Abrupt termination of commercial relationships in an economic crisis: The use(lessness) of force majeure

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During this epidemiological crisis, the peaceful continuation of commercial relationships is being challenged.

Facing a sharp economic slowdown, the outcome of which is more than uncertain, economic operators may need to reconsider some of their commercial relationships: whether it is, for example, to cope with the loss of an opportunity, to reduce the volumes of orders to save costs or to opt for the internalization of services, many decisions may have an impact on commercial relationships.

These decisions can be strategically and economically necessary and justified, but operators must nevertheless take them with great caution at the risk of being held liable on the ground of abrupt termination of established commercial relationships.

Article L. 442-1 II of the French Commercial Code sanctions the fact “for any person engaged in production, distribution or service activities to brutally terminate, even partially, established commercial relationships, in the absence of written prior notice which takes into account the duration of the commercial relationship, with reference to trade practices, or interbranch agreements.”

Termination may be total (e.g. complete cessation of orders) or partial (e.g. significant decrease of orders). In either case, termination will be considered abrupt if it occurs without reasonable prior written notice.

Article L. 442-1 II provides for three cases of exemptions from liability:

- the observance of 18 months’ prior notice ¹;
- the failure for the other party to perform its obligations; and
- the existence of a case of force majeure.

In the context of an economic crisis, it is unlikely that, regarding the urgency of the situation, an economic operator would choose to grant 18 months’ prior notice before reducing or terminating services or even wait for its partner's failure (which is very strictly applied by courts) to avoid the allegation of abrupt termination.

Force majeure remains. But there have been an extremely limited number of decisions exonerating the author of a termination on the basis of force majeure (only one since 2008), whereas abrupt termination gives rise to extensive litigation (almost 300 decisions per year), and force majeure is a case of exemption provided since 1996.

This article raises questions about the relevance of the use of force majeure to avoid abrupt termination following an economic crisis. It also reveals a trend in case law emerging from the economic and financial crisis of 2008.
Is force majeure an effective remedy for relief from abrupt termination following economic difficulties?

To claim force majeure, it is imperative to demonstrate that the event meets the four cumulative conditions set out by article 1218 of the French Civil Code:

- it is beyond the control of the author of the termination (externality);
- it was not reasonably foreseeable at the time the contract was concluded (unforeseeability);
- its effects are insurmountable (irresistibility); and
- it renders the performance of the obligation impossible, and not only more expensive or more complex.

Courts are excessively strict on the application of force majeure, systematically verifying that the legal conditions are met. Since 2008, the argument has only been upheld once; in relation to an administrative decision forcing a company to close the establishment it managed and to stop using the services of its partner. Thus, it was held that this administrative injunction had the characteristics of force majeure (external, irresistible and unforeseeable) exonerating the company from its liability on the ground of abrupt termination.

What about the economic difficulties faced by the author of the termination? Are they likely to constitute force majeure, exempting the author from its liability on the grounds of abrupt termination?

If the judges admitted that a “serious economic crisis in a sector of activity can be assimilated to a case of force majeure and thus justify the termination without notice of established commercial relations,” it must be noted that the factual elements claimed by the litigants never meet the conditions of irresistibility and unpredictability required. Thus, it does not constitute a case of force majeure because the circumstances were not irresistible and/or unforeseeable:

- **The sole decrease in turnover**
  
  This is what the Paris Court of Appeal states in a 2015 ruling before condemning a company to pay its service provider, for terminating their relationship without notice, a sum equivalent to nine months’ notice (in this case, the relationship had lasted ten years and there was no economic dependence);

- **The deterioration of the financial situation**
  
  According to the Paris Commercial Court, this deterioration could be external and irresistible, but it was not unforeseeable as “the evolution of the turnover and the results shows a slow and regular deterioration.” And the Court concluded that in these circumstances, the “termination does not derive from an unforeseeable situation and there was nothing to prevent Company X from notifying its partner in a timely manner”;

- **The closure of a plant, caused by a drop in orders**
  
  The Paris Court of Appeal considered that “it has not been established that the economic circumstances giving rise to the closure of the plant is unforeseeable nor irresistible which are the characteristics of force majeure”;

- **The closure of a site due to the economic crisis in a sector of activity**
  
  In this case, the company had terminated, without notice, a 24-year business relationship with its supplier, claiming that its accumulated losses amounted to EUR40 million at the time of the closure of its site.

However, the Paris Court of Appeal noted that if the company had in fact recorded losses, “it nevertheless, even though its financial situation was already affected, indicated [to its partner] that it intended to continue the commercial relationship.”

The Court concluded that “there is no evidence that during the period concerned there was a characterized and sudden collapse of the steel market in the light of the pre-existing deteriorated situation.” In other words, the irresistible character was obviously lacking.

To sum up, no decision so far has qualified the economic difficulties encountered by the operator as force majeure. In the presence of exceptional economic circumstances, the use of force majeure therefore proves ineffective to avoid the allegation of an abrupt termination.

Lessons from the 2008 economic and financial crisis: An unintentional termination is not wrongful
While force majeure is not an effective remedy to escape the allegation of abrupt termination, the operator facing economic difficulties is not totally deprived of arguments.

This is evidenced by two decisions of the French Supreme Court (Cour de Cassation), regarding terminations caused by the 2008 economic and financial crisis: the judges noted that the termination was not attributable to the defendants.

The first decision is the Caterpillar c/. Cmi case. The French Supreme Court rejected the allegation of abrupt termination against the Caterpillar companies after noting that:

- "the decrease in orders from the Caterpillar companies to CMI (...) was due to the decrease in the Caterpillar companies' own orders (...) as a result of the economic and financial crisis of 2008, which had a strong impact on the construction and public works sectors (...)";
- although the Caterpillar companies had "significantly reduced their volume of orders from their subcontractors," they had done so "in view of the decrease in their own orders and therefore not deliberately."

Therefore, the Court of Cassation concluded that the drop in orders was not attributable to the Caterpillar companies. It should be noted that in this case, the companies justified a 70% decrease in their activity between 2007 and 2008.

The second decision is Iplus c/. Icade case. The French Supreme Court reiterated its solution, stating that the termination of the commercial relationship "is not attributable to the company Icade," which "justified a significant reduction in its real estate development during the period from 1 July 2008 to 30 June 2009, following the economic and financial crisis of 2008."

These solutions have been reiterated in connection with other economic crises, such as the one affecting the textile market. Here, the French Supreme Court noted that:

- the 75% drop in the operator's orders, "inherent to a market in crisis, [does] not engage its responsibility" for abrupt partial termination; and
- the total termination of the relationship is neither more attributable to it, as it "is a consequence of the crisis in the activity's sector."

Thus, it is on the ground of accountability of the termination that the economic operator can still, in times of economic or financial crisis, escape the allegation of abrupt termination.

This legal trend has been followed by judges of appeal courts:

- the Paris Court of Appeal recalled that in order to engage the liability for abrupt termination "the termination must be the result of a unilateral will of its author," before concluding that it is not engaged "when the crisis of a activity's sector is at the origin of the modifications made to the established commercial relationship;";
- the Paris Court of Appeal further held that "the decline in Fives Cryo's order turnover inherent in a market in crisis does not present the nature of a fault and cannot therefore engage its liability, since it was forced to pass it on to its commercial partners and subcontractors (...)."

One should be careful not to jump to any hasty conclusions: this does not mean that at the first economic difficulty the commercial relationship can be challenged or significantly reduced without fear of a claim for abrupt termination. Indeed, two conditions must be reunited.

**Good faith**

The economic operator will have to demonstrate that the decrease in orders (partial or total) imposed on its commercial partner is not the result of a deliberate decision. This presupposes demonstrating that: (i) this decrease is the consequence of the decrease in its own business volume, and (ii) the decrease in its business volume was also generated by the economic crisis.

On the contrary, it will be considered as a fault because:

- the decrease in orders in anticipation of economic difficulties is to come but not yet proven;
- the lack of correlation between the decrease in order volume and the economic difficulties actually encountered; and
- the decrease in order volume is generated in part by contracting with another partner.
This was recently recalled by the Paris Court of Appeal, which condemned a manufacturer of textile coatings for automobiles who had imposed, without notice, a decrease in orders to its supplier with whom it had had a business relationship for 25 years. The manufacturer, in an attempt to exonerate itself, mentioned “the necessary repercussion on its turnover of the economic situation: the year 2012 having been a catastrophic year for the automobile market.” However, the Court dismissed the argument after noting “the absence of an obvious and proven correlation between the reduction in its overall turnover and the reduction in the turnover achieved by it with [the supplier], given that it had turned to another supplier (…)”.\footnote{14}

**The absence of a contractual volume commitment**

In the decisions referred to above, the economic operator was not bound by a contractual volume commitment to its co-contractor. Thus, in its decision of 5 July 2019, the Paris Court of Appeal carefully specifies that “since Fives Cryo did not make any volume commitment to AJC and could not be forced to maintain a level of activity with it, Fives Cryo did not make any fault by not placing any more orders (or by drastically reducing them) with AJC.”\footnote{15}

The three rulings of the French Supreme Court were also about commercial relationships for which the judges had noted the absence of a volume commitment.\footnote{16}

Indeed, in the opposite hypothesis, the operator could not use the economic crisis as a pretext to free itself from its contractual obligations and thus unilaterally modify the volume of orders or end its volume commitment.

To sum up, it would be dangerous to claim that the slightest economic difficulty encountered by an operator allows it to free itself from Article L. 442-1 II of the French Commercial Code. The economic operator does not have the freedom to unilaterally adjust its commercial relationships according to market developments and evolutions. However, it may escape the claim of abrupt (total or partial) termination if it demonstrates that it had no control over the (downward) evolution of the commercial relationship and that it only passed on the effects of the economic crisis which it itself had suffered. Regarding force majeure, though it is currently getting a lot of attention, it remains outside the courtroom.

\footnote{1 New provision introduced by Order n° 2019-359 of 24 April 2019}
\footnote{2 Article 1148 of the French civil Code, if the commercial relationship has started or the contract was concluded before 1 October 2016}
\footnote{3 Paris, 20 September 2017, n° 14-23.313}
\footnote{4 Paris, 8 January 2020, n° 18-04.493}
\footnote{5 Paris, 3 July 2015, n° 13-06935}
\footnote{6 Paris, Commercial Court 8 July 2019, n° 2018042408}
\footnote{7 Paris, 3 April 2019, n° 16-21.113}
\footnote{8 Paris, 24 April 2019, n° 16-17.560}
\footnote{9 French Supreme Court, 12 February 2013, n° 12-11.709}
\footnote{10 French Supreme Court, 6 February 2019, n° 17-23.361}
\footnote{11 French Supreme Court, 8 November 2017, n° 16-15.285}
\footnote{12 Paris, 12 September 2019, n° 17-00.236}
\footnote{13 Paris, 5 July 2019, n° 14-10.976}
\footnote{14 Paris, 5 February 2020, n° 18-14.973}
\footnote{15 Paris, 5 July 2019, n° 14-10.976}
\footnote{16 For example: French Supreme Court, 8 November 2017, n° 16-15.285}