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A whiff of dystopia in the air

The end-of-year-holiday season is fast approaching and it will be proper to wish the best to our loved ones and to all those whose path we have crossed in 2022. It is time to look back at a traumatic year and to prepare ourselves to face the worst scenarios: war, recession, and their consequences.

The worst is never certain but it may happen again.

My generation grew up in a world based on the values promoted by major international institutions such as the OECD, the Council of Europe and the European Union: democracy, freedom of the press and freedom of conscience or opinion, which are its indispensable corollary, and universal respect for human rights regardless of race, religion, gender, and more recently sexual orientation.

The OECD has tackled corruption^[1] and the European Union has unified many rules to promote trade between its Members around four fundamental freedoms: the free movement of goods, the free movement of capital, the free movement of services and the free movement of people. Local wars and the resistance of authoritarian regimes with mafia-like practices seemed to us to be the echoes or jolts of an old world destined to disappear.

Then, two years ago, the COVID-19 pandemic reinstated invisible borders and caused individuals and countries to turn inward-looking. Declinism ingrained in people's mind: travel restrictions, distrust in scientific and technological innovations, finding refuge in an idealized bygone world that never existed! The complete opposite of the open world in which we grew up.

Then, Russia's war against Ukraine brought back the ghosts of the past that we thought had disappeared forever: a nationalist rhetoric reminiscent of that of the dictatorships that were responsible for World War II. The words used by Russia to justify its destruction of Ukraine are eerily reminiscent of those used by Nazi Germany before it invaded Poland in 1939. The kleptocracies at work look to 1984 and Fahrenheit 451 dystopias and justify the worst barbarities by their distorted vision of History. A giant leap backwards.

Why does a legal practitioner engage in such considerations? Quite simply because companies must be prepared to face the difficulties caused by the global situation and we must be ready to assist and support them with the only weapon we have: the law.

Many companies, including the largest ones, run the risk of seeing their very existence threatened if gas and electricity prices continue to soar. Industrial furnaces have already been disabled and factories are about to close down throughout France because they cannot cope with the crazy increase in energy prices.

Fortunately, we have an effective legal arsenal in France that is built around case law principles incorporated into the new French contract law resulting from the Ordinance of February 10, 2016. In addition to an article devoted to force majeure and another to unforeseeability (*imprévision*, i.e., a concept close to that of hardship)^[2], the French Civil Code now recognizes good faith as a public policy principle. This new law, which the *Cour de Cassation* (French Supreme Court) paved the way for in 2010, requires contractual parties to renegotiate their agreements if new and unforeseeable circumstances have created a significant imbalance in their respective obligations.

As recalled by some remarkable legal scholars, the arsenal offered by our law and case law, both pre- and post-2016, is not limited to force majeure or unforeseeability. A party that can no longer meet its obligations can also invoke the disappearance, even partial, of the cause of the contract or of a real consideration, or even the lapse of the contract. This arsenal should entitle companies that can no longer meet their commitments due to an uncontrollable increase in energy prices to ask judges to revise the contract or to relieve them from their obligations under “take or pay” contractual clauses which require the purchase of quantities of gas or electricity not consumed due to the collapse of the market.

Depending on the seriousness of future crises, companies should be able to apply to the interim relief judge, whose role is to deal with emergency situations. This is in any case what the Commercial Court of Paris considered at the beginning of the 2020 health crisis in disputes between EDF and Total. What applies to very large companies should also apply to others, the existence of which is threatened by a crisis that could be unprecedented since the Great Depression in the 1930s and World War II to which it eventually led.

The worst is never certain, but we must be prepared for it.

^[1] See *inter alia* article entitled [Fighting foreign bribery: The OECD Working Group’s Phase 4 report on France distributes good and bad marks](#) published on our Blog in March 2022

^[2] See article entitled [Covid-19 - Force majeure or hardship: You do not have to choose](#) published on our Blog in May 2020



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