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Alert Covid-19 | Morocco | Coronavirus and force majeure: what consequences in contractual matters?

Oggi ospitiamo con piacere il contributo dei nostri amici francesi dello Studio Legale LPA-CGR sugli effetti della pandemia in Marocco. In particolare, considerato lo specifico contesto, alcuni operatori economici potrebbero non essere in grado di adempiere alle proprie obbligazioni contrattuali e tentino così di invocare la forza maggiore per giustificare l'inadempimento. La legge marocchina prevede che il debitore abbia il diritto di non adempiere a un'obbligazione, senza che sia possibile chiedergli un risarcimento, se l'inadempimento deriva da una causa a lui non imputabile, come la forza maggiore. Gli Autori **Rim Tazi** e **Romain Berthon** trattano la cruciale questione se la Pandemia possa essere qualificata o meno come caso di forza maggiore.

Morocco has quickly taken measures to contain the Covid-19 pandemic (the *Pandemic*): containment, closure of most businesses (restaurants, cafes, cinemas, theaters, party rooms, sports halls, *etc.*).

Two decree-laws were published in the Moroccan Official Bulletin No. 6867 bis of 24 March 2020 (the *Decrees*):

- The decree-law No. 2-20-292 enacting special provisions for the state of health emergency and the modalities of its announcement, which gives a legal basis to the announcement of the state of health emergency and which is indefinitely renewable. Article 6 of the decree-law suspends the course of all the deadlines provided for by the legislative and regulatory texts in force during the whole duration of the emergency state;
- The decree-law No. 2-20-293 relating to the announcement of the state of emergency throughout the national territory to fight against the coronavirus-covid19, which declares the state of health emergency from Friday 20 March at 6:00 p.m. until 20 April 2020 at 6:00 p.m. (renewable if the Pandemic persists), and imposes certain restrictive containment measures.

In this context, some economic players may be not able to perform their contractual obligations and attempt to invoke force majeure to justify this non-performance. Moroccan law indeed provides that the debtor is entitled not to perform an obligation, without it being possible to ask him for damages, if this non-performance results from a cause which may not be attributed to him, such as force majeure.

Thus, the question of whether the Pandemic may be classified as a force majeure case is crucial.

Our study gives you elements that may help you analyze the situation, as a debtor of an obligation or as a creditor, to predict what it will be possible for your debtor to invoke.

According to the Moroccan legal definition¹ (1), the Pandemic could be qualified as force majeure if it is unpredictable (1.1.), inevitable (1.2) and external (1.3).

¹ Article 269 of the Dahir on obligations and contracts (*DOC*): *Force majeure is all that man cannot prevent, such as natural phenomena (floods, droughts, storms, fires, locusts), the enemy invasion, the prince act, and which makes it impossible to fulfill the obligation.*

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The main effect of the force majeure is the exemption from the debtor's liability, but its consequences on the contractual relationship may be adjusted by mutual agreement between the parties (2).

Each individual case shall indeed be assessed in a particular way, since judges have a predominant place in the assessment and interpretation of this concept according to each situation (3).

1. DOES THE PANDEMIC THEORETICALLY MEET THE CHARACTERISTICS OF FORCE MAJEURE?

1.1 Is The Pandemic An Unpredictable Event?

To be qualified as a force majeure event, an event shall have been reasonably unpredictable at the time of the conclusion of the contract: for example, it would be difficult to invoke the unpredictability of the Pandemic in a contract entered into on April 2020. This circumstance alone could exclude the qualification of force majeure even if it would make it impossible, in a few weeks, to perform such contract.

The condition of unpredictability could be considered as fulfilled if the contract was concluded before the onset of the Pandemic, or at least before the public was informed of the extent it could take.

However, the creditor may always argue that there have already been health crisis of a similar magnitude or nature in the past, to then disqualify the Pandemic from this unpredictability criterion.

Indeed, in the absence of Moroccan published jurisprudence on this matter, French Courts of appeal jurisprudence could serve as an example for comparing purpose, according to which the bacillus of the plague², the epidemics of influenza H1N1³, the virus of the dengue fever⁴ or that of chikungunya⁵ were not retained as case of force majeure because of their predictability.

To sum up, in these previous cases, judges considered either that the diseases were known, as well as their spread risks and effects on health, or that their consequences were not significant enough, and therefore ruled out that they may be invoked to refuse to perform an obligation or to request the termination of a contract.

An epidemic is therefore not necessarily by itself a case of force majeure.

On the other hand, the debtor will likely argue that Covid-19 is a new and unknown virus, and against which there is no vaccine yet. Or that its speed and the extent of its propagation are unprecedented. Finally, the strict measures taken by many countries to halt the Pandemic spread, and in particular the declaration of health emergency state in Morocco through the Decrees, would constitute an unprecedented situation which would justify the unpredictability criterion.

The cause which could be avoided is not considered as a force majeure event if the debtor does not justify that he has taken all due diligence to protect himself against it.

Event which is caused by the debtor's previous default is also not considered as force majeure.

² Paris Court of Appeal, Chambre 25 section B, 25 September 1998

³ Besançon Court of Appeal, 8 January 2014, n° 12/0229

⁴ Nancy Court of Appeal, 22 November 2010, n° 09/00003.

⁵ Saint-denis de la Réunion Court of Appeal – ch. Sociale – 29 December 2009 / n° 08/02114.

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1.2 Has The Pandemic Induced Inevitable Effects Resulting In An Impossibility Of Performance?

To constitute a force majeure case, the Pandemic should be considered as an event which may not be avoided, even in the case where the debtor has taken all necessary steps to prevent it; irresistibility should make it impossible to perform the concerned obligation: for example if the debtor is himself affected by the Covid-19 with disabling symptoms, or if the containment measures cause a disorganization of his production which results in the impossibility to deliver its customers, or also because the Decrees prohibit displacements essential to the performance of the obligation.

Here it would be necessary to analyze not only the impossibility to perform, but also the link between the event that the debtor wishes to see as a case of force majeure and this impossibility: if there is no link between the event and the impossibility, or if the link is too loose to establish a cause-effect relationship, then force majeure would not be characterized. The analysis would be subtle, and it is in this subtlety that we would find the solution of the application or not of force majeure.

1.3 An Event Beyond The Control Of The Debtor

The force majeure event shall not arise from the default of the party who may no longer perform its obligations.

As soon as the non-performance is directly linked to the Pandemic, and not to the debtor's default, the condition could be considered as fulfilled. A virus with unprecedented spread, justifying the declaration of a health emergency state by Morocco and by many countries, could well seem in principle beyond the control of simple contractors. However, there again, there may be subtleties depending that must be carefully studied on a case by case basis.

2. FORCE MAJEURE EFFECTS

2.1 Exemption From Liability / Disclaimer

The debtor shall not pay damages to the creditor of an obligation which is not fulfilled due to a case of force majeure.

When it is admitted, force majeure therefore exonerates one from his liability, *i.e.* the debtor's liability which should normally be retained, is excluded.

If a force majeure event is characterized as such, a distinction shall be made according to whether:

- the performance impossibility is temporary: for example, the production of goods may restart as of the epidemic peak is behind us (this is already the case in China), the health emergency state is limited in time (currently until April 20 in Morocco), *etc.* In this case, the performance of the obligation that is prevented, is suspended, which could have effects on the suspension of the entire contract. In "synallagmatic" contracts, the creditor of the prevented debtor will indeed invoke the non-performance defense, that is to say, not to fulfill his proper obligation as long as that of his debtor is not performed in turn, but the creditor may not claim for compensation for the damage caused by this suspension. The contract could then resume its normal course at the end of the impediment.

However, this suspensive effect could be excluded if the nature of the contract is such that the performance of the obligation would no longer make sense if it were to be delayed, even if the impediment is temporary. This could be the case for the delivery of particular perishable goods for example: the contract would therefore be canceled without compensation due;

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- the resulting impediment is final, in which case one of the parties could cause the contract termination. No damages would be due by the party who has not performed its obligation for the damage suffered by its counterparty due to non-performance and termination of the contract.

2.2 Contractual Arrangements

In a Morocco which accepts the principle of contractual freedom (article 230 of the DOC), the definition, effects and consequences of force majeure on the contractual relationship seem to us to possibly be arranged conventionally by the parties: contractual definitions of force majeure (strike, pandemic, *etc.*), adjustment of the force majeure regime (time limit for informing the creditor, probative documents, expert procedure, effects on the obligations of the parties, burden of the occurrence of a force majeure case, *etc.*).

This means that it is imperative to carefully check the contractual provisions before being able to determine whether an event may constitute a force majeure case between the parties.

For example, if the Pandemic could legally, in a specific situation, be qualified as force majeure, contractual provision could lead to exclude the possibility for a debtor to claim for the force majeure case, because the parties would have agreed that this debtor could not take advantage of this case, or because the conditions to apply this case would not be met.

Thus, from a legal situation which might have seemed to allow the debtor not to perform his obligation, the contractual situation could lead to oblige him to perform it, or to pay damages in the event of non-performance.

3. ROLE OF THE JUDGES IN THE ASSESSMENT OF A FORCE MAJEURE EVENT

Although apparently qualified, because the criteria would be met, or because the contractual provisions would allow it to take effect, the qualification of force majeure largely depends on the circumstances of each case, and leaves an important place to the interpretation of the judges who appreciate it *in concreto*.

The judges or the arbitrators will have a sovereign appreciation of the facts and an equally sovereign interpretation of the texts, who will determine, on a case by case basis, if the Pandemic constitutes an force majeure event in such or such situation.

The defaulting contracting party must justify itself and establish the evidence attesting that its non-performance is due to an unpredictable, irresistible and external event, all in accordance with the contract which binds it to its creditor. Moroccan higher courts are very demanding on motivation and force majeure evidence. The Moroccan Court of Cassation has in fact affirmed in a certain number of judgments⁶, that force majeure evidence shall be based on certainty and not on doubt and assumption.

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This document is for information purpose only; it is not exhaustive and each case shall be analysis by means of an actual legal advice

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