

PRACTICAL INFORMATION SHEETS

MANAGING YOUR COMPANY DURING THE COVID-19 CRISIS

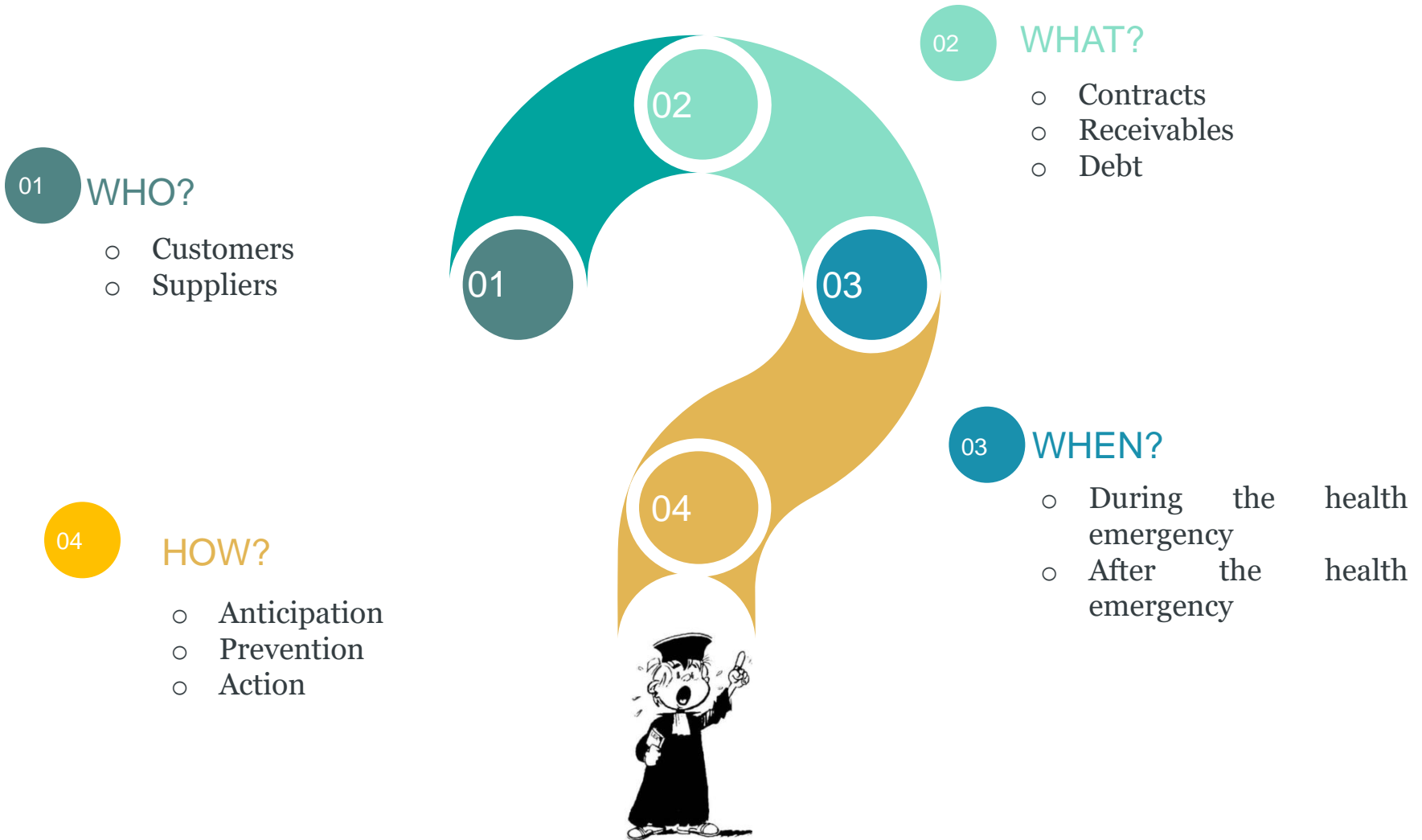
What does French law say?

Anne-Florence Raducault

Dispute Resolution



LEGAL ISSUES DURING THE CRISIS



PRACTICAL INFORMATION SHEETS

Sheet 1: What to do in the event of total or partial failure to provide an expected service?

Sheet 2: Can I terminate a contractual commitment or business relationship due to loss of interest, for example?

Sheet 3: Can I raise my prices / Can my contractual partner raise its prices?

Sheet 4: How do I keep my liquidity and manage my current debts outstanding?

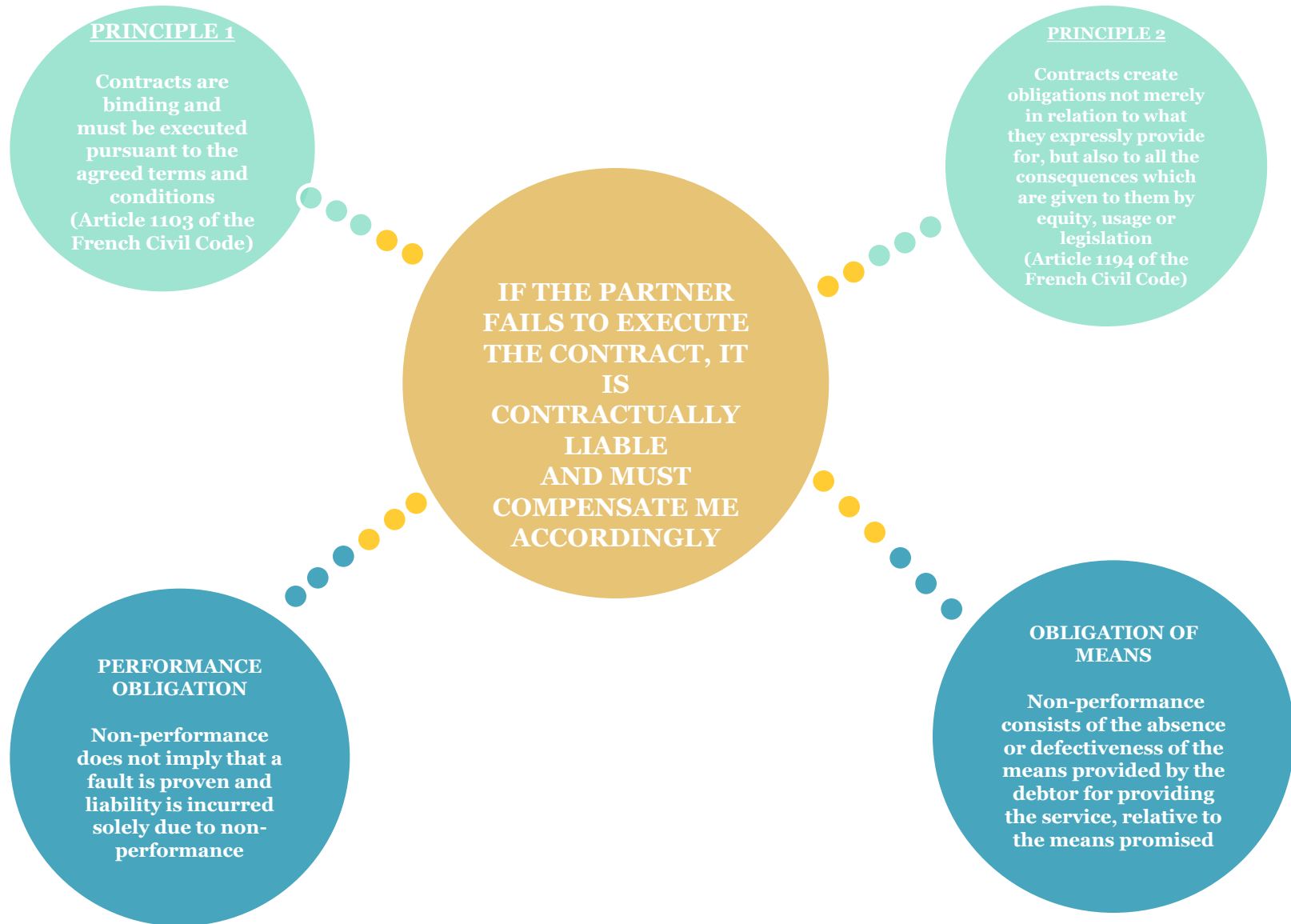
Sheet 5: What actions must I anticipate for after the health emergency ends?

Sheet 1: What to do in the event of total or partial failure to provide an expected service?

Slide 4



I – PRINCIPLE: ALL CONTRACTUAL PROVISIONS MUST BE PERFORMED



II – CONSEQUENCES OF NON-PERFORMANCE



RELEASE

IF THE OTHER PARTY FAILS TO PERFORM ITS OBLIGATIONS, ITS NON-PERFORMANCE ENTITLES YOU TO NOT PERFORM YOUR OWN OBLIGATIONS (ARTICLE 1217 OF THE FRENCH CIVIL CODE)

Examples: no delivery, late delivery, etc.

Such damages are due without the creditor being required to prove any loss.

The damages due because of the late payment of a monetary obligation consist of the interest payable at the legal rate starting from the date of formal notice.

A creditor who suffers, due to the bad faith of an undischarged debtor, loss or damage other than the debtor's failure to make payment at the due date, may obtain compensatory damages separate from said legal interest.



COMPENSATION

OR

Explicit contractual provisions:

The debtor is liable solely for the damages that were stipulated or which could be provided for when the contract was concluded, except when the non-performance was due to gross negligence or wilful misconduct.

Art. 4 Ord. 2020-306 of 25 March 2020 (amended by Ord. 2020-427 of 15 April 2020):

A **moratorium** was introduced on 12 March 2020 on the **penalties** (penalty payments, fines, forfeiture of rights and termination clauses) applicable in the event of failure to comply with the contractual deadlines:

- If the deadline had already expired **before** 12 March 2020, the effects of the penalty are suspended for a *legally-protected period* (health emergency period + 1 month) i.e., in principle, until 24 June 2020.
- If the deadline expires **during** the legally-protected period, the effects of the penalty are postponed, at the end of the *legally-protected period*, for a period equal to the time normally remaining on 12 March 2020.
- If the deadline expires **after** the *legally-protected period*, the effects of the penalty are deferred for an equal period, **unless it is an obligation to pay a sum of money, in which case the penalty applies at the end of the agreed period.**

III – CAN I FORCE THE EXECUTION OF THE CONTRACT DURING COVID-19?

The judicial and litigious situation has slowed down considerably as a result of the COVID-19 epidemic, but some possibilities still exist.



CHECK THE **STIPULATIONS** OF THE CONTRACT

Article 1351 of the French Civil Code provides that “*Impossibility of performing the act of performance discharges the debtor to the extent of that impossibility* where it results from an event of force majeure and is definitive unless the debtor had agreed to perform*”

** up to the value of what has not been performed*

if such a clause exists, **SERVE FORMAL NOTICE ON YOUR PARTNER TO EXECUTE THE CLAUSE**

However, such a clause may be deemed unwritten if it creates a **significant imbalance*** between the **parties** (Article 1171 of the French Civil Code and Article L.442-1 of the French Commercial Code).

** link of submission or an unequal balance of power resulting in a disproportion between the rights and obligations of the parties*

PREPARE LEGAL ACTION ON THE MERITS OF THE CASE FOR AFTER THE HEALTH EMERGENCY ENDS

Article 1217 of the French Civil Code provides *the judge* with various possibilities:

- **Reducing the price** (proportionally)
- **Revising** the contract
- **Adapting** the contract
- **Setting a term** to the contract
- **Terminating** (destroying) **the contract**
- **Repairing** the consequences of non-performance

Court orders on acts to be done or not done, subject to a financial penalty, are also possible

If there is an **imminent danger** for your business **TAKE URGENT LEGAL ACTION** to request a **court order subject to a financial penalty or enforcement in kind**, or to take **the necessary security** guaranteeing payment or performance.

Civil and commercial emergencies (in summary proceedings or on application) are dealt with by the courts. Sessions have been set up and judges can now issue **decisions without a hearing** and make judgements on documents or organise **hearings by any means of communication** (videoconference or telephone)

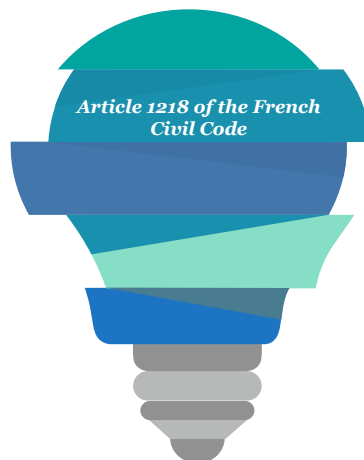
IV – EXCEPTION: APPLICATION OF FORCE MAJEURE TO COVID-19

CONDITION 1: EXTERIORITY *

An event beyond the control of the obligor

It should be noted that the act of the obligor or its agent or substitute may not constitute a case of force majeure, as the obligor exercises control over the actions of its agent or substitute (Court of Cassation, 14 Oct. 2010, no. 09-16.967).

**Prior to the contract law reform of 2016, case law usually referred to the criterion consisting of the event's externality relative to the obligor. (Court of Cassation, 15 Oct. 2013, no. 12-23126)*



CONDITION 2: UNFORESEEABILITY

An event that cannot reasonably be foreseen when the contract is concluded

If the event was foreseeable, the obligor remains bound to perform its obligation if the parties do not agree to any adjustments.

CONDITION 3: IRRESISTIBILITY

An event that cannot be avoided through appropriate measures

*The effects of this COVID-19 event on the execution of the contract must be radical, since the partner must be **totally prevented** from performing its obligation as a result.*

It cannot simply be a question of opposing:

- *the higher cost of the service*
- *the lack of means of protection*
- *an additional difficulty of any kind arising at the time of execution*
- *whenever solutions exist (e.g., changing the means of transport or the supplier, adapting the working conditions, etc.)*

*→ The event must be **insurmountable**: it must then be shown that there is no possible remedy*



What is true for your partner is also true for you: whenever solutions exist (e.g., calling on another supplier), you cannot use force majeure to release yourself from your obligations to your contractual partner, even if any of your suppliers oppose force majeure.

DOES COVID-19 CONSTITUTE A CASE OF FORCE MAJEURE?

Issue: If the conditions of force majeure are adopted, the parties are exempt from any liability in the event of non-performance by them

Government position (for public contracts)

According to the French Minister for Economic Affairs and Finance:

*“Without supposing which provisions could be adopted as part of the emergency bill for dealing with the COVID-19 epidemic, these difficulties **may** be recognised as force majeure, thereby exempting the parties of the contracts from any contractual breach. In these situations, therefore, companies must not be subject to penalty payments or any other contractual penalty whatsoever in the contract’s silence on force majeure.”*

(Statement by Bruno Le Maire, the French Minister of Economic Affairs and Finance, on the economic impact of the COVID-19 epidemic, Paris, 28 February 2020)

- Public buyers (different from the State) can use a different analysis
- To date, no text expressly states this position: it must be checked whether the situation resulting from the current health crisis, including the lockdown, indeed no longer allows the service provider to fulfil its contractual obligations
- This position does not bind the judge in the absence of detailed legislation

What about contracts between private companies/individuals?

To date, nothing is specified for private contracts: caution should therefore be exercised and discussions with the partner are strongly recommended regarding the contractual obligation of loyalty.

Only the Judge can decide, on an individual case basis, whether the conditions of force majeure are met, thereby justifying a contractual partner not performing its obligation.

COVID-19 does not automatically constitute force majeure for all contracts, but following the adoption of Order no. 2020-306, regardless of whether the case is recognised as force majeure or not, the penalties applicable in the event of failure to comply with the deadlines provided for in the contract (fines, penalty payments, termination or forfeiture) are suspended for a period extending from 12 March 2020 until one month after the health emergency is lifted.

The judges said yes to force majeure

- Illness preventing a person from following a training course
 - no obligation to pay the tuition fees
Court of Cassation, 10 February 1998, no. 96-13.316
- The sudden and unforeseeable occurrence of a severe asthenia attack requiring the irresistible and **unforeseen hospitalisation** of a lawyer
 - non-application of the penalty provided for in the event of failure to comply with a procedural deadline
Nîmes Appeal Court, 6 November 2018, no. 18/04133
- The **border restrictions** of a country banning the movement of livestock during an epidemic
 - no sudden termination of commercial relations if orders placed with a supplier are suspended
Paris Appeal Court, 26 September 2018, no. 15/09123
- The occurrence of an **epidemic** affecting the animals having irresistible consequences on the farm's operation
 - maintaining of the operator's lease despite several debts outstanding
Bourges Appeal Court, 21 May 2010, no. 09/01290
- **The bovine brucellosis epidemic**, with its considerable virulence and terrible contagiousness and characterised by a period of undetectable and unforeseeable latency, bore the characteristics of force majeure, especially since the farmer had done everything possible to avoid contamination and complied with the mandatory health measures
Agen Appeal Court, 21 January 1993
- Force majeure was found due to **suspicious of COVID-19 contagion** and the risks involved for everyone, for two asylum seekers in the most affected department (Haut-Rhin) exempting them from attending the court hearings
Colmar Appeal Court, 12 March 2020, nos. 20/01098 and 20/01207

Rather YES if
the event in
question...

- ✓ is beyond the control of the obligor
- ✓ could not reasonably be foreseen when the contract was concluded
- ✓ and if its effects cannot be avoided by any appropriate measure (*i.e.*, no remedy)

The judges said no to force majeure

- A widely announced H1N1 epidemic **foreseen** even before the health regulations were implemented, insofar as the supplier had proposed to its customer that it change the orders placed by offering it an **alternative solution** complying with the new health requirements

Besançon Appeal Court, 8 January 2014, no. 12/02291

- Flu **not completely preventing** people's movements

Rennes Appeal Court, 9 March 2018, no. 18/01827

- The presence of the chikungunya virus cannot be considered as being unforeseeable and above all irresistible since, in all cases, this disease is relieved by analgesics and can generally be **overcome**, and the hotel could honour its service during this period

Basse-Terre Appeal Court, 17 December 2018, no. 17/00739;

- The same is true for **dengue fever in Martinique**, which is neither unforeseeable nor irresistible

Nancy Appeal Court, 22 November 2010, no. 09/00003

- The obligation to confine animals linked to avian flu **with no impact shown in the operating results** does not allow the operator to avoid paying farm rent (rent)

Toulouse Appeal Court, 3 October 2019, no. 19/01579

- The financial difficulties of a company resulting from the impact of an **epidemic** on its activity in Africa do not make it impossible to fulfil its obligations (payment of rent)

Paris Appeal Court, 29 March 2016, no. 15/12113

Rather NO if the event in question...

- ✓ is not insurmountable for the party invoking it
- ✓ can be solved, although the solutions cause an additional cost (*If the additional cost is unacceptable, see Sheet 3*)
- ✓ has no proven causal link with the non-performance of the obligation

V – THE EFFECTS OF COVID-19 ON YOUR CONTRACTUAL RELATIONS

IN THE EVENT OF TEMPORARY IMPEDIMENT

- ✓ **The partner's obligation is merely suspended** (Article 1218 of the French Civil Code and settled case law).
 - ✓ The length of the suspension then depends on the **length of the impediment, within a reasonable time**, as execution may resume as soon as the event ends.
- In other words, all obligations that cannot currently be fulfilled (e.g. works, rentals and organisation of events, vocational training, etc.) must be postponed and then carried out as soon as the situation allows.
- ✓ Regarding this “**reasonable time**”, Order 2020-306 established a moratorium on all penalties for failure to comply with the contractual deadlines up to the expiration of a period ending one month after the health emergency ends: this may be reconciled with the period during which the partner can resume following a temporary impediment.
 - ✓ Nevertheless, it is possible that the delay may render the service unnecessary or obsolete for one of the parties (for example, the company that ordered a celebratory event for the anniversary of its creation, which would take place during the period concerned by the force majeure, could argue that the postponement of this celebration does not make sense: the temporary impediment may then be considered as a permanent one).

IN THE EVENT OF PERMANENT IMPEDIMENT

- ✓ **For contracts prior to 1 October 2016**, the permanent impediment may lead to the termination of the contract, which must be pronounced by the judge (former Article 1184 of the French Civil Code – Court of Cassation, 13 November 2014, no. 13-24.633).
- ✓ **For contracts concluded after 1 October 2016**, if it is permanently impossible to execute the contract as a result of a force majeure event, the contract is automatically terminated without the need to refer the matter to the judge (Article 1218 paragraph 2 of the French Civil Code).
- ✓ The partner's obligation no longer exists: **it is discharged** from any liability, with no compulsory measures against it, or compensation. However, it cannot retain the price of an unperformed service or undelivered item.
- ✓ Where the inability to perform results from the loss of the item due, the debtor given formal notice is nevertheless **released** if it proves that the loss would have also occurred if the obligation had been fulfilled (Article 1351-1 of the French Civil Code).
- ✓ If the contract is terminated, **the sums already paid are returned**, unless the contract has been partially executed. In this case, it is necessary to calculate the pro rata of the price corresponding to what has already been executed pursuant to the contract.

Your liability with regard to your own customer



If your service provider or contractual partner has a legitimate impediment, does this automatically exempt you from your liability towards your own customers?

In fact, you are yourself the service provider /supplier to your own customers and the principles set out above apply to your relationships with them.

—> **Only force majeure can exempt you**

You must therefore **prove that you cannot replace** your own subcontractor or supplier.

For example, it may have unique know-how, or the time required to find a new service provider does not enable you to honour your own contractual commitments, etc.



Note: In **criminal matters**, if the life of others is threatened because you are unable to provide your service (urgent safety work for example), you must prove that you have not committed gross misconduct, i.e., that you have **used all reasonably accessible means to comply with and meet your own obligations**.

VI – SPECIFICS OF PUBLIC CONTRACTS

PUBLIC PURCHASER

The public purchaser may **award a public contract** outside the usual official procedures.

In the event of a simple emergency, the public purchaser may award a public contract outside the usual official procedures (for example, reducing the time required to receive applications and tenders).

On imperative grounds of urgency, it may even disregard the obligation of publication and competitive tendering to conclude a negotiated contract.

The contract will be solely limited to the services required to meet the urgent needs. Renewals are possible but these exceptions are controlled.

In any event, the public purchaser may **terminate a public procurement contract** for force majeure or for reasons of general interest: the private operator will then be entitled to compensation, subject to the stipulations of the contract.



PRIVATE OPERATOR

Private operators may cease to execute the private contract on condition that they prove force majeure, but pay attention to the SCC and GCC.

If it is impossible to resume the contractual relationships, the unforeseen event will be qualified as force majeure, and the private operator may obtain the termination of the contract without being required to pay compensation.

The private operator awarded the contract may invoke force majeure in order to waive its liability, particularly if the public purchaser wishes to charge it late penalties for the execution of the contract.

If it continues to execute the contract during the COVID-19 crisis, the private operator may obtain compensation if the public purchaser radically changes the conditions of execution of the contract (provided that the conditions of unforeseeability and/or government action theory are met).

Sheet 2: Can I terminate a contractual commitment or business relationship due to loss of interest, for example?



I – ACTION TO BE TAKEN ON CONTRACTS THAT HAVE BECOME OF NO INTEREST



Renegotiation

An **unforeseeable change in circumstances** may totally jeopardise the balance of the contract between the parties (for example, a considerable increase in the price of raw materials).

Stage 1

The possible nullity of my contracts concluded or renewed **before or after 1 October 2016**



Stage 2

**B
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F
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R
E**

✓ **Contracts whose performance is instantaneous**

Case law considers that the existence of the cause of a contract, understood here as the interest that it presents for the contractual partner, must be assessed when the contract is concluded. If such an interest disappears after the contract is concluded, the contractual partner **cannot**, in principle, **invoke its uselessness and annul it**.

- Cassation 3rd Civil Chamber, 17 July 1996, no. 93-19.432

✓ **Contracts involving successive performance**

The disappearance of the cause of a contract whose service provision is staggered over time may, if an essential element of said contract involuntarily disappears externally to the parties, result in it lapsing so that **it will not be effective in the future**.

- Cassation 1st Civil Chamber, 30 October 2008, no. 07-17.646

According to Article 1186 of the French Civil Code: “A validly formed contract shall lapse **if one of its essential elements disappears**.”

When the execution of several contracts is necessary for the execution of the same operation and one of them disappears, the contracts whose execution is rendered impossible by said disappearance and those for which the execution of the disappeared contract was a decisive condition of the consent of a party shall lapse. However, said lapse shall only occur if the contractual partner against which it is invoked knew of the existence of the overall operation when giving consent.”

The disappearance of one of the essential elements of the contract may only result in it **lapsing** if this disappearance is beyond the control of the party invoking it (if not, a breach of the contract would be concerned). As a result, the contract does not lapse if the contractual partner personally participates in this disappearance (e.g., if a tenant voluntarily destroys the leased property, thereby making the continuation of the contract impossible).

- Aix-en-Provence Appeal Court – Pole 01 ch. 08, 5 March 2020, no. 2020-80

**A
F
T
E
R**



If there is no contractual clause providing for the lapse, it would be necessary for you to contact your contractual partner to agree on the consequences of the lapse, particularly to guard against the risk linked to the suddenness of termination. Failing this, a recourse to the judge to have it recorded is appropriate.

II – SPECIFICS OF ORDER CANCELLATIONS

Inform the supplier as soon as possible of this cancellation and, if possible, negotiate an amicable solution:

- Pursuant to the good faith obligation of the contract
- Pursuant to the loyalty obligation

Cancellation of an order already executed or being executed or delivered

Cancellation incurs my liability and my contractual partner may request the following:

- ✓ **enforcement** (obligation to receive the goods and to pay the price),
- ✓ the **payment of late interest**,
- ✓ the allocation of **damages** if it proves the existence of a loss

(Paris Appeal Court – Pole 05 ch. 11, 18 January 2013, no. 11/08524)

Cancellation of an order before execution begins

Cancellation incurs my liability and my contractual partner may request the following:

- ✓ the allocation of **damages** with regard to the loss suffered by the vendor:
 - time spent,
 - capacity for reuse,
 - loss of the expected payoff

IF THERE IS A WRITTEN CONTRACT

Option 1: Implement a contractual termination clause

Following the health emergency, fines, penalty clauses, termination clauses and those providing for forfeiture, if their purpose is to impose penalties for failure to perform an obligation within a specified period, are deemed not to have taken effect or produced an effect if said period expired during the period between 12 March and the expiration of a one-month period starting from the date the health emergency ends (Article 4 Order no. 2020-306)

Option 2: Terminate the contract without a termination clause

- ✓ **Fixed-term contract:** obligation to go up to its end date (except in the case of force majeure)
- ✓ **Permanent contract:** obligation to give notice
 - if the notice period is specified in the contract, it must be respected
 - or failing this, a reasonable notice period (Article 1211 of the Civil Code)
- ✓ The existence of a contractual notice period does not exempt the court from examining whether this notice period takes into account the length of the commercial relationship and other circumstances at the time of the termination (new Article L.442-1 of the French Commercial Code)
- ✓ The courts remain free to increase it if it is insufficient (C.Cass., 5 July 2016, no. 15-17.004), but also to reduce it (C.Cass., 22 October 2013, no. 12-19500) though the latter is more controversial.
- ✓ The termination can therefore be described as sudden even if the contractually determined notice period has been respected (C.Cass., 6 March 2007, no. 05-18121)

Exception to giving notice: Sufficiently serious breach by the partner

- The judges of the merits decide that the absence of notice is justified if the breaches they raise are **serious enough** to justify termination without notice (C.Cass., 8 June 2017, no. 16-10.005) → given the current context, it will be **extremely hard** for the applicant to reach this degree of seriousness.
- Order 2020-306 relating to COVID-19 provides for a moratorium on all penalties relating to non-compliance with contractual deadlines and **the termination on such grounds must wait until the end of the period.**
- Late payments are not serious enough to justify termination without notice, particularly given the length of the commercial relationship (Paris Appeal Court, 17 May 2019, no. 17/05180)

IF THERE IS NOT A WRITTEN CONTRACT

Article L.442-1 of the French Commercial Code requires written notice that takes into account the length of the commercial relationship

However, case law assesses the notice period in light of all the circumstances: the financial importance of the relationship, whether or not it is exclusive, the reputation or specificity of the products, and the investments made.

To date, no legal provision allows COVID-19 to be invoked in order to refrain from giving notice.

Effect: End of the contract

- ✓ If the services exchanged are useful only through the complete execution of the terminated contract: full reciprocal refunds
- ✓ If the services exchanged become useful as the contract is reciprocally executed: termination for the future

Sheet 3: Can I raise my prices / Can my contractual partner raise its prices?



CHANGE IN THE COST OF THE SERVICES (AND THEREBY, IN THE MARGIN): WHAT CAN I DO?

COVID-19 generates additional costs: increased price of certain materials, and the need to change the production, working, transport and delivery conditions.

Can these additional costs be passed on in the negotiated prices?



You cannot impose an increase in the contractual price fixed, as there is no automatic impact on the execution of the contract.

UNFORESEEABILITY MECHANISM

Article 1195 of the French Civil Code
applicable to contracts concluded
after 1 October 2016

- ✓ You must prove that the difficulties invoked could not be anticipated: the change in circumstances must be unforeseeable,
- ✓ You must prove that the change makes the provision of the service excessively expensive,
- ✓ You must not have chosen to assume the risk, and the unforeseeable event may be excluded or governed by contractual provisions: you must therefore analyse your price clauses.
- ✓ Nothing prevents you from including contractual provisions relating to the level at which the unforeseeability theory is triggered: doubling of the price of raw materials, changes in manufacturing methods, etc., if necessary under the supervision of a third party.



NEGOTIATION

*Obligation to renegotiate in
good faith while respecting the
contractual terms
(contractual loyalty)*

*No obligation to enter into an
agreement*



PREPONDERANT ROLE OF THE JUDGE

- ✓ A party may ask the judge to revise the contract,
- ✓ The judge may adapt the contract by mutual agreement between the parties,
- ✓ The judge may also decide on a **contractual term**: he or she considers that as the contract can no longer be executed because its obligations and essential conditions have changed, an end must be determined,
- ✓ In this case, the judge sets the end date of the contract,
- ✓ The judge sets the conditions for performance of the contract until it expires.

Sheet 4: How do I keep my liquidity and manage my current debts outstanding?



I – MANAGING MY DEBTS OUTSTANDING PRIOR TO COVID-19

The debtor partner is obliged to pay the sums due before 12 March 2020, unless a case of force majeure can be proven.

Even if a case of force majeure is invoked and justified (*see sheet 1*), it may be ineffective in two situations:

Article 1351 of the French Civil Code provides that *“The impossibility of providing the service releases the debtor proportionally when said impossibility is the result of a case of force majeure and is definitive, unless the debtor has agreed to [take charge of said service] or it has been given prior notice.”*

- Guarantee clauses may have been stipulated in the contracts: these clauses may require the debtor to “take charge” of providing the service despite the force majeure.
- The force majeure exception is not granted if, before the event occurs, the creditor has already served notice to the debtor to provide the service.

Where the debtor has been ordered to perform, it is responsible for assuming the risks of service provision becoming impossible later due to force majeure.

The Court of Cassation ruled that *“the debtor of a contractual obligation for an unexecuted sum of money may not be exempted from said obligation by invoking a case of force majeure* (Court of Cassation, 16 September 2014, no. 13-20.306)

Coercive measures may therefore be put in place against it if any of the above conditions is met.

Debts outstanding BEFORE

12 March 2020*

LEGAL ACTION FOR PAYMENT

- ✓ *Due to the very limited functioning of the courts, you should prove that there is a real emergency (particularly with regard to your economic situation)*
- ✓ *Due to the moratoriums put in place by Order no. 2020-306 of 25 March 2020 (public policy) and amended by Order no. 2020-427 of 15 April 2020, the penalty payment, fine, termination or forfeiture measures are paralysed up to one month after the health emergency ends*

SETTING-UP OF PROTECTIVE MEASURES (special authorisations)

- ✓ *Garnishment of bank accounts*
- ✓ *Confiscation of receivables*
- ✓ *Pledge of business assets*
- ✓ *Seizure of movable assets*
- ✓ *Other measures*

LINKS WITH BAILIFFS

- ✓ *Research on bank accounts held*
- ✓ *Research on movable assets*

II – MANAGEMENT OF MY DEBTS OUTSTANDING DURING AND AFTER COVID-19

Order 2020-306 of 25 March 2020, amended by Order no. 2020-427 of 15 April 2020, imposed a moratorium on all penalties related to non-compliance with contractual deadlines, for a period extending from 12 March 2020 to one month after the health emergency ends (legally-protected period).

However, **the payment terms themselves are unaffected**: your partner is obliged to pay the sums due on the scheduled date, even though the penalties for non-performance (penalty payments, fines, forfeiture and termination clauses) are suspended during the legally-protected period.

It is stated that “*the payment of the contractual obligations must always take place on the date specified in the contract*” (Report to the French President)

In addition, late payment interest for non-payment when due is generally not qualified as a penalty clause and should continue to be applied.



Termination for non-payment at the due date cannot be implemented before the end of the defined period.



Legal guarantees can be set up or action taken in the same way as for debts outstanding before COVID-19.

IT IS THEREFORE ESSENTIAL TO HAVE AN IMMEDIATE RESPONSE

NOTE:

- The Government calls for contractual loyalty and for companies in vulnerable situations not to be penalised.
- There must be no undue advantage or abuse and, therefore, no significant imbalance (*Article L.442-1 of the French Commercial Code*)

The Commercial Practices Review Commission considers that the absence of a review clause in a successive performance supply contract for equipment concluded between a wholesaler and a partner, whereas as a result of changes in the economic circumstances (increase in the price of the raw materials used in the manufacture of said equipment and the corresponding increase in the prices paid by the wholesaler) there is a significant, uncompensated, increase in the wholesaler's obligation towards the commercial partner, may constitute a significant imbalance. (Opinion 12-07)

Debts outstanding AFTER 12 March 2020*

SETTING-UP OF ALERTS

- ✓ Classify and monitor your business partners on the basis of risk
- ✓ Set up a financial watch

SETTING-UP OF MORATORIUMS

- ✓ Manage moratoriums by a specific written agreement signed by both parties (contract amendment)
- ✓ Indicate penalties in the event of late payment or default

/! Fines and penalties must only begin after the end of one month after the health emergency situation ends

NEGOTIATION OF GUARANTEES WITH PARTNERS

- ✓ Obtain a guarantee from a shareholder, parent company or bank
- ✓ Obtain a financial guarantee from a third party
- ✓ Set up ownership reserve clauses no later than the time of delivery to ensure their enforceability
- ✓ Set up payment delegations or a mechanism for direct payment by the end customer

Sheet 5: What actions must I anticipate for after the health emergency ends?

Slide 24



I – IF THERE IS A SUBSTANTIAL CHANGE TO THE CONTRACTUAL CONDITIONS: RENEGOTIATION IS MANDATORY

Given the significant changes in economic circumstances and the financial impacts of the COVID-19 crisis, relationships with contractual partners will change.



PRINCIPLE

Article 1195 of the French Civil Code reiterates the case law previously applicable in matters of unforeseeability and provides that:

"If a change in circumstances that could not be foreseen when the contract was concluded makes the execution [of the contract] excessively onerous for a party that had not agreed to assume the risk, said party may ask to renegotiate the contract with its contractual partner. It shall continue to perform its obligations during the renegotiation. If the renegotiation is refused or fails, the parties may agree to terminate the contract, on the date and under the terms and conditions that they determine, or mutually agree to ask the judge to adapt it. In no agreement is reached within a reasonable period, the judge may, at the request of either party, revise the contract or terminate it, on the date and under the terms and conditions that he or she sets."



CONDITIONS OF APPLICATION

- ✓ The party invoking it must not have agreed to assume the risk
- ✓ The change in circumstances invoked must be unforeseeable: prove that the difficulties invoked could not be anticipated,
- ✓ The change must make the provision of the service excessively expensive (this differs from the event constituting a case of force majeure that makes the provision of the service totally impossible)



PRACTICAL LESSONS

- ✓ A contractual partner may impose the **good-faith renegotiation** of the contract upon its partner
- ✓ The parties must **comply with the contract during the renegotiation**
- ✓ **No obligation** to reach a new agreement
- ✓ The **contractual loyalty** remains indispensable



- ✓ A party may apply to the judge to **revise the contract**
- ✓ The judge may **adapt the contract** with the mutual agreement of the parties
- ✓ The judge may also **terminate the contract** on a date, and under the terms and conditions, that he or she sets

II – RECOURSE TO JUDGES: PREPARING FOR DISPUTES

ANTICIPATION



Monitoring of risky partners / checking of operating loss insurance

Setting-up/negotiation of protective measures

Negotiation of amendments with new terms and conditions during the crisis

Preparation of legal documents (subpoenas, memorandums, petitions, exhibits, etc.)

Forced execution of agreements concluded with partners

Issue of legal documents (order for payment or execution under penalty, provisional order, summons to pay on merits, etc.)

Recording of guarantees taken

Enforcement of decisions

ACTIONS

Order no. 2020-306 of 25 March 2020 created a protection zone for action deadlines

Any act, appeal, legal action, formality, registration, declaration, notification or publication that is provided for by the law or a regulation under pain of nullity, penalty, lapse, foreclosure, prescription, unenforceability, inadmissibility, expiry, automatic withdrawal, the application of a particular regime, voiding or forfeiture of any right whatsoever and which should have been carried out during the period beginning on **12 March 2020 and expiring one month** after the date the health emergency ends, **shall be deemed to have been done on time** if it has been carried out within a period that may not, starting from the end of this period, exceed the period legally allowed for action, **limited to two months**.

It should be noted, however, that the deadlines for reflection, withdrawal and waiver, as well as the monetary repayment deadlines relating to the exercise of these same rights were **expressly excluded from this deadline protection zone** (Order no. 2020-427 of 15 April 2020)

Sheet 6: Who should I contact to assist me?

Slide 27





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(Partner)

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+33 (0)4.78.65.65.75

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- Civil and commercial disputes
- Product liability
- Risk/crisis management/prevention
- Criminal risk prevention

20 years of experience



Céline Gasser

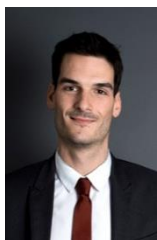
(Senior Associate Lawyer)

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+33 (0)4.78.65.65.85

- Commercial disputes (unfair competition, misleading practices, etc.)
- Contractual and pre-contractual disputes
- Real estate law disputes
- Management/execution of protective measures

8 years of experience



Benjamin Maubert

(Associate Lawyer)

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- M&A disputes
- Shareholders litigations
- Financial disputes
- Negotiation/ settlement agreements drafting

3 years of experience

Thank you & Bird & Bird

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