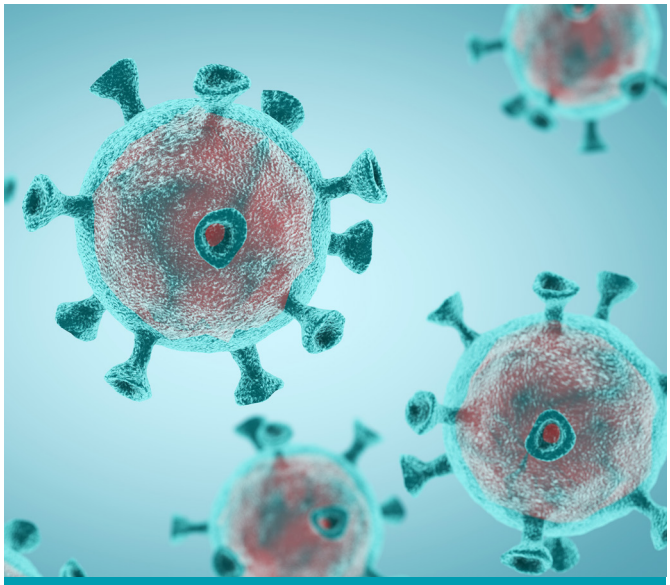
SQUIRE PATTON BOGGS

Coronavirus Disease 2019 (COVID-19):

Alert on Legal Issues (France)

16 March 2020



Over the last few days, we have received an increasing number of enquiries about the coronavirus disease 2019 (COVID-19), commonly known as the "coronavirus", and what organisations should be doing to mitigate the impact of the virus on their business, staff, supply chains, etc.

Key Legal Issues and Practical Advice

(Official information/Employment/Data Protection/ Support to Organisations/Contracts)

Official Information Websites

The government has set up a website, (www.gouvernement.fr/info-coronavirus) which is updated daily, and a toll-free number (0800 130 000) for all information.

There is a daily epidemiological report on Santé publique France.

The Ministry of Europe and Foreign Affairs regularly updates its travel advice. For more information, see the travel advice of the Ministry of Europe and Foreign Affairs.

The French Ministry of Labour has published a Q&A for employers and employees on its website.

Employment

In this epidemic context, employers must take appropriate measures to safeguard the safety of their employees and, thus, respect their obligations. Companies must also adopt a clear position on this subject – the health and safety of their employees, customers and suppliers is paramount and takes precedence over business considerations. The French Ministry of Labour has published a Q&A for employers and employees on its website.

1. Reminder of the Employer's Best Efforts Obligation

As a reminder, the employer has a reinforced best efforts obligation of means in terms of risk prevention since the case law of the Supreme Court of 25 November 2015. More specifically, the employer must be able to show that it has implemented the preventive measures necessary to ensure the safety and protect the health of its employees (Article L.4121-1 of the Labour Code).

2. Employee's Right of Withdrawal

The employee has a right of withdrawal. As such, he/she may refuse to go to a risk area (whether within or outside his/her workplace) by exercising his/her right of withdrawal if certain conditions are met, namely if there are reasonable grounds to believe that there is a serious and imminent danger to their life or health (Article L.4131-1 of the Labour Code).

Similarly, if the employer refuses to repatriate an employee despite their request, the latter may invoke their right to withdraw under the same conditions. The employer may not take any sanctions in this case, nor make any deductions from the employee's salary (Article L.4131-3 of the Labour Code).

However, in an epidemic situation, the possibilities to use the right of withdrawal are limited, as long as the employer has taken the necessary prevention and protection measures (principle resulting from DGT Circular n°2009/16 of 3 July 2009). If the exercise of the right of withdrawal is manifestly abusive, a deduction from salary for non-performance of the employment contract may be made and this may constitute a "real and serious" cause for dismissal. The government website specifies that "the sole circumstance that the employee is assigned to welcoming the public and for prolonged and close contacts is not sufficient, subject to the sovereign discretion of the courts, to consider that it justifies reasonable grounds to exercise the right of withdrawal."

3. Recommendations to Employers

Employers need to be prepared for the epidemic risk and can take the following steps:

3.1. Preparatory Measures

General Measures

- Prior consultation of the Social and Economic Committee (CSE) and involvement of the occupational doctor in order to carry out health, hygiene and safety measures.
- In companies with more than 50 employees, the CSE must be informed and consulted on measures to adapt working conditions (e.g. implementing reduced working days or hours activity, derogations from the rules on rest periods, etc.); however, the employer may take precautionary measures for the organisation of work before any consultation of the CSE.
- Amendment and updating of the Risk Assessment Document (DUER) to incorporate the epidemic risk and the actions taken to limit that risk.

Purchase of hygiene equipment (e.g. soap, hydro-alcoholic gel, FFP2 masks, single-use gowns, etc.) combined with education/instruction of staff on their use (the government has also published posters that can be distributed and posted on company premises).

Development of safety and hygiene instructions related to the epidemic risk.

Staff training on all measures taken to ensure their application.

Creation of a communication system between employees and the employer, such as an internal chat (e.g. WeChat group) to exchange information with employees on the evolution of the situation and the measures to be taken.

Informing employees (by email or other means) about the status of the epidemic risk using information provided by the government.

Possibility of limiting the use of public transport by financing private travel (e.g. taxis, private drivers, car-pooling, etc.).

Implementing a logbook to track employee travel (and particular, stays in risk areas).

Avoid business trips to risk areas.

Arrangement of Working Conditions

- Establish/update a Business Continuity Plan (BCP). This optional document lists all the measures aimed at ensuring that the essential activity of the company is maintained, while safeguarding the health and safety of employees (absenteeism scenarios, prioritisation of tasks, changes in work organisation, etc.).
- Adapting work organisation (e.g. new collective working hours, adaptation of workstations, workplace layout and multiskilling to replace absent employees) via an in-house collective agreement or, failing that, a unilateral decision by the employer after consulting the CSE.
- Arranging working time in the event of temporary extra work after informing/authorising the Labour Inspectorate and obtaining the opinion of the CSE (suspension of weekly and/or daily rest, exceeding the maximum daily working time and night work, derogation from the maximum working time).
- Offering temporary home working as a possibility to employees whose duties allow it (this can be set up without any particular formalism); however, it is recommended that employers regulate this practice through an in-house collective agreement or a charter drawn up by the employer after consulting the CSE or simply by a written agreement between the employee and the employer (in the form of an addendum of the employment contract, for example).
- Taking days off or RTT days in agreement with the employee.
- It should be noted that in view of the exceptional circumstances, the employer may decide to postpone the leave days already scheduled to cover a future 14-day period of vigilance (Article L.3141-16 of the Labour Code).
- Implementing on-call duty time if a collective agreement permits, or failing that, by unilateral decision of the employer after consulting the CSE (information, notice periods for the employees concerned, compensation in the form of money or extra leave will notably be provided).
- Implementing overtime.
- Provide for the multiskilling of employees:
  - Change of working conditions can be decided by the employer unilaterally (overtime and change of tasks without modifying the employee's contract). If the employee refuses this change, unless he/she is a protected employee, his/her refusal constitutes a misconduct that may justify his dismissal. The CSE must be consulted in advance if the contemplated changes are significant.
  - Amendment of the employment contract if the essential elements of the contract are changed (e.g. functions, remuneration, change from part time to full time).

3.2. Emergency Measures (If an Employee Is at Risk or Infected)

The employer must inform the employees and implement the following measures:

- Prohibit all business travel for the employee at risk or infected (risk area or not)
- Prohibit all physical appointments by the employee at risk or infected with customers
- Prohibit any meeting, gathering or collective event for the employee at risk or infected.
- Impose home working on all employees in case of epidemic risk; no formalism is imposed (Article L.1222-11 of the Labour Code).
- Impose the wearing of masks by employees at risk or infected in case of proven risk (to be transcribed in the DUER).

- Propose and organise the repatriation of employees located in affected areas.
- Restricting or prohibiting access to the premises to infected employees; if home working is not possible, their remuneration will be maintained.
- Reinforce the measures for cleaning and disinfecting the premises and special equipment for those responsible for cleaning floors and surfaces.
- Quarantine decided by the employee at-risk or infected employee who must ring the number 15 or a doctor from the Regional Health Agency (the only one authorised to issue a sick leave certificate corresponding to the duration of the 14-day isolation period) – the government strongly advises against going to hospital emergency rooms and consulting a doctor.
- To take leave to cover the 14-day quarantine period.
- Possible modification of working hours after consultation with the CSE and information/authorisation from the Labour Inspectorate (see above).

4. Compensation for Persons in Quarantine

In order to avoid the spread of the virus, the authorities have provided for a 14 days' confinement period for employees at risk. The government has set conditions for the granting of daily allowances for insured persons who are in quarantine and unable to work. Decree No. 2020-73 of 31 January 2020, provides that these insured persons may receive the allowance in respect of their sick leave without having to justify the minimum period of activity or the minimum contributions. In addition, the three-day waiting period will not apply. However, in order to benefit from this regime, insured persons must have been identified and issued with a sick leave certificate by a doctor from the Regional Health Agency.

In addition, when a child under the age of 16 has to stay at home because of the closure of his/her school, one of the parents may benefit from sick leave benefits when he/she cannot benefit from a special arrangement of his/her working conditions allowing him to stay at home to look after the child. The employer must declare the work stoppage via the employer page of the Ameli's website.

Data Protection

On March 6 2020, the French Data Protection Authority, the CNIL, published recommendations on the collection of personal data in the context of COVID-19. Health data is particularly protected within the framework of a series of regulations (notably, GDPR, French Data Protection Act and French Public Health Code).

1. Restrictions

The CNIL insists that employers cannot take measures likely to impair the privacy of the data subjects, in particular by collecting health data that would go beyond the management of suspected exposure to the virus.

For example, employers must refrain from collecting in a systematic and generalised manner, or through individual inquiries and requests, information relating to the search for possible symptoms presented by an employee/agent and their relatives. It is, therefore, not possible to implement, for example:

- Mandatory readings of the body temperatures of each employee/agent/visitor to be sent daily to their hierarchy
- The collection of medical files or questionnaires from all employees/agents

2. Lawful Processing

As part of its actions to prevent occupational risks, the employer can:

- Make employees aware and invite them to provide individual feedback of information concerning them in connection with a possible exposure, to the employer or to the competent health authorities
- Facilitate the transmission of information to the competent health authorities by setting up, if necessary, dedicated channels
- Encourage remote working methods and encourage the use of occupational medicine

The CNIL had published in 2009 during the influenza A (H1N1) epidemic, an exemption to register processing activities implemented within the framework of business continuity plans (BCP) relating to a pandemic influenza implemented by public and private employers. The only purposes of the processing activity are (i) to contribute to the development of a BCP by identifying people who may be unavailable due to their family situation and/or their mode of travel; and (ii) in the context of monitoring the BCP, to warn the personnel of the measures taken by the organisation; or (iii) to carry out all non-nominal statistical processing linked to the development and activation of the plan in the company. Processing of this data is only lawful if a certain flu pandemic stage is reached and the data must be erased when the health risk disappears. Although this text has no longer had any effect since the entry into force of the GDPR, it remains a good indication of what the CNIL considers proportional and lawful.

In the event that a report is made to the employer, the latter may:

- Record the date and identity of the person suspected of having been exposed and the organisational measures taken (confinement, teleworking, orientation and contact with the occupational doctor, etc.)
- Communicate to the health authorities who request the elements related to the nature of the exposure, necessary for possible health or medical care of the exposed person

According to the CNIL, each employee/agent must, for their part, implement all means in order to preserve the health and safety of others and of themselves (Article L.4122-1 of the Labour Code). They must inform their employer in case of suspected contact with the virus.

The processing of actual health data is the responsibility of the health authorities, qualified to take the adequate measures considering the situation. The CNIL invites individuals and professionals to follow the recommendations of the health authorities and to only collect data on the health of individuals who have been requested by the competent authorities.

3. CNIL 2020 Investigation Programme

On 12 March 2020, the CNIL announced its investigation programme for 2020 https://www.cnil.fr/fr/quelle-strategie-de-controle-pour-2020. It will focus, amongst other topics, on the security of health data. The CNIL clarified that "recent news related to health issues (telemedicine, connected health objects, personal data breaches in public establishments...), demonstrates the attention that must be paid to the security of health data". Although this is particularly intended to cover activities by healthcare professionals, it cannot be excluded that the CNIL will also take an interested in activities of organisations relating to health of employees or visitors, when carrying out an investigation on this particular topic or any other.

Measures Planned to Support Organisations

An economic continuity unit was activated on 3 March, at the Ministry of the Economy, in order to obtain all the necessary information on the economic situation of the country in real time, and to better manage the impact of this health crisis on the economy.

Since 28 February, the government considers COVID-19 to be a "case of force majeure" for public procurement. Consequently, companies under state public contracts will not be penalised in the event of late delivery.

From 2 March 2020, the Banque Publique d'Investissement (BPI) has stood as guarantor for all loans requested by SMEs in order to support them during this difficult period.

The Ministry of Economy and Finance also announced the following measures:

- The provision of all useful information on the activity and logistics situation in the various Chinese provinces. Companies will be able to find out the exact situation, province by province, as well as in the major Chinese ports where exports from France and Europe arrive.
- The acceleration of approval procedures in certain sectors for new sources of supply, in particular for the construction or chemical sector in order to help them diversify their sources of supply while respecting social standards, environmental and European.
- Launching of a reflection on securing supplies for certain strategic sectors, such as the automobile sector, in order to make them gain independence from their supplies abroad.
- In conjunction with the Governor of the Banque de France, it was decided to re-establish credit mediation to support on the territories in the departments all SMEs that would need to renegotiate their contracts and renegotiate their credits.
- The simplification of the aid system for companies impacted by COVID-19:
  - Possibility for companies to request a postponement of social charges by simply sending an email
  - Reduction for direct taxes, on a case-by-case basis, for companies threatened with disappearance due to the economic impact of COVID-19
- In connection with the Ministry of Labour, a strengthening and simplification of the partial activity system (partial unemployment); in order to preserve employment (response time of 48 hours, increase in the allowance up to the minimum wage in very small businesses).
- Support by the business mediator for dealing with a conflict with customers or suppliers.

The President announced on 12 March 2020 the reinforcement of the above measures.

To be supported in their efforts, companies can contact the sole referent of the DIRECCTE in their region or the sole referent of CCIs and CMAs. For more information in each region, the government recommends contacting 0 800 130 000.

Impact on Contractual Relations

1. Force Majeure

Force majeure applies in a contractual relationship governed by French law (this is not necessarily the case if the contract is governed by another law).

Whatever the applicable law, the contract may happen to define, in a more or less detailed, extensive or restrictive manner, the *force majeure* event and their consequences on the parties. It is, therefore, important to read the content of one's contracts carefully, should you wish to invoke *force majeure*.

With regard to the relationship between a professional and a consumer, the contractual provisions, which are more unfavourable to the consumer than what is provided by law (even implicitly), are likely to be void, since they are abusive. Any clause "which removes or reduces the consumer's right to compensation in the event of the trader failing to fulfil one of its obligations" is considered to be null and void, which could be the case in particular of a clause giving a much defined definition of *force majeure* (Article R article R. 212-1 of the consumer code).

Since October 1, 2016, *force majeure* is defined in Article 1218 of the Civil Code, which provides: "In contractual matters, there is force majeure where (i) an event beyond the control of the debtor, (ii) which could not reasonably have been foreseen at the time of the conclusion of the contract; and (iii) whose effects could not be avoided by appropriate measures, (iv) prevents performance of its obligation by the debtor." Article 1218 has taken over, the previous case-law criteria of unpredictability and irresistibility, abandoning the criterion of externality. The parties are free to supplement their contracts with specific cases or circumstances as being due to *force majeure*.

The text also provides: "If the prevention is temporary, performance of the obligation is suspended unless the delay that results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by Articles 1351 and 1351-1." Many contracts provide for the possibility of termination by the parties.

The state has announced that COVID-19 should be treated as a "*force majeure*" in the context of French public procurement contracts. Even if this decision may influence it, the determination of the existence of a case of *force majeure* is a matter for the sovereign discretion of the courts, particularly in relations between traders or with consumers.

This is not the first time that the question of the *force majeure* of an epidemic has arisen: the judges have, for example, ruled on diseases such as chikungunya, Ebola, dengue fever, plague, SARS or even influenza A (H1N1).

In practice, we will remember that:

- The "unpredictability" of the event qualified as *force majeure* is assessed on the day of the conclusion of the contract. For the coronavirus, if the question does not arise for old contracts, it will be necessary to consider when the intervention of the coronavirus on the contract could have (or should have) been anticipated and on the measures taken as a result.
- The severity and the complication or mortality rate of the virus, as well as the existence or not of a medical cure (this is not the case today for COVID-19) and the ease of limiting the risk of contamination (wearing protective clothing or masks, for example) should be taken into account to determine whether the criterion of "irresistibility" is actually fulfilled. The implementation of sanitary measures by the public authorities preventing the debtor from fulfilling its contractual obligations is also taken into account.
- The location of the *force majeure* event is important in some cases. Can the precautionary principle be taken into account when it comes to areas near a risk area? The issue is often dealt with specifically by the tourist and travel industry.
- *Force majeure* cannot be invoked as a mere pretext for disengaging from contractual obligations; there must be a real impediment. A causal link between the event of *force majeure* and the non-performance must be established. In addition, the possibility of using substitutes or substitution circuits must be assessed, and whether the effects can be "avoided by appropriate measures", as provided for in Article 1218.
- If *force majeure* can prevent or delay the performance of a service, case law considers that it does not affect the payment of a sum due (unless *force majeure* makes the debtor insolvent).

2. Hardship

Does the epidemic constitute a case of unforeseen circumstances that would allow a party to renegotiate the contract?

Under Private Law

Hardship applies in any contractual relationship governed by French law formalised since 1 October 2016 law (this is not necessarily the case if the contract is governed by another law).

Whatever the applicable law, the contract may happen to define and govern, in a more or less detailed, extensive or restrictive manner hardship events and their consequences on the parties. It is, therefore, important to read the content of one's contracts carefully, should one wish to invoke unforeseen circumstances.

Article 1195 of the Civil Code states that "If (1) a change of circumstances (2) that was unforeseeable at the time of the conclusion of the contract (3) renders performance excessively onerous (4) for a party who had not accepted the risk of such a change, (5) that party may ask the other contracting party to renegotiate the contract. (6) The first party must continue to perform their obligations during renegotiation."

Some parties prefer to exclude the application of the article referring to the acceptance of the risk by the parties.

The text further provides that "In the case of refusal or the failure of renegotiations, (1) the parties may agree to terminate the contract, on the date and on the conditions that they determine, or (2) by a common agreement ask the court to set about its adaptation. (3) In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine."

Many parties, in practice, rather than leaving the ordinary law of Article 1195 of the Civil Code to govern their contract provides for a "tailor-made" contractual clause with specific terms and in order to avoid leaving the judge an excessive freedom in the development of the new post-revision contractual regime.

Under Public Procurement Law

Public law recognises hardship since a judgment of the Council of State in 1916. The hardship theory is codified by the Public Procurement Code (PPC), entered into force on April 1, 2019. Article L. 6, 3 PPC provides that an agreement can be modified when an event "exterior to the parties, unpredictable and temporarily disrupting the balance of the contract" takes place. In this case, the other party is entitled to compensation. In exchange for this, the latter is required to continue to execute the agreement and all of the obligations attached to it.

The main contracts affected by such circumstances are public service delegations, which are concluded for a relatively "long" period.

The hardship theory presents similarities to the notion of "unforeseen technical constrains", which covers all the technical difficulties encountered during the performance of a public market and governed by the Public Procurement Code. If unforeseen technical constraints are recognised, the contract may be subject to modification if the overall nature of the contract remains unchanged (Articles L. 2194-1 and L. 3135-1 of the Public Procurement Code) and if the additional works, services or supplies do not entail, for contracting authorities, an increase greater than 50% of the initial amount of the agreement (Articles R. 2194-3 and R. 3135-3 of the Public Procurement Code).

It is important to read the content of its contracts carefully as regards the terms governing changes.

Insurance

1. Damages Policy

If the damages policy contains a section covering operating losses and additional costs, these assume that the company has suffered a material loss specific to itself (such as a fire, flood or broken machine). In this way, classic policy damages will not be able to cover the operating loss generated by a stoppage in work because of COVID-19.

Extensions of these policy damages (however, quite rare on the French market and with sub-limit of cover and important retentions of insurance) can provide cover for operating losses linked to the loss of members in the supply chain. However, generally, this loss must be linked to a covered event and only a case-by-case analysis of the policy wording is likely to be able to determine whether COVID-19 is likely to be covered by insurance.

2. Specific Policies for the Cancellation of an Event

There are specific insurance policies for the cancellation of cultural or sporting events. These assume an event outside the control of the organiser so that decisions to cancel events taken independently by the company, and not the decision of a public authority, would not be covered. On the contrary, and subject to the definition of covered events and/or the exclusion clauses, if the cancellation of an event resulted from a decision of an administrative authority, the financial consequences of this cancellation are likely to be protected by such cover.

However, we must keep in mind that given that the necessity of a contingency, only the policies, which would have been taken out before being aware of an urgent public health epidemic, could be triggered.

3. Third-party Liability Policies

Third-party liability policies generally cover liability in relation to third parties (other than employees) in cases of physical injury linked to work. The claims of third parties could be expressed in relation to a company from which it would be alleged that a fault would be mobilised.

In relation to employees specifically, third-party liability policies are equally likely to be used, if the third-party responsibility of the employer is sought based on responsibility provided for by the social security code governing gross negligence.

In any case, the cover is only employable subject to the conditions of the coverage and the exclusion clauses set out in the policy.

Supply Chain Issues

There is a range of supply chain risk management measures that companies should consider in light of the COVID-19 outbreak:

- Maintain good lines of communication with your key suppliers, logistics providers and end customers as to what steps are taken on a regular basis, etc.
- Conduct assessments of the risk posed to your supply chain, considering factors specific to high-risk suppliers and working conditions.
- Obtain information from suppliers on measures they are taking in relation to goods (or services) supplied to you and, if appropriate, consider whether procuring supplier agreement to minimum standards of conduct is necessary.
- Consider whether you are going to prefer certain suppliers and customers, including the consequences of doing so. Be mindful of not giving priority to suppliers and/or customers in return for the payment of money or the giving of some other advantage.
- Is there scope to switch suppliers and/or dual source product? Can you modify your product to substitute different components/suppliers?
- Review the terms of all key/critical contracts for risk and potential contractual protections, including penalties, limitations of liability and *force majeure* clauses (see further below), etc., including how they might be interpreted in different jurisdictions.
- Be mindful that if there is a shortage of raw materials/components, suppliers may be compelled to use alternative materials to meet customer demand. Such materials may not be quality-tested or even be out-of-spec. Depending on the type of raw materials/components, consider whether there is a risk that they may be contaminated by the virus.
- Identify what law/jurisdiction applies to your contracts.
- Consider the use of express infection/disease/epidemic/pandemic wording in all new contracts and, where possible, amend and incorporate into existing contracts.
- Be alert to attempts by your customers and suppliers to sign you up to declarations of compliance with applicable health guidelines, monitoring of staff, limiting contagion, etc., which could inadvertently shift liabilities and/or expose your company to increased legal and financial risk.
- Meet with your corporate peer group to share good/best practice.
- Check your insurance arrangements (see above).
- Maintain records and evidence to assist any future supply chain claims/defences – have a good audit trail.
- During periods of disruption, local officials may request (either expressly or implicitly) payment from you or your local representative in return for expediting the performance of an otherwise routine task or function, adding further pressure on your supply chain. Be aware that while such requests are not unusual, the making of such payments (known as "facilitation" or "grease" payments) is generally unlawful in France and across the globe.

Contacts

If you would like to discuss any of the issues raised in this advice note, please contact any of our team listed below.

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