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Impact of Coronavirus Emergency on Contract Law

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The impact of Covid-19 crisis on the French law of contract

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The impact of Covid-19 crisis on the French law of contract

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The effect of the Covid-19 on contracts comes not as much from the virus itself than from the containment measures imposed by Governments which made it hard, if not impossible, for debtors to perform their obligations. This is why the crisis, as regards contracts, really started in France in the midst of March 2020 when President Macron and Prime Minister Edouard Philippe decided to shut down non-essential businesses, schools, restaurants, theatres, to forbid public gatherings and to impose containment measures on individuals.

The consequences of this immediate and almost total shut down of activities could have been dealt with by the sole use of pre-existing general provisions, especially those recently enshrined in the Civil code by the 2016 reform of the law of Contract (force majeure, revision pour imprévision, délais de grâce, etc.). But it would have taken years before clear solutions would emerge. Individuals and businesses needed a faster response, they needed ready-to-use rules, exempted from judicial interpretation, telling them what would happen next

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French Parliament responded quickly. It adopted within a couple a days, on March 23, a statute ("Loi")[1] authorizing the Government to take "ordonnances". 27 of them were adopted in almost no time on March 25. These "ordonnances" have been modified or completed several times since then. None of them is specifically dedicated to contracts but quite a few contain provisions interesting the law of contract.

In this paper, we will give an overview of those new provisions (A), try to evaluate their impact on the general law of contract (B), and finally present the general provisions of the Civil code that will apply to fill in the blanks left by the new rules (C).

a) New provisions related to contracts

The containment measures adopted in France made it almost impossible to carry on simple activities or tasks such as delivering goods, posting a letter or filing an action. For this reason, it appeared justified to withhold the usual penalties or sanctions incurred in case of delay, and to do so regardless of whether the *force majeure* is or isn't characterized in each particular case. The main legislative response to the crisis hence consisted in postponing a vast number of time limits.

Precisely, amongst the many ordonnances adopted on March 25th, the one that has the broader scope – and could thus be described as containing the general provisions related to Covid-19 – is the ordonnance n°2020-306 "on the extension of time limits during the period of public health emergency and the adaptation of procedures during the same period"[2].

In drafting this ordonnance, the French Government was helped by a precedent. Immediately after the May 1968 crisis, which resulted in a disorganization of the country, a "Loi n°68-696" was adopted on July 31 "on "foreclosures incurred as a result of the events of May and June 1968 and extending various time limits". The main provisions of this 1968 statute were copied, slightly modified and pasted in the 2020-306 "ordonnance". This is particularly true of the provisions interesting the law of contract. There are 3 of it. They will be reproduced hereafter before a short explanation is given.

Article 2 of the 2020-306 "ordonnance" holds that:

[1] LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 (see http://www.legifrance.gouv.fr).

[2] Ordonnance n° 2020-306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d'urgence sanitaire et à l'adaptation des procédures pendant cette même période (see http://www.legifrance.gouv.fr).

"Any act, appeal, legal action, formality, entry, declaration, notification or publication prescribed by law or regulation under penalty of nullity, sanction, lapse, foreclosure, prescription, unenforceability, inadmissibility, lapse, automatic withdrawal, application of a special regime, nullity or forfeiture of any right whatsoever and which should have been completed during the period mentioned in Article 1[3] shall be deemed to have been done in time if it has been done within a period which may not exceed, as from the end of the period mentioned in Article 1, the time legally prescribed for taking action, within a limit of two months.
The same shall apply to any payment prescribed by law or regulation for the acquisition or retention of a right.
This Article shall not apply to cooling-off periods, withdrawal or renunciation time limits provided for by law or regulation, nor to the periods provided for the reimbursement of sums of money in the event of the exercise of such rights
Where the provisions of this article apply to a time limit for opposition or contestation, they shall not have the effect of postponing the date before which the act subject to the expiry of that time limit cannot lawfully be performed or take effect or before which payment is not discharging.".

Article 4 of the 2020-306 "ordonnance" holds that:

"Where periodic penalty payments ("astreintes"), liquidated damages clauses ("clauses pénales"), termination clauses ("clauses résolutoires") and clauses providing for forfeiture ("clauses de déchéance") are intended to penalise failure to fulfil an obligation within a specified period, they shall be deemed not to have commenced or to have taken effect if that period has expired during the period defined in Article 1(I).

If the debtor has not performed his obligation, the date on which those periodic penalty payments take effect and those clauses produce their effects shall be postponed for a period, calculated after the end of that period, equal to the time elapsed between 12 March 2020 or, if later, the date on which the obligation arose and the date on which it should have been performed.

The date on which such periodic penalty payments take effect, and such clauses take effect, when they are intended to penalise failure to perform an obligation, other than by way of payment of sums of money, within a specified period expiring after the period defined in Article 1(I), shall be postponed for a period equal to the time elapsed between

[3] This period starts on March 12th. It was to end one month after the end of the sanitary emergency period. But improvements regarding the spreading of the disease led the Government to transform this floating ending term into a fix term: June 23rd.

12 March 2020 or the date on which the obligation arose, whichever is the later, and the end of that period.

The course of periodic penalty payments and the application of liquidated damages clauses which took effect before 12 March 2020 shall be suspended during the period defined in Article 1 (I)".

Article 5 of the 2020-306 "ordonnance" holds that:

"Where an agreement may be terminated only during a specified period or is renewed if no denunciation is made within a specified time limit, that period or time limit shall be extended, if it expires during the period defined in Article 1 (I), by two months after the end of that period".

Short presentation. These texts refer to the period of time "defined in Article 1". This period is known as the "période juridiquement protégée" (legally protected period). It starts on March 12 and ends on June 23. During the period a derogatory regime applies[4]. It consists in the following rules.

The person who was supposed, under the terms of the law or a regulation, to act before a certain time that falls into the "période juridiquement protégée" is granted an extra period of time after the end of that period (art. 2).

Regarding time limits imposed by contract, the situation is more complex. No general postponing is provided for by the new provisions (art. 2 *a contrario*). Hence, if a decision was to be taken or an act was to be accomplished before a certain time under the terms of a contract, no extra-time is given, as a general rule, by the 2020-306 "ordonnance". But a major exception exists. Some – but not all – of the remedies for non-performance of an obligation are temporarily frozen. If payment was due *during* the "période juridiquement protégée", periodic penalty payments, liquidated damages clauses, termination clauses and clauses providing for forfeiture only apply if the debtor does not fulfil his obligation before the end of an extra period of time starting at the end of the "période juridiquement protégée" (i.e. June 23). If payment is due *after* the end of the "période juridiquement protégée" and if the obligation is in kind, the above mentioned sanctions only apply if the debtor does not fulfil his obligation before the end of an extra period of time starting at

[4] On the impact of the 2020-306 « ordonnance » on contracts, see O. Deshayes, «La prorogation des délais en période de Covid-19 : quels effets sur les contrats?», *D.* 2020, 831; On the 2020-306 « ordonnance » in general, see N. Cayrol, "Etat d'urgence sanitaire: dispositions générales relatives aux délais, A propos de l'ordonnance n°2020-306 du 25 mars 2020, titre I", *JCP G*, Apercus rapides, 481.

the time payment is due under the terms of the contract. And if payment is due *before* the beginning of the "période juridiquement protégée" and if a periodic penalty payments or a liquidated damages clause has already come into effect, these sanctions are suspended during the "période juridiquement protégée".

Finally, the period within which a periodic contract may be terminated by notice or whose automatic renewal may be denunciated – whether this period is provided for the law, a regulation or a contract –, is extended (art. 5).

Alongside these important and broad provisions are a set of rules dealing with specific matters. The following can be mentioned: freezing of remedies for non performance in case of failure from the part of small enterprises to pay rents of commercial leases, electric, water or gas bills (under strict conditions)[5]; right for travel agencies, sports clubs or cultural events organizers not to reimburse immediately clients whose trip, practice or event has been cancelled or made impossible[6].

b) Impact of new provisions on general contract law

As one can easily see, the new provisions afore mentioned are temporary ones. The imply no modification of the general provisions of the law of contract. In fact, they apply in addition to them to the extent they are compatible.

For instance, the fact that small enterprises benefit from a freezing of remedies in case of failure to pay rents of commercial leases (see above) does not mean that lessees outside the scope of that regime have to pay the rent. If the impossibility to welcome clients in a given shop under lease amounts to the non-performance – though an excusable one – on the part of the lessor of his contractual obligation to let access to a premise fit for the purpose of a commercial activity, then the lessee should have the right not to pay the rent under the provisions of Civil code on "force majeure" (C. civ., art. 1218)[7].

Another example is that the extra-time given to the debtor to fulfil his obligation after the end of the "période juridiquement protégée" – before the creditor can invoke a liquidated damages clause for instance – does not mean that the debtor is exposed to pay damages

[5] Ordonnance n° 2020-316 du 25 mars 2020 relative au paiement des loyers, des factures d'eau, de gaz et d'électricité afférents aux locaux professionnels des entreprises dont l'activité est affectée par la propagation de l'épidémie de covid-19.

[6] Ordonnance n° 2020-315 du 25 mars 2020 relative aux conditions financières de résolution de certains contrats de voyages touristiques et de séjours en cas de circonstances exceptionnelles et inévitables ou de force majeure ; Ordonnance n° 2020-538 du 7 mai 2020 relatif aux conditions financières de résolution de certains contrats en cas de force majeure dans les secteurs de la culture et du sport.

[7] This is, to tell the truth, a highly debated question in France.

in any case. He can prove that the non-performance is excused by "force majeure" arising out of supervening events during this extra-time. In this case, no damages are due (C. civ., art. 1218).

On the contrary, if the new provisions are not compatible with the general ones, the former prevail on the latter (as always with special rules).

Whether the pre-existing general provisions apply in addition to the new ones or are set aside by the latter, they, in any case, need to be kept in mind and properly applied in the context of Covid-19.

c) General contract law provisions

We will focus on some of the most relevant provisions[8].

Impossibility of performance – Force majeure. If the Covid-19 disease or, more probably, the containment measures adopted by the French Government are seen as "force majeure" – which should be the case, at least for contracts concluded before mid-march 2020 – and if it makes it impossible for the debtor to perform his contractual obligations, then article 1218 of the Civil code applies[9]. This provision holds that (i) the contract is suspended if the "force majeure" only prevents temporarily the performance of his obligations by the debtor; (ii) the contract is terminated if the prevention is definitive or if the delay which would imply a suspension justifies such a termination. In both cases, no damages are due. No sanction is applicable. Unfortunately, the text does not consider the case where the prevention caused by "force majeure", though definitive, is only partial. Scholars agree that in this case of excused partial non-performance suspension or termination of contract are not appropriate remedies: a proportionate reduction of the counterpart should intervene[10].

Performance possible but excessively costly for the debtor – Révision pour imprévision. If Covid-19 arose or the containment measures were taken after the conclusion

[8] See: M. Béhar-Touchais, « L'impact d'une crise sanitaire sur les contrats en droit commercial, À l'occasion de la pandémie de Covid-19 », *La Semaine Juridique Entreprise et Affaires* n° 15-16, 9 Avril 2020, 1162 ; C-E. Bucher, « Contrats : la force majeure et l'imprévision remèdes à l'épidémie de covid-19 ? », *Contrats Concurrence Consommation* n° 4, Avril 2020, étude 5 ; J. Heinich, « L'incidence de l'épidémie de coronavirus sur les contrats d'affaires : de la force majeure à l'imprévision », *D.* 2020, 611 ; M. Mekki, « De l'urgence à l'imprévu du Covid-19 : quelle boîte à outils contractuels ? », *AJ Contrat* 2020, 164.

[9] For a translation of this provision in English, made by J. Cartwright, B. Fauvarque-Cosson and S. Whittaker, see: http://www.textes.justice.gouv.fr/art_pix/Translationrevised2018final.pdf.

[10] See O. Deshayes, T. Genicon et Y.-M. Laithier, *Réforme du droit commun des contrats, du régime général et de la preuve des obligations*, 2nd ed., LexisNexis, 2018, under article 1218.

of the contract, were unpredictable at the time of that conclusion and make it excessively costly for the debtor to perform his obligation – though not impossible – then article 1195 of the Civil code applies[11]. This text allows one party to ask for re-negotiation of the contract. In the case where the re-negotiation is refused by the other party or fails, an action can be brought before the judge aiming at revising or terminating the contract. Adopted with reluctance in the 2016 reform, this new provision, was largely regarded as "supplétive" before the Covid-19 appeared: it was said that parties could wave the application of the text. Waiver clauses of this sort became indeed very frequent in contracts after 2016. There is no doubt that Courts will soon have to say if the prediction regarding the validity of such clauses was correct.

Specific performance of a disproportionate cost. French law of contract is legendarily favourable to specific performance. The 2016 reform introduced, though, a new brake: the creditor cannot be granted specific performance if the cost of this remedy for the debtor is disproportionate to its benefits for the creditor (C. Civ., art. 1221)[12]. One might think to invoke this provision when a debtor has committed a non-excusable breach of contract but still deserves some kind of compassion given the difficulties of the present time. It is doubtfull, though, that article 1221 would apply in Covid-19 cases. For this to happen, the cost of specific performance needs to be disproportionate to the benefits of the remedy for the creditor. It is thus insufficient that performance is costly or made costlier by the circumstances. What matters is that performance is of no – or little – interest to the creditor *compared to another remedy* (especially damages), while it exposes the debtor to much higher costs. Precisely, in Covid-19 cases, if the cost of specific performance is made higher by the circumstances, then it is probable that damages will also rise in the same proportion, making the costs/benefits balance of specific performance more or less the same as the one of other remedies.

Bonne foi. Finally, if Covid-19 has made the contract unbalanced, one might think to invoke the duty to execute contracts in good faith ("bonne foi") in order to obtain from the creditor a renegotiation. This argumentation should not succeed. First, the French courts have been reluctant, in the past, to impose such an obligation of renegotiation on the ground of "bonne foi". It has merely been admitted in long-term relational contracts, with uncertain consequences. Second, the introduction of "révision pour imprévision" in article 1195 of the Civil code (see above) reform makes it even more unlikely for the Courts to use "bonne foi" in order to impose a duty to renegotiate because such a solution would amount to bypassing the new next.

[11] For a translation of the provision in English, see ref. in *footnote* n° 9.

[12] For a translation of the provision in English, see ref. in *footnote* n° 9.