WilhelmGilliéron
AVOCATS

Auteur: Christophe Wilhelm | Le : 9 June 2020

Force majeure in Swiss contract law: cautionary note

The COVID-19 crisis is forcing the legal profession to review its contractual fundamentals. The proliferation of opinions and views on social networks requires constant updating in order to avoid unfounded rumours or principles from other legal systems from causing confusion in the minds of the practitioner and his or her clients.

Thus, having recently learned that the President of the Paris Commercial Court had considered – at the stage of provisional measures – that the health crisis linked to COVID-19 could constitute, under French law, a case of force majeure of such a nature as to suspend contractual obligations of delivery and payment of a debtor towards his co-contractor, (cf. T. com. Paris, 20 May 2020, Total Direct Energie v. EDF), we wondered about the situation under Swiss law.

Swiss contract law (the Code of Obligations) does not contain a definition of the concept of force majeure, but considers it to be an extraordinary, unforeseeable and insurmountable external event interrupting the causal link between the breach of contract and the damage caused by that breach. As contractual liability under Swiss law is a liability for fault (Art. 97 CO), the debtor can therefore be released from liability by proving the absence of fault if his non-performance is caused by force majeure.
It follows from this concept that a case of force majeure cannot in itself allow the interruption of a contractual obligation (as in the French case law mentioned above), but only exonerate the debtor who is incapacitated from his liability for the damage suffered by his co-contractor. Moreover, this conception will allow exemption from liability for non-performance, but not from liability for improper performance. Nor will it permit the avoidance of performance if the services have become useless as a result of an event of force majeure.

In order to remedy the shortcomings of Swiss law, it is therefore important to include in the contracts to be concluded a well-thought-out force majeure clause adapted to the case in question.

This clause should first define what the parties understand by force majeure. In this respect, the parties should ensure that only an illustrative list of cases falling within this definition is included. We recommend including cases of pandemic or epidemic. A further situation which, in our opinion, should also be included in the list of cases of force majeure is that of international economic sanctions (which are becoming increasingly frequent in our current political environment) preventing, for example, the debtor of a service from obtaining supplies from embargoed third parties in order to fulfil his contractual obligations.

The contractual clause on force majeure should, moreover, not only provide for an exemption from liability, but also provide for the consequences of non-performance, such as the setting of an additional period of time for the debtor to perform, beyond which the contract may be terminated.

Our experience shows, however, that the Parties (in particular the banks providing credit – but also the lessors) systematically refuse to provide for a force majeure clause allowing the debtor to be exempted from liability in the event of non-performance due to force majeure, the obligation to pay always being deemed “possible”, even in the event of a pandemic or embargo.

WILHELM Attorneys at Law is able to provide you with useful advice in drafting the clauses of your contracts.

Source : https://www.wg-avocats.ch/en/news/contract-law/force-majeure-in-swiss-contract-law-cautionary-note/