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The Paris Court of Appeals confirms that COVID-19 is to be considered as a force majeure event

On July 28, 2020, the Paris Court of Appeals ruled on the dispute between EDF and Total Direct Energie concerning the suspension by Total Direct Energie of the framework agreement for the purchase of nuclear electricity that they had entered into, due to the Covid-19 pandemic.

The Court of Appeals upheld the interim order issued by the Paris Commercial Court on May 20, 2020 and found that the Covid-19 pandemic constitutes a force majeure event justifying the suspension by Total Direct Energie of the framework agreement as soon as this event occurred.

As a reminder, EDF and Total Direct Energie disagreed on the fact that the COVID-19 pandemic could constitute a force majeure event that would suspend the performance of the framework agreement for the purchase of electricity that they had entered into under the so-called ARENH mechanism ("*Accès Régulé à l'Electricité Nucléaire Historique*", i.e. regulated access to historic nuclear electricity).

In particular, Total Direct Energie contended that EDF's refusal to recognize the COVID-19 outbreak as a force majeure event and to suspend the framework agreement constituted a manifestly unlawful disturbance. For its part, EDF considered that its co-contractor was not facing an impossibility of performance but simply wished to call the agreement into question.

On May 20, 2020, the President of the Paris Commercial Court, ruling in summary proceedings, considered that the requirements for establishing the existence of force majeure provided for in the framework agreement signed by EDF and Total Direct Energy were met and ordered EDF to accept the suspension of this framework agreement[1].

As previously announced, EDF appealed against this order.

In its judgment of July 28, the Paris Court of Appeals upheld this decision. It ruled that the COVID-19 pandemic must be considered a force majeure event – recognizing the obviousness of the facts as required under summary proceedings – given the broad definition of force majeure provided for in the framework agreement, and that EDF's refusal to interrupt the sale of electricity constituted a manifestly unlawful disturbance.

In addition to confirming the above, the Court of Appeals also provided some welcome clarifications and reminders.

First of all, in an overreaching statement recalling a fundamental rule of law, the Court of Appeals stressed that "*the refusal by a party to perform a provision of the contract which is not subject to any difficulty of interpretation is likely to constitute a manifestly unlawful disturbance where that party's conduct flagrantly calls into question the principle of the binding force of contracts and is contrary to the principle that no one can take the law into his/her hands*".

Having recalled this principle, the Court of Appeals moved to a more pragmatic approach.

In the first place, it stated that the framework agreement, although of a regulatory origin – since it is governed by Executive Order of April 28, 2011[2] – is only binding upon EDF and Total Direct Energie and is, therefore, a private law contract. In this respect, the Court noted that the private law nature of this framework agreement was confirmed by the fact that it conferred jurisdiction on the Paris Commercial Court.

The Court thus set aside any discussions that would question the scope of application of this decision on the basis of the specific nature of the contractual relationship between Total Direct Energie and EDF.

This being said, the Court of Appeals analyzed the contractual mechanism specifically provided for and held that it has an automatic effect insofar as it clearly provides that the suspension of the agreement takes effect upon the occurrence of a force majeure event, which "*automatically*" results in the interruption of the annual electricity sale.

Moreover, the Court of Appeals specified that this "*temporality*" was appropriate to this type of agreements and that it was "*manifestly related to the material impossibility of storing the delivered electricity which could not be sold, so that no delay is conceivable*". It thus considered that the clause was "*perfectly bilateral*" and balanced in that it preserved the rights of each of the parties.

In these circumstances, the Court of Appeals concluded that, since the existence of force majeure was established, it would be up to EDF to demonstrate before the trial judges that the clause has been wrongly implemented by Total Direct Energie.

EDF has already indicated that it does not rule out the possibility of lodging an appeal before the *Cour de Cassation* (French Supreme Court).

A case to be followed-up…

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[1] Cf. our article entitled The Paris Commercial Court rules that Covid-19 is to be considered as a force majeure event published on our Blog in May 2020

[2] This Executive Order was adopted in furtherance of Article 4-1 II of Law No. 2000-108 of February 10, 2000 on the modernization and development of the electricity public service