

How the Emergency Law Intends to Enhance Sustainability of Business Contracts

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The magnitude of the disruption caused by COVID-19 to the economy has a very significant impact on business contracts and in particular triggers an increase of the number of breaches. This situation undermines businesses and exposes their liability due to these breaches; but above all, and in the very short term, it may deprive them from contracts which are key for their operations - such as supply and distribution agreements, leases or loans - and sometimes definitely compromise their ability to overcome this difficult period.

Ordinary law unsuited to the circumstances

While ordinary law provides solutions applicable in the event of exceptional circumstances - mainly hardship procedure and *force majeure* - such principles apply on a contract by contract basis, are subject to judicial review and are unsuitable for producing the immediate effects necessary to protect the contractual framework which a business may need to carry on its activities.

Specific immediate effect measures

To address this immediate need, the “French emergency bill aimed at tackling the COVID-19 epidemic” of March 23, 2020 empowered the French Government to temporarily alter certain provisions of business contracts by way of ordinances.

These measures are intended to apply to all business contracts, and hence do not require the case-by-case analysis which would be necessary to assess the existence of a *force majeure* situation or initiate a hardship procedure (and which could be at a later stage challenged before court).

So far, one ordinance (n° 2020-306 of March 25, 2020) has been issued.

Continuation of contractual payment obligations

This ordinance does not provide for any adjustment to payment obligations, which therefore should continue to be performed on due date as set forth in the contract, failure to comply with these covenants being treated as a breach of contract. As a result, only an amicable agreement with the other party could allow for a deviation from the terms of the agreement. It is advisable to have the terms of such understanding - including its duration - confirmed in writing.

Suspension of certain clauses applicable in the event of a breach of contract

The ordinance text suspends daily penalty payments (“*astreintes*”), penalty clauses (“*clauses pénales*”), termination clauses (“*clauses résolutoires*”) and forfeiture clauses (“*clauses de déchéance*”) sanctioning the debtor's non-performance. The duration of the suspension varies depending upon the date on which the provisions concerned are due to become enforceable:

- The provisions which became enforceable before March 12, 2020 will resume their effects one month following the expiry of the end of the state of health emergency (fixed, to date, at May 24, 2020), i.e. as from June 25, 2020;

For instance, a daily penalty payment that began due and payable as from March 1st would be (i) due for the period from March 1st to March 11th, (ii) suspended between March 12th to June 24th, and (iii) resume on June 25th (unless the provision has been complied with in the meantime).

- Those provisions that should have become enforceable between March 12, 2020 and June 24, 2020 will not have immediate effect during the state of health emergency. They will become enforceable only two months following the expiry of the state of health

emergency (i.e., to date, July 24, 2020), unless, again, the provision has been complied with in the meantime.

Based upon the above, a penalty clause due on April 1, 2020 may be claimed only as from July 25, 2020, provided that as at such date the provision concerned is still being breached.

Extension of non-renewal or termination clauses

Finally, whenever a contract includes a termination or non-renewal clause which becomes exercisable between March 12, 2020 and (to date) June 24 2020, such provision not only remains in any case exercisable in accordance with the contract terms, but the period to exercise such termination or non-renewal right is extended until the second month following the expiry of the state of emergency, i.e., to date, August 24, 2020.

This measure is aimed at avoiding systematic termination of such contracts under the pressure of current crisis circumstances. For instance, a yearly service agreement renewable on May 15th which may be terminated with a one-month notice, could in accordance with the ordinance be terminated after May 15th and until – to date – August 24, 2020.

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