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Impact of Coronavirus Emergency on Contract Law

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Instant paper for Senegal
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I. Overall Framework: New code of civil and commercial obligations

The provisions that apply to the contract in particular to force majeure and impracticability

Force majeure: Article 129 and 132 of the civil and commercial obligations' code

Article 129 of the Code des Obligations Civiles et Commerciales (COCC) stipulates that *«that there is no liability if the harmful event is the consequence of force majeure or a fortuitous event, i.e. an external, insurmountable event which could not be foreseen».*

Article 132 specifies that *«The debtor may by agreement take charge of fortuitous events or force majeure. Conversely, it may be agreed that the occurrence of a specific event shall be considered as creating the fortuitous event or force majeure».*

It can be inferred from this that in Senegalese law, there are three criteria in the definition of force majeure.

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1. The Externality

The event potentially constituting a force majeure shall first of all, under Senegalese law, be external to the will of the party invoking it. This means that the party invoking the force majeure shall not be the cause of the event or be involved in its occurrence. This requirement of externality was well illustrated in a decision of the Senegalese Court of Cassation, which held that: «the classification of a strike as force majeure cannot be recognized as such when it has erupted on within the company invoking it. The requirement of externality is not met and unpredictability appears likely».¹

2. The unpredictability

In accordance with the Article 129 of the Senegalese's COCC, the event in question shall be unpredictable to the parties concerned on the day the contract is concluded. In other words, the contracting parties shall only be reasonably able to prevent the event potentially constituting a force majeure in order to anticipate and limit the damage. If the unpredictability is not established, or if it appears implausible, the force majeure will be ruled out. The rapid expansion of Covid-19 is likely to leave economic operators with an insufficient margin to protect themselves against it.²

3. The insurmountability

In order to be able to invoke the insurmountability provided for in Article 129 of the COCC, the debtor of the obligation shall establish that the event occurring prevents the performance of such an obligation. For example, the measures taken by the Senegalese government on the occasion of Covid-19 (border closures, curfews at certain hours, etc.) may make the performance of certain contracts particularly delicate or even impossible.

The force majeure and the fate of conventions affected in Senegal

Once the force majeure is established, the contract is then suspended or terminated depending on the duration of the force majeure, the nature or the duration of the affected agreement. In the case of long-term contracts, a temporary force majeure event such as a pandemic may result in the suspension of the affected agreement until the pandemic ends. Such could be the case of the Covid-19 illness.

When the execution of the contract becomes impossible, in particular in the event of the disappearance of the contract's subject, the force majeure becomes a legal condition for termination of the contract. The force majeure constitutes a source of exemption from liability in Senegalese law. The contractual responsibility cannot therefore be engaged with

¹ *Senelec c/ Popec* [2000] Court of Cassation 142, [20 October 2004] <<https://juricaf.org/arret/SENEGAL-COURDECASSATION-20041020-142>> accessed 31 May 2020.

² For more forecasts, see Komlavi Agbam, 'Le COVID-19, la porte ouverte pour une entrée de l'imprévision dans les Etats d'Afrique Francophone à droit civil codifié?' (April 2020) n. 5 Recueil LGA <<https://legiafrica.com/subscription/publication/36426-le-covid-19-la-porte-ouverte-pour-une-entree-de-l-imprevision-dans-les-etats-d-afrique-franco-phone-a-droit-civil-codifie>> accessed 31 May 2020.

regard to the obligations affected by force majeure and the party concerned is therefore released from it. Also, it should be noted that the affected person shall not be related to any personal failure to perform the contract in question.

When the fault of the perpetrator of the damage is established, the force majeure's effect of exempting wears off.

A. The impracticability or unforeseeability (Imprévision, in french Law)

No provisions apply. The Senegalese law does not acknowledge the theory of unforeseeability, at least not expressly. The COCC drew heavily on the French Civil Code of 1804 (which did not acknowledge the theory of impracticability or hardship "Théorie de l'imprévision, in french law"). Thus, when the Covid-19 is not characterized as force majeure, but rather as unforeseeability, i.e. when it has made performance of the contract not impossible but difficult, the injured party will not be able to invoke the rules of force majeure.

It may propose to the other party the renegotiation of the contract. The latter may accept or refuse it, except in cases where the contract has provided for an obligation to renegotiate in the event of an unpredictable change of circumstance.

However, the party that is the victim may invoke the rules of good faith contained in Article XX of the COCC of Senegal. It will be up to the Senegalese judge to assess the appropriateness of a revision or renegotiation for a change of circumstances based on good faith.

II. Specific framework

When it comes to special contracts, the Senegalese COCC does not generally apply. OHADA law (Organization for the Harmonization of Business Law in Africa), for example, will have to be used.

As a reminder, it should be noted that Senegal is a member of OHADA. OHADA enacts Uniform Acts which are directly applicable in all its Member States. The Uniform Act on General Commercial Law (AUDCG) applies to all contracts for the commercial sale of goods in the Member States and therefore in Senegal.

A. Rules applicable to contracts for the commercial sale of goods in Senegal:

Change of Circumstances Rules Article 294 of the AUDCG

Article 294 of the AUDCG states that *«a party is not liable for non-performance of any of its obligations if it proves that such non-performance is due to an impediment beyond its control, such as the act of a third party or an event of force majeure.*

A case of force majeure is any impediment that is beyond the control of the company and which cannot reasonably be foreseen in its occurrence or its consequences».

There is a difference between the Senegalese legislator's definition of force majeure and the one enshrined in OHADA law. This difference is topical of a contrast relating to the

socio-economic elements that motivated their consecration. In Senegalese law, only **the event** is important, hence the need for the judge to check that it is an event that meets the characteristics mentioned in the provisions of article 129 of the COCC.

On the other hand, in OHADA law, the use of the noun «*impediment*» refers to a much broader concept not only in the nature of force majeure but also in its assessment.

In its nature, it is no longer a question of confining itself to material events such as natural disasters or other events. This approach leads to an analysis of the consequences of a given situation as constituting an **impediment**. The impediment refers to an event or any situation likely to disrupt the economy of the contract to some extent. Hence the assessment of a force majeure's case occurs at two levels in OHADA law: either in its occurrence or in its consequences.

Thus, when the COVID-19 retains the qualification of force majeure, the provisions of the aforementioned article 294 will apply and the party affected by the change in circumstances will be released from its contractual obligations.

A part of the doctrine considers that this text can also apply to unforeseen circumstances.³

Other specific texts in Senegalese law.

– Order of 23 April 2020 on fiscal and business support measures in the context of the COVID-19 pandemic.

The text provides for:

1. The remission or suspension of the payment of tax contributions on the wages and salaries of employees.
2. The extension to 15 July 2020 of the obligations to declare and pay taxes due between March and May 2020 for:
 - a. Companies whose turnover does not exceed 100,000,000 CFA francs
 - b. As well as companies directly affected by the Covid-19 crisis and operating in the following sectors: tourism, catering, hotels, passenger transport, education, culture, agriculture, press.
3. The suspension of the collection of tax debts recorded for the companies mentioned in 2b.

In order to benefit from these measures, companies will have to commit themselves in writing to:

- Maintain their employees or
 - Guarantee 70% of their salary to their employees who are laid off.
4. Taxpayers whose activities are directly affected by the covid-19 crisis will be able to request a partial remission of their tax debt as of December 31, 2019.

³ Dorothé Cossi Sossa, 'L'adaptation dirigé du contrat du commerce international aux changements de circonstances', D-10-49 OHADATA 16 <<http://www.ohada.com/doctrine/ohadata/D-10-49.html>> accessed 31 May 2020.

– **The act No. 15/2020 of 15 April 2020 on the extension of missed deadlines and the suspension of expulsion measures and procedures.**

The text provides for:

1. Suspension of extinctive prescription and civil, commercial, and tax customs forfeiture until the expiry of the state of emergency, with the exception of cases deemed urgent and by the courts and tribunals.
2. Suspension of expulsion measures ordered by judicial or administrative channel before the entry into force of the state of emergency.

III. Some cases that can be invoked in Senegalese Law

On the assessment of the unpredictable nature of the force majeure

Senelec c/ Popec [2000] Court of Cassation, 20 October 2004, Ruling Number 142, available at <https://juricaf.org/arret/SENEGAL-COURDECASSATION-20041020-142>, accessed 31 May 2020

Ministre de l'intérieur directeur général des élections agent judiciaire de l'Etat c amadou mamadou thiam [2000] Supreme Court, Administrative Chamber, 24 June 2014, 38. Ruling number 38, available at : <https://juricaf.org/arret/SENEGAL-COURSUPREME-20140624-38>, accessed 31 May 2020

