



## COVID-19 EXCEPTIONAL MEASURES

Harlay Avocats | 29 April 2020

### The legal regime of contracts challenged by Covid-19

On March 23 2020<sup>5</sup> a state of health emergency was declared in France for the period running from March 24 2020 to May 24 2020.

In order to take into account the effects of the health crisis and the potential difficulties for restart, the Government enacted a series of orders<sup>6</sup> to set a protection period beginning on **March 12 to June 24 2020** at midnight (the “**Legal Protection Period**”) and draw the necessary conclusions with regards to the fate of those contractual clauses that come into effect during this period.

#### **1) My contract includes a termination clause, can I implement it against the other contracting party for the non-performance of an obligation that has fallen due during the Legal Protection Period?**

Yes but its entry into effect will be postponed to after the end of the Legal Protection Period, by a period equal to the time that has elapsed between March 12 2020 or - if it is later than this - the date when the obligation arose, on the one hand, and the date on which it should have been performed, on the other hand<sup>7</sup>.

#### **Example:**

A contract with a termination clause was concluded on February 1st 2020. During the course of the contract’s performance, it appears that one of the parties has failed to comply with its obligations. Formal notice was sent to the defaulting party on March 28 2020, requiring it to remedy non-performance of its obligations within one month, otherwise the contract would be terminated.

In practice, the entry into effect of this termination clause will be postponed, to after the end of the Legal Protection Period (June 24) plus the period given for compliance (one month). The termination clause will therefore take effect on July 24 2020.

#### **2) Can I implement a termination clause for non-performance of an obligation falling due after the Legal Protection Period?**

Yes but its entry into force will be postponed, from the date on which the clause should have taken course or produced its effects pursuant to the contractual provisions (and not after the Legal Protection Period as in 1) above), by a period equal to the time that has

elapsed between March 12 or the date on which the obligation was incurred - if that is later - on the one hand, and the end of the Legal Protection Period on the other hand<sup>8</sup>.

**Example:**

A contract with a termination was concluded on February 1st 2020. However, during the course of the contract's performance it appears that one of the parties has not complied with its contractual obligations. Formal notice was sent to the defaulting party and received on June 1st 2020, requiring it to remedy the non-performance within a period of one month.

In practice, the effects of the termination clause will be postponed, from the date at which the clause should have produced its effects (July 1st, because June 1st + one month), for a period of 24 days, equal to the time that has elapsed between the date of notice (June 1st 2020 in this example) and the end date of the Legal Protection Period (June 24). The termination clause would therefore take effect on July 24 2020.

### **3) Can I serve notice on a contracting party to pay a sum of money?**

Yes and its entry into force will not be delayed or postponed, regardless of the deadline in the notice to pay (during or after the Legal Protection Period) because the Order excludes money obligations from its scope.

However, the notice to pay must not come with a threat to terminate the contract for contractual non-performance, nor must it be accompanied by a penalty to force the contracting party to pay, otherwise it will be subject to the derogations detailed at points 1 and 2 above.

It is therefore advisable to be careful when drafting the formal notice (obligation to do versus obligation to pay a sum of money, with or without penalty), the time given to remedy the non-performance (deadline expiring before or after the Legal Protection Period) and in analyzing the effective date of the formal notice (according to the rule based on issuance or receipt of the letter).

### **4) The term of my tacitly renewable contract falls during the Legal Protection Period. What are the rules that apply to its termination?**

Article 5 of the Order grants companies an additional two-month period at the end of the Legal Protection Period to terminate or to refuse the tacit renewal of a contract that reaches its term during the Legal Protection Period.

In practice, this means that two options are open to the contracting party wishing to terminate or not to renew the contract.

Option 1: The contracting party can give notice of termination (other than for breach) or non-renewal of the contract during the Legal Protection Period according to the terms of the contract. The contract will then come to an end at its term.

Option 2: The contracting party can give notice of termination (other than for breach) or non-renewal of the contract during the two months after Legal Protection Period (until August 24 2020).

Attention, this second option is, however, available on condition that it does not constitute an abusive practice.

**Example:**

A contract was concluded on June 5 2019 for a period of one year. It contains a clause for its tacit renewal, unless one of the parties sends notice to the other contracting party at the latest one month before it reaches term.

Each of the parties has therefore until May 5 2020 to refuse the renewal (option 1).

As the deadline expires during the Legal Protection Period and provided that no notice of non-renewal has been sent, either party can still refuse renewal of the contract until August 24 2020 (option 2).

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For more information or if you have a question, feel free to contact the partner with whom you usually work, or contact us at [contact@harlaylaw.com](mailto:contact@harlaylaw.com).

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<sup>5</sup> Emergency law n°2020-290 of March 23 2020 to deal with the Covid-19 epidemic, article 4.

<sup>6</sup> Order n°2020-306 March 25 2020 relating to the extension of expired deadlines during the health emergency period and adapting procedures during this same period (the “**Order**”), amended by Order n°2020-427 of April 15 2020 containing various provisions regarding deadlines to deal with the Covid-19 epidemic (the “**Amending Order**”).

<sup>7</sup> Article 4 paragraph 2 of the Amending Order.

<sup>8</sup> Article 4 paragraph 3 of the Amending Order.



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