SQUADRA
AVOCATS

INFORMATION NOTICE FOR THE CONSIDERATION OF OWNERS OR MANAGERS OF REAL ESTATE ASSETS **ON THE DUE DATES DURING THE PERIOD OF HEALTH EMERGENCY AND THE ADAPTATION OF PROCEDURES**

AN UPDATE OF THE PROVISIONS OF ORDINANCE N°2020-560 OF 13 MAY 2020

16/05/2020

Following Act No. 2020-290 of 23 March 2020 on emergency measures to deal with the Covid-19 pandemic, a series of 55 ordinances and implementing decrees, ministerial orders, circulars and reports to the President of the Republic was issued by the Government.

These new provisions have an impact on the rights and obligations of legal persons governed by private law exercising an economic activity.

The Ordinance No. 2020-306 of 25 March 2020 («***the Time Limits Ordinance***») relating to the extension of time limits during the health emergency period and the adaptation of procedures during that period, particularly in terms of payment deadlines and penalties, **is the one that has the greatest impact on the management of real estate assets.**

Since then, several texts have supplemented or amended the initial measures taken by the government.

The main ones are:

Ordinance No. 2020-427 of 15 April 2020, which amended and completed the mechanism for deferring the contractual deadlines provided for in the event of non-performance. These amendments were included in the update of our note on 20 April 2020.

The Amended Finance Act No. 2020-473 of 25 April 2020, which provides for the deductibility of rent waivers granted by landlords to their tenants.

Act No. 2020-546 of 11 May 2020, which not only extended the state of health emergency, but also set its term, at 10 July 2020 inclusive.

And Ordinance No. 2020-560 of 13 May 2020, which established the time limits applicable to various procedures during the health emergency period, modifying once again the computation of time limits.

The dates to remember are now as follows:

- **12 March 2020:** commencement date of the period to be taken into account to fall within the scope of the regime of extension of time limits;
- **24 March 2020:** commencement date of the state of health emergency;
- **10 July 2020 inclusive:** termination date of the state of health emergency;
- **23 June 2020 inclusive:** termination date of the period to be taken into account for the regime of extension of the time limits referred to in particular in Article 4 of the «Time Limits Ordinance».

CAUTIONARY NOTE:
The rules presented in this note are still susceptible to evolve. We will also pay attention to the forthcoming bill for the ratification of these orders. Please be vigilant and do not hesitate to contact us!

Find below the updated answers to the questions that landlords and asset managers are asking themselves:

QUESTION 1. ARE THE TENANTS ALWAYS OBLIGED TO PAY THEIR RENT AND CAN THEY BE ENJOINED TO DO SO ?

QUESTION 2. IF THE TENANT IS THE SUBJECT OF COLLECTIVE PROCEEDINGS, WHAT IS THE DEADLINE AND UNDER WHAT TERMS CAN HIS CLAIM BE DECLARED ?

QUESTION 3 . CAN THE TENANTS TAKE ADVANTAGE OF FORCE MAJEURE TO ESCAPE THE PAYMENT OF THEIR RENT? UNDER WHAT CONDITIONS CAN A TENANT BE GRANTED LEAVE ?

QUESTION 4. JUDICIAL ACTIVITY DURING THE PERIOD OF HEALTH EMERGENCY ? FOCUS ON THE RESUMPTION OF ACTIVITY INITIATED IN PARIS AND NANTERRE.

The aim of this new version of our note is to update the calculation of deadlines following the extension of the state of emergency and the publication of Ordinance No. 2020-560 of 13 May 2020 (questions 1 to 3), and thus enable you to monitor your contracts over the coming months.

We have also taken this opportunity to inform you of the provisions of the French Finance Act relating to the waiver of rents, **and to present you with the latest available information on the resumption of judicial activity initiated in Paris and Nanterre.**

As a preamble, we thought it appropriate to recall the definition of the various «sanctions clauses» referred to in the Government's ordinances, the effects of which have been suspended.

The aim **of the penalty clause** is to fix in advance the amount of damages due by one of the parties in the event of non-performance of his obligations and at the same time to compel the debtor to perform by the lump sum compensation envisaged.

A penalty payment is a sentence to pay a sum of money per day, week or month pronounced by a judge against a debtor.

Where the penalty payment is of conventional origin, its regime is the same as that of the penalty clause.

The resolutory clause specifies the commitments whose non-performance will result in the termination of the contract. Rescission is subject to an unsuccessful formal notice, if it has not been agreed that it would result solely from non-performance. The formal notice is effective only if it expressly mentions the resolutory clause.

Forfeiture of the term is a sanction, which consists in depriving the debtor of the benefit of the term, i.e. the suspension of the liability.

It entails that the obligation becomes immediately due and payable, thus giving the creditor the possibility of instituting proceedings.

QUESTION 1 : IN CASE OF NON-PAYMENT OF RENT AND CHARGES DUE, IS IT POSSIBLE TO SEND A FORMAL NOTICE, AN ORDER TO PAY, OR TO HAVE A SUMMONS ISSUED TO SEE THE ACQUISITION OF A RESOLUTORY CLAUSE OR TO OBTAIN THE EXECUTION OF A PENALTY CLAUSE OR A PENALTY PAYMENT?

TRACK UPDATES IDENTIFIED BY A COLORED LINE IN THE MARGIN.

Rents and charges remain due at the contractual due dates.

Therefore, it is not impossible to issue a letter of demand, a summons to pay or an order for payment during the protected period to obtain payment of rent.

However, Ordinance No. 2020-306 of 25 March 2020 postpones the effects of the contractual clauses provided for in the event of non-performance by the debtor. Thus, the sending of a letter of formal notice, the issuance of a summons to pay would not make it possible to obtain, in the immediate future, the execution of a contractual financial penalty clause.

Indeed, Article 4 of Ordinance No. 2020-306 of 25 March 2020 in its latest version resulting from Ordinance No. 2020-427 of 15 April provides for:

" Penalty payments, penalty clauses, termination clauses and clauses providing for forfeiture, when their purpose is to penalise failure to perform an obligation within a specified period, ***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 executed his obligation, ***the date on which these periodic penalty payments take effect and these clauses produce their effects shall be postponed for a period, calculated after the end of that period, equal to the time elapsed between, on the one hand, 12 March 2020 or, if later, the date on which the obligation arose and, on the other hand, the date on which it should have been executed.***

The date on which such periodic penalty payments take effect and such clauses take effect, where they are intended to penalize the non-performance of an obligation, other than sums of money, within a specified period expiring after the period defined in I of Article 1, shall be postponed by a period equal to the time elapsing between 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 penalty clauses which took effect before 12 March 2020 shall be suspended during the period defined in I of Article 1".

According to the circular of 26 March 2020, these provisions aim to take into account the difficulties of enforcement resulting from the state of health emergency «***by paralyzing,*** *during this period, the penalty payments ordered by the courts or administrative authorities as well* ***as contractual clauses whose purpose is to sanction the debtor's non-performance.***"

CAUTIONARY STATEMENT:
Ordinance No. 2020-560 of 13 May 2020 setting the time limits applicable to various procedures during the period of health emergency amended certain provisions of the aforementioned Ordinance No. 2020-306 of 25 March 2020.

Thus,
1° In article 1st :
a) At I, words: “the expiry of a period of one month from the date of cessation of the state of health emergency declared under the conditions of Article 4 of the aforementioned Act of 23 March 2020” are replaced by the following words: « **the 23 June 2020 including** ».

This amendment reduces the period of paralysis of the «sanctions clauses» which should have ended on 10 August 2020, following the extension of the state of emergency to 10 July 2020.

However, this clarification has the merit of putting an end to the debates on the calculation of dies a quo and dies ad quem.

We have therefore updated the various examples that we had submitted to you.

Firstly, in accordance with the fourth paragraph of the abovementioned Article 4:

The effects of a periodic penalty payment or penalty clause which began to run before 12 March 2020 shall be suspended throughout the protected period.

They will take effect from the day after the end of this period, i.e. 24 June 2020.

In other words, between 12 March 2020 and 23 June 2020, periodic penalty payments and penalty clauses no longer apply.

If, **for example**, the daily penalty clause in a lease agreement had already been applicable as of February 1, 2020, the lessor could only request its enforcement as of the end of the **protected period on June 23, 2020, i.e. as of June 24, 2020**.

In this example, the lessor will then be able to claim the liquidation of the periodic penalty payment for the period between February 1 and March 12, 2020. And, if the tenant has still not fulfilled his obligation on June 23, 2020, the daily penalty payment will start again as from June 24, 2020.

Secondly, pursuant to the second paragraph of Article 4:

The effects of a periodic penalty payment or a penalty or **resolutory clause** which has not begun to run before 12 March 2020, but which relates to obligations to be performed during the protected period,

shall be carried forward at the end of that period and within a period which corresponds to the time elapsed between the date on which the obligation arose and the date on which it should have been performed.

Either, **for example**, a tenant who would not have paid his rent on the contractual date of April 1, 2020 and a resolutory clause due to take effect on May 15, 2020, i.e. one month after the issuance of a summons to pay by a bailiff concerning the resolutory clause (L. 145-41 of the Commercial Code), to consider that a bailiff has agreed to issue such a deed during the confinement.

In this case, the duration of the deferral corresponds to the time elapsed between the date on which the obligation arose (15 April) and the date on which it should have been performed (15 May), i.e. 1 month.

The clause may therefore take effect one month after the end of the protected period (23 June 2020 inclusive), i.e. 24 July 2020 if the debtor has not complied.

This rule also applies if the date of birth of the obligation is before 12 March 2020.

Suppose, hypothetically, a tenant has not paid his or her rent by January 1, 2020. The lessor has him deliver on February 20, 2020, a summons to pay by bailiff concerning the resolutory clause of the contract and indicating that the tenant had a period of one month to regularize his situation, that is until March 20, 2020.

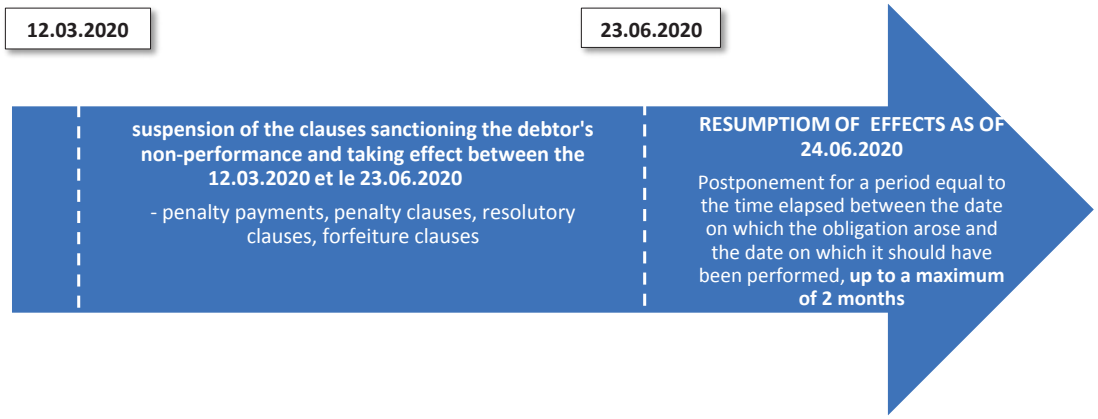
In this case, the resolutory clause would take effect 8 days after the end of the protected period, i.e. July 2, 2020, if the debtor has still not performed by that date.

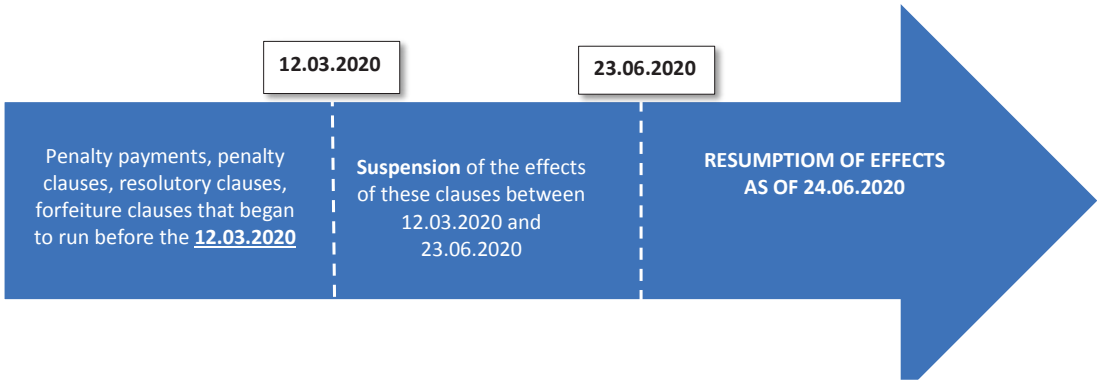
As the report to the President of the Republic on these provisions indicates, the amended ordinance now takes into account, in setting the date of the postponement, the duration of performance of the contract affected by the epidemic, which is far from easy.

It is therefore necessary from now on to:

- calculate the duration between March 12, 2020 OR a later date if the obligation arose after March 12, and the date on which the obligation should have been performed
- and to apply the result of this calculation from 24 June 2020.

INTERRUPTION AND EXTENSION OF PERIODIC PENALTY PAYMENTS AND CERTAIN CLAUSES





In addition, protective measures have been taken for smaller businesses particularly affected by the spread of the pandemic.

Following Ordinance No. 2020-316 of 25 March 2020 relative to the payment of rents, water, gas and electricity bills for the business premises of companies whose activity is affected by the spread of the Covid-19 pandemic **the penalties in the event of non-payment of rents and charges will be neutralised:**

- for tenants eligible for the solidarity fund set up by the government, on the one hand;
- and for companies which are the subject of collective proceedings and which have been particularly affected by the spread of Covid-19 on the other hand.

Thus, according to the provisions of article 4 of this order n°2020-316 of March 25, 2020 :

" *The persons mentioned in Article 1 may not incur financial penalties or interest for late payment, damages, periodic penalty payments, enforcement of a termination clause,* ***penalty clause or any clause providing for forfeiture, or activation of guarantees or sureties, as a result of non-payment of rent or rental charges relating to their business and commercial premises****, notwithstanding any contractual stipulation and the provisions of Articles L. 622-14 and L. 641-12 of the French Commercial Code.*
The above stipulations apply to rents and rental charges for which the due date for payment is between 12 March 2020 ***and the expiry of a period of two months after the date of cessation of the state of health emergency declared by article 4 of the aforementioned law of 23 March 2020*** *"*

Decree No. 2020-371 of 30 March 2020, as amended by Decree No. 2020-433 of 16 April 2020 and then by Decree No. 2020-433 of 12 May 2020, organises the operation of the solidarity fund created by Ordinance No. 2020-317 of 25 March 2020, which will be financed by the State, the regions and the overseas collectivities, to prevent the cessation of activity of very small enterprises (VSEs), micro-entrepreneurs, self-employed persons and liberal professions exercising an economic activity and meeting the following conditions:

- have started their activity before 1 February 2020 for March 2020 aid or before 1 March 2020 for April and May 2020 aid;
- was not in liquidation on 1 March 2020;
- number of employees is less than or equal to ten;
- with an annual revenue of less than 1 million euros;
- and an annual taxable profit of less than 60,000 euros;
- **particularly affected by the economic consequences of Covid-19:**

  have been the subject of an administrative ban on receiving the public between 1 and 31 March 2020 for the month of March, between 1 and 30 April 2020 for the month of April 2020 and between 1 and 31 May 2020 to be eligible for the solidarity fund for the month of May 2020

  or

  have suffered a loss of turnover of at least 50% during these periods compared to the previous year or to the average monthly turnover over 2019.

However, since the decree n°2020-378 of 31 March 2020, the conditions for benefiting from the neutralisation of penalties for non-payment of rent have been restricted.

Tenants must:

- either be eligible for the Solidarity Fund;
- be in suspension of payments on 1 March 2020 ;

and

- in any event have been the subject of an administrative ban on receiving the public and have suffered a loss of turnover of more than 50 % during that period compared with the previous year.

CAUTIONARY NOTE:
The cumulative or alternative nature of these criteria is a matter of debate. Some authors consider that Article 1 of Decree No. 2020-378 of 31 March 2020 refers to 1° and 2° of Article 2 of Decree No. 2020-371 of 30 March 2020 and that they should therefore be considered cumulative. Conversely, others consider that in view of the objective pursued by the government, these two criteria should be considered alternative and not cumulative.

The provisions apply to rents and rental charges for which the payment due date is between 12 March 2020 and the expiry of a period of two months after the date of cessation of the state of health emergency declared by Article 4 of the Act of 23 March 2020, and set at 10 July 2020 inclusive by Article 1 (I) of Act No. 2020-546 of 11 May 2020, i.e. **10 september 2020, as it stands.**

Thus, if the rents and charges remain due by the tenant, no sanction can be taken for non-payment of unpaid rents and charges between 12 March and 10 September 2020.

The benefit of these measures is nevertheless subject to the production of certain supporting documents by the lessee. Under the terms of the provisions of Article 2 of Decree No. 2020-378 of 31 March 2020, the lessee must produce the following documents:

- a declaration on honour attesting to compliance with the conditions for access to the solidarity fund;

and

- an acknowledgement of receipt of the submission of their application for eligibility for the Solidarity Fund or, where they have filed a declaration of cessation of payments or are in difficulty, a copy of the filing of the declaration of cessation of payments or of the judgment opening collective proceedings.

On the other hand, no provision has yet been made for the payment of rental arrears when the situation returns to normal.

Disputes initiated before the state of health emergency

If the summons was validly delivered to the tenant before the beginning of the state of health emergency: the initiated procedure should resume its course as of 11 May 2020 since the Courts closed since 16 March 2020 reopen, and judicial activity gradually resumes its course.

However, it is still necessary for the writ of summons to have been served, that is to say delivered to the Registry of the Court of Justice or the Commercial Court in order for it to be brought before that court within the prescribed period.

But

- in accordance with the provisions of Article 2 of Ordinance No. 2020-304 of 25 March 2020 on the adaptation of the rules applicable to courts of law ruling in non-criminal matters and to co-ownership syndicate contracts,

- the provisions laid down in Article 2 of Order No. 2020-306 of 25 March 2020 (below) relating to the extension of time limits during the period of public health emergency and the adaptation of procedures during the same period **shall be applicable to proceedings before the courts of law in non-criminal matters.**

As it stands, the assignment may therefore be enlisted up to and including 23 August 2020, unless otherwise specified.

QUESTION 2 : " IF A POLICYHOLDER IS SUBJECT TO COLLECTIVE PROCEEDINGS, DOES THE TIME LIMIT FOR DECLARING THE CLAIM REMAINS 2 MONTHS FROM THE PUBLICATION IN THE BODACC (OFFICIAL BULLETIN OF CIVIL AND COMMERCIAL ANNOUNCEMENTS)? "

TRACK UPDATES IDENTIFIED BY A COLORED LINE IN THE MARGIN.

This is a historic crisis and many companies will unfortunately go bankrupt. It is therefore important to monitor as much as possible, the activity of tenants and to be informed of the evolution of their economic situation.

The declaration of claims is considered as a legal action (*Cass com 14 February 1995 n°93-12064; Cass plenary 4 February 2011 n°09-14619*).

However, according to Article 2 of Ordinance No. 2020-306 of 25 March 2020 as amended by Ordinance No. 2020-427 of 15 April 2020:

" 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 accomplished during the period mentioned in Article 1 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 that period, the period legally prescribed for taking action, up to a limit of two months.
The same applies to any payment prescribed by law or regulation for the acquisition or retention of a right. This Article shall not apply to the periods of reflection, withdrawal or renunciation provided for by law or regulation, nor to the periods provided for the reimbursement of sums of money in the event of exercise of these rights.."

CAUTIONARY NOTE :
However, it will be specified that *" This article is not applicable to the periods of reflection, retraction or renunciation provided for by the law or the regulations, nor to the periods provided for the reimbursement of sums of money in the event of the exercise of these rights."*

Thus, and knowing that according to article R 622-24 of the French Commercial Code, the legal deadline for declaring a claim is 2 months from the date of publication in the BODACC, the lessor will have 2 months from the end of the **protected period to make his/her claims declarations, i.e. until August 23, 2020[1].**

However, nothing prevents the lessor from sending them by email or fax to the court-appointed representative in the event of safeguard or receivership proceedings or to the liquidator in the event of compulsory liquidation, as soon as it becomes aware of the opening of collective proceedings, and to double these mailings by registered letter with acknowledgement of receipt once the confinement has ended and/or the postal services are once again fully operational.

Moreover, according to the ordinances on collective proceedings of 25 and 27 March 2020 until the expiry of a period of three months following the end of the state of health emergency, i.e., as it stands, until 10 October 2020, the state of cessation of payments, if any, of the undertakings is assessed, in principle, only on the basis of the financial situation of the undertakings as at 12 March 2020.

Consequently, a company in a state of cessation of payments as of 30 April 2020 will not be considered to be in a state of cessation of payments and **will therefore not be obliged to apply for receivership proceedings within 45 days at the latest** (Article L631-4 of the French Commercial Code), since its situation will be assessed as of 12 March 2020 and, as of that date, it was not in a state of cessation of payments..

Of course, there is nothing to prevent companies from applying for receivership or compulsory liquidation during this period.

It is therefore preferable to monitor the www.infogreffe.fr website to be informed in due course of any decision by the Commercial Court to initiate collective proceedings, but also to closely monitor the financial health of the companies concerned, as far as possible.

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[1] ***Cautionary Note*** **:** if the legal time limit is shorter than the 2-month limit, such as the 15-day time limit for lodging an appeal against an interim relief order or the 10-day time limit for serving a statement of appeal on pain of lapsing, the act must have been performed, de facto, well before 23 August 2020.

QUESTION 3 : " CAN LESSEES INVOKE FORCE MAJEURE TO SUSPEND THE PAYMENT OF RENT? "

FOLLOW THE UPDATES IDENTIFIED BY A COLORED LINE IN THE MARGIN.

Since the intervention of the Minister of Economy and Finance on 28 February 2020, Bruno LE MAIRE announcing that the coronavirus would be «considered as a case of force majeure for companies» for all public contracts of the State (only), force majeure would be the strongest argument to exonerate oneself from its contractual obligations.

What is indisputable is that the impact on the economic activity of companies will be significant: many sectors are currently operating at less than 50% of their economic capacity.

Already, many tenants have announced to their landlords that they will not pay future rent due dates.

The purpose of this note is to enable lessors or their agents to better understand the legal means that could be put forward with varying degrees of relevance by tenants during this exceptional crisis, even if there is still a judicial and legal uncertainty, but also to provide an appropriate response.

However, it should be remembered that as the legislative situation continues to evolve, it is not impossible that the government will take new measures, in particular with regard to payment deadlines and the staggering of arrears.

For the time being, the Amended Finance Act n°2020-473 adopted on 25 April provides for the deductibility of rent waivers granted by lessors to corporate tenants between 15 April and 31 December 2020.

Force Majeure

Force majeure is the unforeseeable and insurmountable event preventing the debtor from performing his obligation.

It cannot be decreed, it is a legal means employed by a party who fails to perform a contract in order to try to escape the consequences of its non-performance.

The new Article 1218 paragraph 1 of the Civil Code resulting from Ordinance No. 2016-131 of 10 February 2016 provides that in contractual matters:

" There is force majeure in matters relating to a contract when an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of conclusion of the contract and the effects of which cannot be avoided by appropriate measures, prevents performance of the obligation by the debtor.

If the impediment is temporary, execution of the obligation shall be suspended *unless the resulting delay justifies termination of the contract. If the impediment is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations in accordance with the conditions laid down in articles* ***1351*** *and* ***1351-1****. "*

With rare exceptions, epidemics as such Ebola, H1N1, chikungunya and even SARS have so far not been considered by case law as representing a case of force majeure, but often because the causal link between the epidemic and the drop in activity was not demonstrated or because the criterion of unpredictability was lacking.

In our view, therefore, the Tribunals are not, as a matter of principle, opposed to classifying an epidemic as force majeure if the conditions are met.

Force majeure has moreover been upheld in 2 very recent decisions (Court of Appeal of Douai - Individual Liberties Chamber - 5 March 2020 - No. 20/00400 and Court of Appeal of Colmar, 6th Chamber, 12 March 2020, No. 20/01098) which, however, do not concern contract law or commercial leases.

It is therefore conceivable that certain tenants may take advantage of exceptional circumstances, in particular due to the closure orders of 14 and 15 March 2020, which made it impossible for them to continue to meet their obligations to the lessor, to request, on the basis of force majeure, that they be relieved of the payment of their rent..

However, a distinction must be made here between the performance of a contract for material services which can no longer be provided because of the coronavirus pandemic and the payment of a sum of money.

According to case law, the debtor of an unfulfilled obligation of a sum of money cannot be exonerated from this obligation by invoking a case of force majeure:

*" **But whereas the debtor of an unfulfilled contractual obligation of a sum of money cannot be exonerated from this obligation by invoking a case of force majeure** ; that by this plea of pure law, the judgment is legally justified; that the plea cannot be upheld; »* (Cass Com 16 September 2014, Appeal No. 13-20.306)

Thus, even if, once again, the classification of the event under consideration is a matter for the **sovereign appreciation of the trial judges**, it seems unlikely that a tenant, even if prevented from using his premises during the period under consideration, could avail himself of force majeure in order to evade payment of the rent.

In any event, when the execution of the payment of rent is only made more difficult, lessees will not be able to take advantage of force majeure to evade their contractual commitments.

Finally, and before anything else, it is important to check the content of the clauses of the leases in order to rule on the possibility for a party to invoke force majeure. The parties may have undertaken to perform their commitments even in the event of force majeure.

The obligation to deliver in conformity and exception of non-performance

It is also conceivable that donors could quickly receive requests to suspend leases while their premises are closed.

Indeed, the lessor has an obligation to deliver in accordance with Article 1719 of the Civil Code:

" The lessor is obliged, by the nature of the contract, and without the need for any particular stipulation:

1° To deliver to the lessee the rented thing and, if it is his main dwelling, a decent dwelling. Where premises leased for residential use are unfit for such use, the lessor may not invoke the nullity of the lease or its terminationto apply for the eviction of the occupant ;
2° To maintain this thing in a condition fit for the use for which it was rented;
3° To allow the lessee to enjoy it peacefully during the term of the lease;
4° To also ensure the permanence and quality of the plantations. "

In other words, the lessor must ensure that the tenant can carry out his activity in the premises in accordance with the purpose of the lease. If the landlord is prevented from fulfilling his obligation to deliver because of an order to close the premises during the period of health emergency, the tenant may wish to suspend the execution of the lease and the related obligations, including that of paying the rent, during the period in question.

Under article 1217 (new) of the Civil Code, a person who is party to a synallagmatic contract and whose commitment has not been performed has several actions against the other party:

" The party to whom the undertaking has not been performed, or has been performed imperfectly, may

- *refuse to perform or **suspend the performance of its own obligation**;*
- *continue the compulsory execution in kind of the obligation;*
- *get a discount;*
- *cause the contract to be terminated;*
- *seek compensation for the consequences of non-performance.*

Sanctions that are not incompatible may be cumulative; damages may always be added to them."

According to case law, it is possible to substitute, depending on the interest of the tenant and also on the seriousness of the non-performance, compensation for the disturbance of enjoyment suffered, which is not subject to a formal notice from the lessor…

Nevertheless, the lessor - debtor of the obligation to deliver - who would be prevented from satisfying his obligation to deliver in this case could invoke an event of force majeure, i.e. the order of the public authorities ordering the closure of certain shops, in order to escape the aforementioned penalties.

Again, the assessment of force majeure will be a matter for the judges on the merits.
Similarly, a of its refusal to pay rent during the period in question, availing itself of the plea of non-performance provided for in Article 1220 of the Civil Code, according to which:

" A party may suspend the performance of its obligation if it is clear that the other party will not perform on the due date and the consequences of such non-performance are sufficiently serious for that party. Such suspension must be notified as soon as possible.".

Hardship

The lessee could also request the implementation of other mechanisms, such as hardship but only for leases signed or renewed after 1 October 2016 and Article 1195 of the Civil Code to be enforced.

Previous leases are subject to the old law and in the absence of a contractual provision allowing for the revision of the contract, the judge does not have the possibility to modify the agreement of the parties due to a change of circumstances.

In addition, the parties may have contractually agreed to waive recourse to Article 1195 of the Civil Code.

Terms of payment

It is necessary to recall that the grant of payment terms by the Court is always possible according to article L145-41 paragraph 2 of the Commercial Code:

" Judges seized of an application presented in the forms and conditions provided for in Article 1343-5 of the Civil Code may, by granting time limits, suspend the performance and effects of termination clauses, where termination is not established or pronounced by a court decision that has acquired the authority of res judicata. The resolutory clause does not come into play if the lessee is discharged under the conditions set by the court ".

Our recommandations

In conclusion, whatever arguments will be put forward by tenants - with varying degrees of relevance - in an attempt to avoid paying their rent or to obtain delays in payment or discounts, it is essential to respond quickly to them.

Moreover, in view of this exceptional context, if the tenant's demand is well-founded by a drastic drop in his/her activity, any agreement on the scheduling of the debt and possibly future maturities must be favoured. If the tenant were to apply to the Commercial Court for safeguard or receivership proceedings, or even compulsory liquidation, this would make the possibility of recovering overdue debts much more uncertain.

In the event of disagreement, the lessor may encourage the tenant to submit a request for conciliation to the Commercial Court. The purpose of the conciliation procedure referred to in Article L. 611-4 of the Commercial Code is to seek an amicable agreement between the debtor and its creditors in order to resolve the difficulties encountered by the company.

Similarly, the lessor may also take the initiative to implement a mediation procedure under the aegis of an independent third party.

Of course, your Board can assist you in all these steps to protect your interests.

Finally, it is important to note that the government is encouraging landlords to waive their rent claims in return for tax measures.

Under the terms of the provisions of Article 3 of the Amended Finance Act no. 2020-2020-473 of 25 April 2020, rents that have been waived or renounced in favour of the tenant between 15 April and 31 December 2020, do not constitute taxable income, either as land income (art 14 B of the CGI) or as non-commercial profits (art 92 B of the CGI), and this, without the company consenting to the abandonment or renunciation of rents having to demonstrate that this abandonment or renunciation is part of normal management.

Nevertheless, these provisions may not benefit the tenant operated by an ascendant, descendant or member of the lessor's tax household, unless the lessor can justify the company's cash flow difficulties.

QUESTION 4 : WHAT ABOUT JUDICIAL ACTIVITY DURING THE PERIOD OF HEALTH EMERGENCY? FOCUS ON THE BUSINESS RECOVERY INITIATED IN PARIS AND NANTERRE.

UP TO DATE WITH THE LATEST AVAILABLE INFORMATION

It turns out that 90% of judicial activity had been at a standstill since 16 March 2020. Business continuity plans have been implemented in the various courts pursuant to the circular of 14 March 2020 adapting the criminal and civil activity of the courts during the period of health emergency.

Ordinance No. 2020-304 of 25 March 2020 adapted the rules applicable to courts of law ruling in non-criminal matters.

Some courts have remained partially open to deal with essential litigation that cannot be postponed in criminal or family matters, as well as summary proceedings before the Judicial Court in urgent cases.

Under Article 9 of the abovementioned Order, the Court of First Instance hearing the application for interim measures **may refuse it without an adversarial procedure**:

" *In the case of a summons for interim measures, the court hearing the application for interim measures may reject the application before the hearing, by an order without an adversarial procedure, if the application is inadmissible or if there is no need for interim measures.*"

We note a gradual resumption of judicial activities from 11 May 2020, but the situations are very heterogeneous on the national territory.

Each jurisdiction has its own disaster recovery plan. While it is not possible to know when the parties and their counsel will be informed of the dates of referral of pending cases, there is no doubt that this information will be provided promptly by the Registries.

Moreover, the maintenance of judicial activity is encouraged since, according to the provisions of Article 6 paragraph 1 of Ordinance No. 2020-304 of 25 March 2020, " *The parties may exchange their writings and documents by any means as long as the judge can ensure that the adversarial process is respected.*".

As soon as the courts resume activity, it will be advisable to regularize the documents as soon as possible to avoid congestion on the platforms as the deadlines mentioned above approach.

For their part, the bailiffs who did not deliver any more service of documents and did not carry out either enforcement measures since last 16 March should gradually resume their activity as from 11 May 2020.

Regarding the Paris Court of justice :

According to Order 59-2020 of 27 April 2020 issued by the President of the Paris Court of Justice, on the procedure without a hearing for civil cases with compulsory representation and written procedure:

- the closed substantive files as well as the pre-trial incidents set for a deleted pleading hearing between 16 March and 10 May 2020,
- or to be held between 11 May and 24 June 2020,

will be dealt with in accordance with the procedure without a hearing as set out in Article 8 of Ordinance No. 2020-304 of 25 March 2020, unless the lawyers have expressed their opposition within 15 days of the said order.

According to article 8 of the above-mentioned ordinance:

" *Where representation is mandatory or where the parties are assisted or represented by a lawyer, the judge or the president of the bench may decide that the proceedings shall be conducted in accordance with the procedure without a hearing. It shall inform the parties by any means...With the exception of summary proceedings, expedited proceedings on the merits and proceedings in which the judge must rule within a specified period, the parties shall have a period of fifteen days in which to object to the proceedings without a hearing. In the absence of an objection, the proceedings shall be conducted exclusively in writing. Communication between the parties shall be made by notification between lawyers. A statement of reasons shall be given within the time limits set by the court.* "

Furthermore, the activities of the Paris Judicial Court will gradually resume as of 11 May 2020, even though the Court has never ceased to function fully during this period. It also appears that the processing of VAS messages will gradually resume from that date.

Thus,

- **As of 11 May 2020, the activity of the civil** emergency unit will resume for the majority of urgent cases (common law, expert appraisals, including medical appraisals and referrals by appointment, etc).

  Certain summary proceedings, in particular specialized summary proceedings (press, intellectual property, social law, construction), will be dealt with under the «without hearing» procedure of Article 8 of Ordinance No. 2020-304 of 25 March 2020 for which there is no possible opposition.

  For summary hearings (and expedited proceedings on the merits) cancelled during the period from 16 March to 10 June 2020 inclusive, the court makes available a table of postponements of hearings with the dates of referral for examination of the files.

  As of 11 May 2020, the duty roster will also restart.

  Hearing scheduling resumes as usual and new dates will be opened.

- **The activity of the service of the enforcement judge (movable and immovable property)** gradually resumes from 11 May to 24 June 2020. Applications for precautionary measures, as well as applications for hour-to-hour summonses may again be filed on paper or sent by post. For the latter, in case of urgency, it will be possible to double this sending by e-mail.

  Decisions that should have been rendered between 16 March and 11 May will be extended in part until next June

  With regards to the conduct of hearings:

  · for the litigation of motions, it will be decided without a hearing;
  · for personal property and guidance litigation, the hearings have been cancelled and will resume in June 2020;
  · for real estate litigation, hearings will resume at an ordinary rate as of June 4, 2020

  As in the case of civil emergencies, the scheduling of hearings resumes as usual.

  A note on the gradual resumption of the activity of the service of the enforcement judge has been published on the website of the Judicial Court.

- **The activity of the commercial rents judge's service is gradually resuming** For hearings scheduled from 17 March to 7 May 2020, which have been cancelled, and for hearings to be held from 11 May onwards:

  · In cases that are ready for trial, the lawyers will be informed that the proceedings will take place without a hearing unless the parties object within 15 days.
  · In cases that are not ready for trial, the parties will be reconvened in chronological order automatically without the need for a request for referral or reconvening.

  Hearings will normally resume as of 2 June 2020 with the possibility for the judge to have recourse to the procedure without a hearing under Article 8 of the Ordinance of 25 March 2020. The date of the hearing will have to be set by lodging a paper file with the single reception service of the Tribunal's Justifiable Persons or by sending it by post.

  For more details, we refer you to the note on the gradual resumption of the activity of the commercial rents judge's department.

Certain activities of the **local civil division** also resumed as of 11 May, namely civil activities and activities relating to the protection of adults (guardianship, trusteeship, in particular)

The resumption of hearing dates will begin on 18 May 2020.

For more details, we refer you to the note on the gradual resumption of activity in the civil local area division.

The Tribunal also makes the details of the recovery available on its website: https://www.tribunal-de-paris.justice.fr/75/reprise-progressive-de-lactivite-civile

Regarding the Judicial Court of Nanterre.

The Judicial Court of Nanterre announces a gradual resumption of its activity as of 11 May 2020.

A plan for resumption of activity from 11 to 23 May 2020 has been drawn up and concerns:

- The criminal division (10 hearings);
- The civil emergencies and enforcement unit (8 hearings);
- The Social Affairs Division (1 hearing);
- The family division (2 hearings); and
- Juvenile Court (1 to 3 hearings).

With the exception of these hearings, all other hearings and summonses will be postponed

With regard to the **civil division,** the Tribunal has drawn up a fact sheet on the modalities for the resumption of jurisdictional activity.

From 11 to 25 May, the Tribunal will conduct an internal audit with a view to developing a settlement plan taking into account the constraints and resources available. As a result, the oral argument and incidental hearings scheduled during this period will be discontinued. On the other hand, status hearings that do not require the presence of counsel will be maintained.

Procedures without hearings and filings will be systematized in order to allow judges and civil servants to focus on the essential tasks of resumption of activity.

- Cases that came for oral argument between 16 March and 11 May 2020 will be dealt with under the procedure without a hearing
- Hearings scheduled to take place on or after 11 May are cancelled and will be rescheduled or fixed as part of the proceedings without a hearing. This information will be communicated by the Registry to the lawyers by means of the AVR or other means.

The Tribunal also makes the details of the recovery available on its website:
https://www.cours-appel.justice.fr/versailles/tribunal-judiciaire-de-nanterre

Regarding Paris Commercial Court

All hearings on the merits have been cancelled. In a case of proven urgency, a summary hearing may be held, and a judge may receive the parties to deal with the motions. In order to be allowed to summon in summary proceedings, motions must be sent by e-mail to the duty judge.

Thanks to the provisions of Ordinance No. 2020-304 of 25 March 2020, the hearings were held by videoconference.

Many cases have also been dealt with under the procedure without a hearing in accordance with Article 8 of Ordinance No. 2020-304 of 25 March 2020.

The magistrates have handed down thousands of decisions that could not be notified due to the lack of clerks whose activity will resume as of 11 May 2020. Their priority will be to focus on the publication of all these judgments.

Regarding Nanterre Commercial Court

The Commercial Court of Nanterre announces a resumption of its activities as of 11 May 2020.

The Tribunal shall resume physical hearings in respect of procedural, placement and summary proceedings and those of the judge hearing the case.

However, the Tribunal maintains the possibility of holding hearings by videoconference and also of ruling without hearings for summary hearings and for those of the judge hearing the case.

In addition, the collective proceedings which had been restricted during the period of confinement to the opening of safeguard, receivership or judicial liquidation proceedings on declaration of cessation of payment , conversions to receivership or liquidation, adoption of plans (sale or continuation), approval of conciliation agreements, have been extended to collective proceedings litigation, summonses, applications for reorganization or judicial liquidation, closures and extensions.

These hearings are held by videoconference only.

The information relating to the business continuity plan of the jurisdictions in the provinces is relayed to us by our colleagues of the other Bars and Law Societies.

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Solën and her team deal with complex litigation, in particular in the industrial risk involving insurance, technical and financial issues.

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Major companies of mass retail, industry, automobile industry, horse racing and insurance companies, as well as investment funds with real estate assets in metropolitan France and overseas territories have placed their trust in her.

Solën is a graduate of the Institut des Assurances de Paris I, and holds an Executive MBA from HEC.