State of Health Emergency and Survival of the Contractual Relationship in International Contracts

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Abstract

Moroccan law seems to limit the principle of "force majeure" to the sole non-performance of damages. In all cases, the defaulting party bears the burden of proving its liability. However covid-19 has created confuesion and inconsistance on exeqution of force majeure of internatioal contracts. Thus, the objective of the stusy is describe and anlyse how Covid-19 global state of health emergency affect performance of contractual obligations of international contracts in Morocco. Morover to assess to what extent can international contract be adapted to the test of covid-19 per the provisions of Moroccan law. The research employed observation method which is an exploratory type of research approch that collect relevant information and data through observation to describe and anlyse how Covid-19 global state of health emergency affect performance of contractual obligations. The study found that Moroccan law does not have an explicit legal framework for contract negotiations, but could provide a basis for sanctioning an abusive termination of negotiations which is evedent during the covid-19 case. In addation" Dahir" (executive decree by king) which describes obligations and contracts, did not take into account the theory of hardship. Therefore, besed on the findings It is recommended to stpulate explicit legal framework for contract negotiations to integrate various impacts, particularly in terms of deadlines, in the contracts to be concluded. Moreover, inclusion of new Dahir to embrece the theory of hardship which alows revison of binding force (force majeure) of the contract during hardship time such as Covid-19. Making such changes would help for effective exicution of contractual concept of force majeure in the time of C-19 to effective decide approprate combination of suspension of performance, exemption from liability for non-performance or termination of the contract.

Keywords
COVID-19, International Business Contract, Health Emergency, Moroccan law

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Introduction

The Covid-19 outbreak currently sweeping the globe is an unprecedented event of unparalleled magnitude (Ait Mokhtar, 2022), which has directly affected international trade and economic actors due to both the spread of the disease and government restrictions, Morocco is by no means immune to this global health pandemic because many international trade relations have been terminated by contractors or the performance of contractual obligations has become very difficult, if not impossible, for many economic actors who are therefore tempted to look for ways to adapt their contract to this epidemic and restore the contractual balance within their contracts.

A party to a contract could be tempted to invoke the current crisis but above all the government measures taken in this regard as constituting a case of force majeure to request the suspension of the execution of the contract in the event of a temporary impediment or even the resolution by operation of the law of the contract in the event of permanent impediment. However, Section 268 of the D.O.C appears to limit the principle of force majeure to non-enforcement of damages only In any case, the defaulting party has the burden of demonstrating the existence of force majeure to clear itself of its liability (Zeynalova, 2013).

In general, government measures to combat the COVID-19 epidemic would rather lead to a temporary impediment that could only justify a suspension of the performance of the obligation discussed and not the termination of the contract.

However, the application of force majeure will necessarily have to be studied in concerto according to the obligation in dispute and the contractual stipulations binding the parties.

Another course of action lies in the theory of the exception of non-performance defined in article 235 of the DOC (Mazzacano, 2022). Under this Legal text, the debtor of an obligation could decide to suspend the execution of the contract if his co-contracting party does not perform its obligations, subject to compliance with the conditions of formal notice incumbent on it.

Based on the above, to what extent can the international contract be adapted to the test of covid-19 per the provisions of Moroccan law?

These theories could be invoked in the context of the performance of various obligations, which will necessarily have to be studied on a case-by-case basis and subject of course to any legislative or regulatory measures which may be taken subsequently, keeping a close eye on the solutions offered by comparative law.

1. Literature review

Applications to the pre-contractual phase and preliminary contracts.

Contract negotiations

The conclusion of a contract generally involves a preliminary phase of discussions and negotiations between the potential future contracting parties. This period of pre-contractual negotiations does not have an express legal framework in Moroccan law and in principle, the parties, who are not contractually bound to each other, are free to contract or not. However, this principle is not absolute and must be limited, following the example according to Nouali, (2019) French law which sanctions the abusive termination of talks, by obligations of good faith or even the absence of intention to harm by one of the parts. Article 94 of the D.O.C could constitute a legal basis making it possible to sanction an abusive termination of negotiations.

In any case, the breakdown of negotiations should not be considered abusive given current events. However, in the context of ongoing negotiations, the parties are informed, before the signing of the contract, of the current situation and its consequences. It will then probably be impossible to invoke the COVID-19 crisis as constituting a case of force majeure once the contract has been signed. It is therefore recommended that the parties already integrate the various impacts, particularly in terms of deadlines, in the contracts to be concluded.

The argument of force majeure is, without a doubt, a means of releasing oneself from one's contractual commitments when their execution becomes impossible. However, many players in the economy are not affected by this scenario, which implies the existence of an insurmountable ("irresistible") obstacle to the performance of an obligation. In this case, the majority of operators seem to be faced more with the occurrence of circumstances that make the performance of their obligations particularly onerous but not, strictly speaking, impossible to perform.

In some cases, the parties to a contract may have planned – upstream – adjustments and corrective mechanisms likely to be implemented in the current context:

- Indexation clauses (or sliding scale clauses) thus make it possible to calculate the price of a service or product according to the fluctuation of a reference index (the price of wheat or oil). However, this type of clause can only influence the contractual price, even though other factors are likely to cause performance difficulties (delivery times, etc.)

- Also, the renegotiation clauses at maturity require the parties, often on the anniversary date of the contract, to come together to renegotiate the conditions of their commitment. However, this renegotiation is only possible on the date set by the parties to the contract, which may prove to be too far off to deal with the urgency imposed by the context of an economic and health crisis;

- Finally, the hardship (or safeguard) clauses by which the parties undertake to renegotiate the conditions of the contract when, as a result of external circumstances, the conditions of performance of the contract become deeply unbalanced, can make it possible to adapt the contract to the consequences of a crisis such as the one we are going through.

Preliminary contracts

In the case of preliminary contracts, it will be necessary to assess the situations in which the ban on assembly and the containment measures materially prevent, at least temporarily, the reiteration of promises before a notary within the required time limits or the signing of contracts of purchase of securities of companies holding real estate, taking into account in particular, the possibility of an electronic signature for the latter.

Since 2007, electronic signature and certification have been possible for private deeds, it being specified that Barid Al-Maghrib is the only entity approved by the state to issue electronic certificates (Mejdoubi, Ghita and Kevin, 2020). Nevertheless, it seems to us that for acts whose legalization is necessary, a trip to the competent administration is always necessary.

Concerning the unfulfilled conditions precedent provided for by the terms of the promises and contracts, the automatic postponement of the deadline for fulfilling these conditions precedent does not seem to be possible at this stage. Indeed, it would be necessary to examine on a case-by-case basis depending on the nature of the condition precedent to know whether its fulfillment within the stipulated deadlines has been made impossible due to the COVID-19 crisis and the government measures taken in this regard. In general, the parties will have an interest in agreeing on an amicable extension of the deadlines for the fulfillment of the condition's precedent or the non-fulfillment of the resolutive conditions.

2. Research methodology

Observation is widely used research approach in an exploratory phase, usually in an unstructured form, to figure out what's going on in a situation as a prelude to testing the insights gained (Aynalem and Vibhute, 2022). It is also used as a supporting or supplementary way to collect data that may complement or put data obtained through other means into perspective (Ibid). In this research the first step starts by observation case and complaints at different levels of Moroccan courts. Following those repetitive cases which took place during Covid-19 were identified by looking court cases. Subsequently, case related to non-performance of contracts due to covid-19 were selected through Identify similarity of causation which are related to Indexation clauses, renegotiation clauses, hardship (or safeguard) clauses for breach of international contracts. finally, the researcher identified clauses of Moroccan legal system available in handling international contracts which could be applicable at a time of such global health emergency like Covid-19 to analyses to what extent can the international contract be adapted to the test of covid-19 per the provisions of Moroccan law and put some recommendations to address similar circumstances in the future.

3. Results and discussions

3.1. Resistance of the binding force of international contracts in the face of the Covid-19 pandemic

Force majeure clauses identify exceptional circumstances upon the occurrence of which the debtor is exonerated from liability for failure to perform. Whether an event constitutes force majeure under a contract involves a casuistry analysis of the facts. In most cases, a force majeure event must be unforeseeable; moreover, the debtor must not be able to avoid or overcome the event or its consequences.

In some contracts, events that constitute force majeure are specifically listed and these lists may include epidemics, pandemics, or other serious and widespread disease terms, which cover Covid-19. If the list is supposed to be exhaustive, the absence of an express reference deprives the injured party of the protection linked to this clause. However, several contracts contain only a general catch-all phrase referring to the force majeure requirements mentioned above (or contain a purely illustrative list), thus leaving open the question of whether the Covid-19 pandemic qualifies force majeure under this specific contract.

Even if Covid-19 falls under the contractual concept of force majeure, other conditions must be met, namely a direct causal link between the pandemic and the non-performance (which must be "due" to the pandemic) (Mundi, 2007) and the inevitability of the effects of Covid-19 (or subsequent pandemic mitigation restrictions), and the unpredictability of the epidemic must also be questioned. (ConocoPhillips Co, 2020).

If all these conditions are met and if the party affected by the impediment invokes force majeure under other contractual requirements (form, deadline), the clause then provides for a compensation regime which, in most cases, is based on the combination of suspension of performance, exemption from liability for non-performance or termination of the contract. In some of the rare comparable circumstances (i.e., when other epidemics have occurred), the courts have been extremely reluctant not to dismiss the plaintiff (Guiomard, 2020).

In particular, the party that successfully invokes force majeure may suspend performance for the duration of the impediment, provided that the other party can also react by suspending its counter-performance. However, if the suspension of performance or its extension in time deprives either party of what it was reasonably entitled to expect from the contract, either party may terminate the contract (Berger and Behn, 2020).

In any case, whatever the recourse between the suspension and the termination, the party which does not perform the contract is exonerated from any liability for damages, including lump-sum damages for delay in the execution and other contractual penalties.

In a smaller number of cases, the contractual remedy may contain alternative solutions – which are more often found in hardship clauses – aimed at preserving the contract, namely an obligation to renegotiate the terms of the transaction. (Which does not in itself imply an obligation to reach an agreement on new terms) or the endowment of a third party or a court with the power to adapt the terms of the contract to changing circumstances.

Not only do these alternative remedies imply that the force majeure clause in question also covers situations where performance is not impossible but simply more cumbersome (because renegotiation would otherwise be pointless), they also appear to be based on the assumption that the preservation of the contractual relationship is desirable, presumably based on the argument that the termination of the contract would entail the burden of new costs.

This is, however, a questionable assumption to be weighed carefully against the benefits arising from the termination of the contract, which allows the parties to return to the market in a competitive environment and to seek again, in the newly changed circumstances, the most profitable transaction, either with the old or with a new contractual counterparty. In the absence of a contractual remedy, the attention of economic actors turns to the national options offered by the restrictions for the mitigation of the pandemic.

3.2. Force majeure and the theory of unpredictability

In Morocco, unlike France, the drafters of the Dahir of obligations and contracts, did not take into account the theory of hardship, claim that this revision is detrimental to the binding force of the contract, because of the imperative nature of obligations, which must be honored in good faith, and the non-performance of which gives rise to the contractual civil liability of the defaulting debtor, giving rise to the right to compensation, also that unforeseeability only makes the performance of the obligations more onerous for one of the parties, and not impossible like force majeure.

Given the extraordinary situation and the uncertainty related to the position that the Moroccan courts will adopt once seized of these subjects, the general recommendation remains the bringing together of the parties to reach amicable solutions.

Concerning contracts in the process of being concluded, it is also recommended that the parties already integrate the various impacts of the current crisis, particularly in terms of deadlines and liability.

At the level of case law, several French judgments rendered in recent decades, "mediators of good justice and precursors of the law", have testified to a certain tremor in case law, to a certain flexibility of the law, clearly reflecting an evolution in the requirement in good faith: from an abundantly reinforced obligation of cooperation, we sometimes slip towards a parsimoniously affirmed obligation to adapt (on this evolution, among these avant-garde decisions, we will note:

The EDF v. Shell France judgment of the Paris Court of Appeal of December 28, 1976: in this case, the balance of the supply contract between EDF and Shell had been upset by the fivefold increase in oil prices. The safeguard clause having been used without success, the judges imposed, by an interlocutory judgment, a new negotiation under the supervision of an observer, reserving the right, in the event of failure, either to terminate the contract if the imposed formula had to alter the economy, or above all to impose this solution automatically in the opposite case. This initiative went far beyond the terms of the safeguard clause providing, in the event of a sudden rise or fall in prices, a rapprochement between the parties and, in the event of failure of the negotiations, an option of termination.

According to (Cabrillac, 2014) the “Huard” judgment rendered by the commercial chamber on November 3, 1992, abundantly quoted and commented upon, (Grimaldi, 1992) confirms the reinforcement of the requirement of good faith, this time in terms of distribution contracts. But here we move from a simple obligation to adapt to an obligation to renegotiate in the event of an unforeseen change in economic circumstances. This involved a distribution contract between BP and a trader bound to the latter by an exclusive

supply clause. The new circumstances, constituted by the liberalization of fuel prices, seriously exposed the distributor to competition. However, the Court of Cassation approves the Paris Court of Appeal for having considered that the requirement of good faith forced BP to negotiate a commercial cooperation agreement allowing the distributor to align itself with its competitors.

The theory of unforeseeability will know through the 2016 ordinance its legal consecration, it thus marries the European conception of unforeseeability. However, it sets the conditions and frames its processing in such a way as to avoid certain abuses. Thus, following the example of foreign models or even European academic projects, the new article 1195 of the Civil Code states in a first paragraph: "If a change in circumstances unforeseeable at the time of the conclusion of the contract makes the execution excessively party who had not agreed to assume the risk, the latter may request a renegotiation of the contract from its co-contracting party. It continues to exercise its obligations during the renegotiation". The text adds in a second paragraph:'' In the event of refusal or failure of the renegotiation, the parties may agree to the termination of the contract, on the date and under the conditions which they determine, or request by mutual agreement the judge to proceed with its adaptation. Failing agreement within a reasonable time, the judge may, at the request of a party, revise the contract or terminate it, on the date and under the conditions that he fixes''.

Conclusion

In the light of the above, it is clear that the outbreak of coronavirus "Covid-19" is not independent by a specific provision, sometimes it does not affect the contract and becomes mandatory to implement following this which has been agreed by the parties, and at other times it places the status of force majeure, which makes the contractual commitment impossible, and not only more difficult and exhausting, and sometimes makes the obligation very onerous, which requires the intervention of the judge to adopt the contract and restore the balance between the two parties, in the application of the theory of hardship.

At the end of this analysis, which is undoubtedly incomplete, and given the doctrinal differences to which the Covid-19 pandemic may have given rise, the international contract remains very sensitive to external changes that may affect its fair balance and its fair substance, its adaptation to future circumstances should be encouraged, allow prevention and securing the contractual whole. So, we should promote the implementation of the will of the parties, and if this will be not clear, the judge or the arbitrator must interpret the contract, according to the economic efficiency of the contract, to maximize the contractual balance between the contracting parties.

Such maximization will occur by limiting the cases of exemption and resolution and suspension of international contracts. However, companies affected by the consequences of the coronavirus epidemic must act in good faith in discussions with their partners (suppliers, customers, Banks, etc.), and in the implementation of the said clauses, to ensure the maintenance of the contract in the event of a change in the circumstances that led to its conclusion.

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