence of the epidemic or by decisions of the public authorities to confine it, the lessee could be relieved by the court of its obligation to pay the rent.

The provisions of the commercial lease will have to be studied precisely and our team can provide advice in relation to the lease terms.

In an interesting decision of 17 December 2018, the Court of Appeal of Basse-Terre, ruling on the chikungunya virus, stated that there is no Force Majeure when the epidemic is known, endemic, and non-lethal:

"With regard to the presence of the chikungunya virus, despite its characteristics (joint pain, fever, headaches, fatigue, etc.) and its prevalence in the West Indian arc, particularly on the island of Saint-Barthélemy during 2013-2014, this event does not have the characteristics of Force Majeure within the meaning of the provisions of article 1148 of the French Civil Code (i.e. now the article 1218 of the French Civil Code). Indeed, this epidemic cannot be considered as having an unpredictable and above all irresistible character since, in any case, this illness relieved by painkillers is generally curable (the respondents having not reported any particular medical fragility) and the hotel could honor its service during this period."

If we apply that on COVID-19, one could argue that it has appeared recently, does not currently have effective treatment, and may be lethal.

As a result, the tenant could be relieved of its obligation to pay rent if such payment is impossible because of the occurrence of COVID-19. On the contrary, when the performance of his obligation is more difficult he will not be able to benefit from Force Majeure and will have to request the implementation of other mechanisms.

It is important to note that no event can be considered in itself as a case of Force Majeure. This depends on the sovereign appreciation of the judicial judge who will have to decide if this is a case of Force Majeure on a case-by-case basis.

THE UNFORESEEABILITY THEORY

The second option concerns the renegotiation of the contract based on the Unforeseeability Theory.

Article 1195 of the French Civil Code provides that: "If a change in circumstances unforeseeable at the time of the conclusion of the contract makes the performance excessively onerous for a party who had not agreed to assume the risk, that party may request a renegotiation of the contract from its co-contractor. It shall continue to perform its obligations during the renegotiation.

If the renegotiation is refused or if it fails, the parties may agree to terminate the contract, on the date and on the terms they determine, or request the court to adapt it by mutual agreement. If no agreement is reached within a reasonable time, the court may, at the request of one of the parties, revise or terminate the contract, on the date and under the conditions it shall determine. »

This article provides that the parties may renegotiate their contract when a change in circumstances unforeseeable at the time of the conclusion of the contract makes performance excessively onerous for one party.

This provision could perfectly apply to the COVID-19 epidemic provided that the lease was concluded or renewed after the entry into force of this article, i.e. from 1 October 2016.

Moreover, until the judge has ruled, the parties are bound to apply the contract in all its provisions.

Article 1195 of the French Civil Code recalls that each of the parties 'continues to perform its obligations during the renegotiation'.

As the courts are closed because of COVID-19, it is not certain that recourse to the judge with the endorsement of Article 1195 is the most appropriate measure at this stage.

SUSPENSION OF THE PAYMENT OF RENT UNDER THE EXCEPTION OF NON-PERFORMANCE.

Article 1219 of the Civil Code provides that: "A party may refuse to perform his obligation, even though it is due, if the other party does not perform his obligation and if the non-performance is sufficiently serious."

In addition, Article 1220 of the Civil Code provides that: "A party may suspend the performance of its obligation as soon as it is clear that its co-contracting party will not perform on the due date and that the consequences of this non-performance are sufficiently serious for it. Such suspension must be notified as soon as possible."

Thus, these articles establish the principle of the exception of non-performance, which allows a party to suspend performance of its obligation when the other party manifestly does not or will not perform when due and if the consequences of such non-performance are sufficiently serious.

That is the case when the closure of the premises has been ordered by public authorities since the lessor is no longer able to meet its obligation to provide premises that are fit for purpose and is not performing its obligation (or will manifestly not perform it when due), the lessee may therefore suspend the payment of its rents.

The lessee must notify the lessor that it will not pay rents during the lockdown period because the lessor is unable to meet its obligation to provide premises fit for purpose. Such notification shall be in accordance with the provisions of the lease, and probably subject to the impossibility of sending registered mail with acknowledgment of receipt.

CONCLUSION

Overall, it is difficult to predict how the French courts will deal with Force Majeure and the exceptional issues raised by COVID-19. At this stage, it seems that we will have to wait for the various decrees of the French government explaining the measures it will decide to take.

KEY CONTACTS



EDOUARD VITRY
PARTNER
PARIS
+33.(0)1.58.44.15.08
EDOUARD.VITRY@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.