

COVID 19 and the postponement of credit installment payments

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1-The surge of the epidemic of COVID-19 - or "coronavirus" constitutes an unpublished health crisis. Dangerous and disturbing pandemic threatens the national economy as well as the international economy.

2- The health fight is thus a general and universal fight, which requires human and material resources, but also the enactment and implementation of exceptional measures.

Faced with an exceptional crisis, it is essential to take exceptional measures. Better still, faced with an unprecedented crisis, new tools must be invented.

3- In Tunisia, the public authorities have not yet established a general framework for the crisis management. However, particular and specific measures have been taken.

This is the case in the banking sector where the regulator has proclaimed the postponement of the maturities of credits. Immediately Tunisian Central Bank issued four circulars that regulate the same topic as per the below details:

- Circular to banks No. 2020-08 issued on 1st of April 2020 around exceptional measures for individuals modifying the circular to banks n ° 2020-07 dated March 25, 2020;

- Circular to banks No. 2020-07 issued on 25th of March 2020 related to exceptional measures to individuals;

- Circular to banks No. 2020-06 issued on 19th of March 2020 related to exceptional measures for companies and professionals;

- Circular to banks No. 2020-05 issued on 19th of March 2020 related to exceptional measures for to banking services pricing and continuity of certain services.

4- With the exception of the last mentioned circular, the first three circulars explain the measurement of the extension of credit installments.

For the regulator, this measure consists of deferring the maturities of the credit installments, due in principal and interest at this specific period.

However, the three circulars are silent on the legal regime applicable to the carry-over and on the practical arrangements to implement such kind of measures.

5- Credit allocation is an operation that is subject to the banking monopoly. Nevertheless, financial institutions can also offer this type of service.

Although the loan is the prototype of credit, credit can take much more complex forms and is not always achieved through the direct disbursement of money, promises can be allocated through various forms of credit such as permanent and temporary overdraft, discount, letter of credit....

However, the carry-over measure only seems to concern credits by making funds available and not signature credits insofar as in the case of carry-over, the client has already benefited from a cash advance and payments schedule was agreed.

6- This being said, it should be noted that in banking law, several events could occur and affect the performance of loan or credit facility agreements. Classically, a distinction is made between early repayment and renegotiation of the loan.

The terminological uncertainties that may underlie them are, however, not the more meaningful. Just focus on the effects of each of these events.

In this respect, the extension of loan maturities is different from early repayment since it is not a question of returning the borrowed sum before the agreed term. Therefore, the deferral or early repayment alters the contractually agreed term.

7- Likewise, renegotiation involves reviewing the contractual terms or conditions already accepted. This generally occurs when the settlement of unpaid installments has been rescheduled. When the borrower is unable to repay the installment payments at the fixed maturity date, it can happen that the duration of the loan is conventionally extended to allow the liquidation of installments.

The renegotiation must not be confused with a simple maturity extension agreement.

Moreover, if the postponement is generally part of the renegotiation of the terms of the loan or the credit contract, it does not identify with the rescheduling.

8- This being so, if the postponement as provided for in the above-mentioned circulars is more like an unprecedented measure, we must wonder: what is its specificity? How effective is this tool to deal with the impacts of the COVID 19 health and global crisis? What legal regime is applicable to it?

9- In fact, the legal regime applicable in contractual matters to situations resulting from the COVID 19 crisis is not always very clear. It is more so with regard to the postponement.

Certainly, the effectiveness of legal standards is measured by the degree of achievement of its objectives. However, the postponement is part of a very delicate national and international context, which leaves its enshrinement very troublesome.

I / THE CONTEXT OF THE POSTPONEMENT

10-The postponement is a measure taken by local regulation authority to deal with the economic impact of the pandemic. In this way, the pandemic can be analyzed as a force majeure (the equivalent of the doctrine of impracticability in common law) justifying the postponement measure taken, which can in turn also be qualified as a concept of “fait du Prince”(decision of the competent authority).

1 / The pandemic, a case of force majeure justifying the measure of postponement of credit installments deadlines

11- The COVID 19 pandemic is an international health crisis. Can the economic difficulties it causes be qualified as force majeure?

Force majeure is one of the most classic and stable legal concepts. It can be found in Roman law under the expression of *vise major*, alongside the notion of fortuitous event, *casus fortuitus*. "To the impossible no one is held", force majeure then, implies that one can neither demand the execution of an obligation which has become impossible, nor engage the responsibility of the one who, victim of a case of force majeure, caused damage to others.

12- It is in this sense that article 283 of the Code of Obligations and Contracts stipulates that: "force majeure is any fact that man cannot prevent, such as natural phenomena (floods, droughts, storms, fires, and locusts), the enemy invasion, the “fait du prince”, and which makes it impossible to execute the obligation. “

Force majeure shall not be deemed to include the cause that it was possible to avoid, if the debtor does not justify that he has taken all due care to guard against it. Force majeure does not include a cause which was caused by a previous fault of the debtor.

13- However, it is important to emphasize that the qualification of force majeure largely depends on the circumstances of the case. No event is in itself a force majeure, neither the “fait du Prince”, nor the state of war, nor the terrorist attack, nor disease, nor even catastrophe natural.

Each phenomenon must be assessed in the light of all the circumstances of the case in order to determine its impact on the defendant.

Under these conditions, even the classification as a health disaster does not necessarily imply the qualification of force majeure.

14- The attempts to rejuvenate the concept of force majeure have not yet shaken its classic concept based on the following three criteria: unpredictability, irresistibility and exteriority.

-First, the criterion of unpredictability: an event is unpredictable if "there was no particular reason to think that this event would occur". The unpredictability is assessed *in concreto*, when at the time the contract is concluded and not at the time the obligation is not fulfilled;

-Second, the irresistibility criterion: the irresistible event is the one against which one cannot protect oneself even by foreseeing it or which, when it occurs, leaves the debtor of the obligation powerless to perform it. Thus, in contractual matters, force majeure makes the debtor unable to act otherwise;

-Third, the criterion of externality: force majeure being a foreign cause, it must be external to the debtor as well as to the material and human means which he uses to execute the contract. Exteriority corresponds to the absence of imputability of the harm to the debtor.

15- A priori, the COVID-19 pandemic is indeed a case of force majeure Force; a virus with an irresistible spread, considered by the World Health Organization (WHO) as a public health emergency of international concern, and now as a pandemic, which States are seeking to fight but are unable to eradicate.

The condition of unpredictability is fulfilled if the contract was concluded before the outbreak of the epidemic.

The fact that health crises of a similar scale or nature have occurred in the past does not preclude the requirement of unpredictability. This is a new, unknown disease in humans and for which there is no vaccine. Moreover, the speed and extent of its global spread seems to be unprecedented.

For this reason, the pandemic is more like a general, universal, serious and original case of force majeure.

16- The question then arises of knowing what are the effects of force majeure? Suspension or termination of the contract ? Postponement or cancellation ?

Generally speaking, the essential effect of force majeure is to relieve the person who invokes it from the sanction attached to the ignored rule. In Law of obligations, it is more precisely a question of exempting the defendant from the obligation to compensate the creditor for a contractual obligation which has remained unfulfilled or the victim of damage falling under extra-contractual liability.

17- In many cases, the impossibility to execute will only be temporary.

Temporary impediment involves suspension of contract performance and exemption from liability

The debtor's counterparty may suspend payments, but he cannot demand compensation for the damage caused by this suspension. The qualification of force majeure here avoids any late payment penalties that the debtor would have had to pay if the delay in execution had been caused by him. The contract resumes then its normal course at the end of the impediment.

18- Presented in this way, the ordinary effects of force majeure are of little help to borrowers.

Already, they must, beforehand and in the absence of any law proclaiming the pandemic as a case of force majeure, demonstrate how it would make it impossible for them the fulfilment of their contractual obligations to meet the various maturities.

In addition, it should be recalled that by opening a credit the banker authorizes his customer to debit his account with the equivalent amount of the credit granted and the customer authorizes his banker to deduct the amount of each installment. In concrete terms, the suspension of the contract then depends on the action of the banker, who has every interest in refraining from doing so.

It is therefore necessary to take action to support customers. The measure taken consists in imposing the postponement of the credit maturities, which amounts to a certain extent to suspend the execution of the contract. However, the postponement measure in itself can be considered, as a “fait du Prince” an act of the prince constituting a case of force majeure.

2 / The postponement of credit installment maturities: “fait du Prince” constituting a case of force majeure?

19- Coronavirus control strategies differ from state to state. Tunisia has chosen a method, at the very least expensive, but which has the advantage of stopping if not limiting the spread of the virus. This is the sanitary confinement method imposed on the majority of citizens.

Thus, the borrowers were obliged to stay at their homes and stop their professional or commercial activities capable of providing them with the necessary funds reimbursement of their credits.

Naturally, the regulator’s action followed that of the public authorities by imposing on banks the extension of credit maturities. Undoubtedly, the concept of force majeure is reflected.

20- It is not here the coronavirus pandemic, which directly constitutes the force majeure, but the measures taken to remedy it, by the authorities.

Article 283 of the Code of Obligations and Contracts expressly cites the fact of the prince as a case of force majeure.

In this regard, it is needless to recall that Article 283 COC specifies that force majeure is everything that man cannot prevent, such as the “fait du Prince” and which makes it impossible to fulfill the obligation.

21- The fact of the prince ("fait du Prince") is a well-known notion in private and public law. In private law, the act of the prince is defined as "a decision of the public authority which has as a consequence to undermine the financial equilibrium of contractual situations and which, in civil matters, may constitute a case of force majeure". It thus designates an act of the public authorities constituting an absolute and insurmountable obstacle to the performance of contractual or legal obligations.

22- Thus, in order for the act of the prince to be considered as a case of force majeure, it is still necessary that it makes the execution of the contract impossible.

The requirement of impracticability due to the act of the prince implies, in contractual matters, the termination of the contract, particularly if the contract is synallagmatic, the impossibility for one party to perform his obligation leads to the disappearance of the correlative obligation of the other party.

23- Assimilated to a case of force majeure, the act of the prince constitutes a cause exonerating from responsibility. As such, the act of the prince precludes any compensation to the person whose interests are harmed by the intervention of the administration. The creditor cannot therefore obtain compensation for the loss suffered.

Thus, the bank which has acted by order of the legitimate authority, the regulatory authority, is not a priori required to pay damages to the possible victim of the execution of this order.

24- The decisions of the administrative authorities of containment may be considered as a fact of the prince creating a legal impossibility to execute, with the same effects as a case of force majeure. Moreover, the postponement, as provided for by the BCT circulars, may be qualified as an act of the prince, but the question remains whether it has the effect of making it impossible to execute credit contracts in order to constitute, in particular for the borrower, a case of force majeure?

25- On the contrary, the measure of the postponement tends precisely to allow the execution of credit contracts.

Moreover, traditionally, it is impossible, or at least very difficult, for the debtor to invoke force majeure if the disputed obligation relates to a fungible thing, a solution that is conventionally linked to the adage *genera non pereunt* (gender things do not perish) which makes it possible to affirm that the debtor of a genre thing "is always able to replace it by buying another".

26- In practice, monetary obligations could hardly be affected by force majeure due to the possibility of replacing currency; it is never materially impossible to pay as long as the currency exists. "There is no financial force majeure". As stated by the French Court of Cassation, "the debtor of a contractual obligation of unexecuted sum of money cannot be exempted from this obligation invoking a case of force majeure".

27- Consequently, the borrower can never free himself from his debt by invoking a concept as variable as force majeure while positive law organizes multiple insolvency procedures and grace periods which allow one to apprehend the difficulties of the debtor. "It is never an objective shortage of money that paralyzes the execution, but always the insolvency of the debtor".

28- Force majeure does not release the debtor from the monetary obligation, it simply allows him not to have to suffer the consequences of a failure to punctuality which is not attributable to him. On this point, the postponement perfectly consecrates the suspensive effect of force majeure. It remains to be seen how?

II/ THE ACHIEVEMENT OF THE POSTPONEMENT

29- The postponement of credit maturities as introduced by the regulator raises three main questions. First, it is necessary to determine the conditions under which the postponement operates (1) Then, the consent of the parties to those conditions must be considered

(2) and finally it is important to verify the actual payment of the deferred instalments (3).

1/ Postponement: under what conditions?

30- Extending the credit refers to the action of making a credit last beyond the initial duration agreed to, i.e. the action of "extending the final maturity" of the loan. The extension of a loan in fine can be analyzed as an extension of credit over time for a new overdue period.

31- The credit operation is a very specific operation as it is based on two main proportional factors: the time factor and the remuneration factor. If the time factor increases the remuneration factor increases. Being an extension in time, the deferral of maturities logically implies an increase in credit remuneration.

32- In order to quantify this increase, the bank can proceed to two methods that do not necessarily give the same result:

- The first method technically consists of stopping the outstanding amount during the deferral period, consolidate the credit and develop a new schedule based on the new outstanding amount. In concrete terms, the customer will not have to pay anything during the deferral period, however, when payments are resumed, he will have to pay additional interests in the first.

- The second method technically consists of simply shifting the maturities, so that the only change made is the replacement of the date of each of the initial due dates by a new date corresponding to the following formula: date of original maturity + deferral period. For example, for a period of a three-month extension if the first due date for the customer has been set initially for 30 March 2020, now it will be for 30 June 2020.

After repayment according to the initial schedule, the client will have to pay interest which corresponds to the deferral period. However, since it will pay interest after the initial

schedule has elapsed, the calculation of such interest will be on the base of the value date that goes back to March 2020.

33- It should be noted that in both methods used, the sum corresponding to the interest can be calculated by applying the interest capitalization rule and without taking into account the eventual possibility of it being spread out over time which will of course generate additional interest.

34- Admittedly, the regulator did mention that the postponement cannot be analyzed as a credit restructuring and the deferral period is not taken into account for the determination countdown of the seniority of assets within the meaning of circular N ° 91-24 relating to the division, coverage of risks and monitoring of commitments, for beneficiaries of measure, but it fits rather in the context of the application of prudential rules. We should not exclude this method, especially if it proves to be less expensive.

35- The fact remains that, the deferral, being an exceptional measure which aims to help the borrower to overcome the period of crisis, the question remains whether it is the client who bear its cost. Moreover, the qualification of force majeure here avoids the possible late penalties that the debtor should have paid if the delay in execution had been his own.

36- Certainly, the bank as the main institution for financing the economy is called to show a surge of solidarity with its customers in times of crisis. However, the specificity of this crisis lies in its general and universal character. Hence, the bank itself will suffer the consequences of this crisis. The bank itself is in crisis. If the qualification of force majeure is retained, the bankers can invoke it themselves and claim the benefit of its suspensive effect with regard to payments of credit interest especially to customers with deposit accounts. In addition, the bank can invoke it with regard to the Central Bank in the context of refinancing operations.

37- In addition, it should not be forgotten that the postponement of maturities of credits granted to companies and individuals affected by the health crisis induces a state of restructuring of these outstandings according to a new system, which will increase the outstandings of the latter and, de facto, the cost of risk. Credit risk is the main risk - with liquidity - highlighted during a financial, health or economic crisis on a territory. What about an international crisis! The desire to save businesses, to support individuals must not overshadow the need to maintain the financial balance of the banks. We know that the time of financial institutions "Too big to fail" is already over.

38-Anyway, in the current state of the law, and in the absence of provisions on the question in the four aforementioned circulars, the customer will have to pay the related fees and interest during the deferral period. But he should be well informed.

2 / Report; informed consent is required?

39- The three circulars specify the new terms and conditions according to the nature of the credit allowed. While circular 2020-06 is intended for loans to businesses and professionals, the other two namely circulars 2020-07 and 2020-08 are intended for individuals.

- First, loans to individuals, the main distinction made in this framework relates to the client's income: Clients whose gross income is less than a thousand dinars and those whose gross income exceeds one thousand dinars.

For the former, circular 2020-07 requires the postponement of the deadlines for six month.

For the second, article 2 of circular 2020-08 added an article 3 bis to the circular of 2020-7 to thus extend the carry-over measure to this category of customers who will then benefit from a three-month postponement.

- Regarding loans to professionals and businesses, circular 2020-06 requires to banks the postponement of the credit maturities by six months.

40- The postponement of credit maturities implies obligations different from those initially contracted between banks and their customers. Conclusion and modification of contracts obeys the sacred principle of the autonomy of the will. The interference of the regulator in contractual relationships may be justified by the COVID 19 crisis, but its legality remains doubtful. In addition to the violation of article 242 COC, it is enough to quote article 137 COC to be convinced. Indeed, this article provides that: "The court may not grant any term or grace period, if it does not result from the agreement or the law. When the deadline is determined by convention or by law, the judge cannot extend it, unless the law authorizes it. "The question of the parties' consent to these various contractual modifications remains then asked.

Regarding the consent of the bank,

41- In no clearer terms, the regulator imposes postponement to banks. In this regard, it states that "the banks must". This deferral obligation concerns customers classified 0 or 1 at the end of December 2019. On the other hand, the bank regains its discretionary power if the customer is ranked 2 or 3.

42- In principle, the lender is free to accept or refuse a renegotiation of the credit of his customer. In general, renegotiating the loan is a simple option for the bank. In case of difficulty the borrower can seek to renegotiate the terms of his loan; the lender is under no obligation to grant such a request. However it is conceivable to consider an obligation of means to renegotiate based on the duty of good faith. This analysis is further confirmed by the possibility given to the borrower in difficulty as with any debtor to ask the judge for a grace period.

In this case, the banker must not only renegotiate the credit but categorically modify it. Better yet, the measure does not affect one or two customers but sometimes thousands of customers !!!

Regarding client consent

43- If the customer is an individual classified 0 or 1, he will automatically benefit from the measure. Customers who do not wish to benefit from this measure must inform the bank by a request made by any means leaving a written record. The deferral runs automatically for individuals unless the client opts for his declination. If the client is a company or a

professional classified 0 or 1, he cannot benefit from the deferral only on request. In this context, it should be noted that the importance of the system put in place to support the clients is based on the idea of adequacy between the measure and the category of target clientele on one side and asset classification on the other.

44- For this purpose, remember that article 8 of the circular N ° 91-24 requires banks to monitor and classify all their assets. This is a classification declared to the information center and accompanied by an ongoing update. Any client company receiving credits that has been declared to the information center, can consult the data which relate to it and relating essentially on outstanding loans and unpaid amounts, broken down by lending institution or creditor and by credit category.

45- The classification is mainly made between current assets and classified assets. Furthermore, certain special rules are provided for overdraft and arrangements.

Firstly concerning current assets, within the meaning of Article 8 of Circular No. 91-24 this are the "assets whose realization or full recovery in time seems assured and which are owned by companies including:

- the financial situation is balanced and confirmed by certified accounting documents less than 18 months old and provisional situations less than 3 months old;
- the management and the prospects of activity are judged satisfactory on the basis of the reports of visits;
- the form and volume of assistance they receive are compatible with both needs of their main activity only with their real capacity of reimbursement ".

46- Next, concerning classified assets which are "intimately linked to companies in difficulty", the circular distinguishes between 4 classes based mainly on seniority arrears:

- Class 1: Assets requiring special monitoring.
- Class 2: Uncertain assets: These assets are characterized by the existence of late payment of interest or principal, greater than 90 days and not exceeding 180 days.
- Class 3: Assets of concern: Late payments of interest or principal, corresponding to these assets are generally greater than 180 days and without exceeding 360 days.
- Class 4: Compromised assets: this class represents receivables for which the late payments of interest or principal are greater than 360 days.

47- Whether the postponement is automatic, or on request, the extent of the client's consent arises fully.

Two points deserve attention:

- First, an informed consent is necessary. The borrower must be informed. He must be informed about the effects of the extension of deadlines. According to French case law, the bank owes an obligation to advise borrowers requesting the extension of their maturities. " It belonged to the bank under its advisory duty, to issue them a full information on the

effects of extending deadlines ". In this case, the-not warned borrowers request the contractually scheduled break repayment of monthly mortgage payments. The bank does not inform them of the additional amount of interest earned in the absence of capital amortization during this suspension.

- Second, what interest rate to apply?

Are the costs of deferral and unpayments or extensions excluded from the global effective rate (TEG)?

What about the extension of deadlines or in general when the credit opening agreement entered into for a fixed term is extended, should the interest rate be stipulated again with indication of TEG?

On this point, the French Court of Cassation gave a negative answer, stressing that when the original convention continues to produce its effects beyond the initially agreed term, the fixed rate remains applicable to successive extensions. In this connection, the question of position of Tunisian law arises fully. Two solutions are possible: the rate of interest applicable for each category will be fixed, or the solution of the French case law which may be retained.

3 / Report: What payment guarantees?

- The modification of the repayment terms or the extension of the original loan does not constitute and does not result in a "novation" of the initial loan. Simply, an addendum must be concluded.

The lender retains the benefit of his mortgage or lien, and the enforceable title originally issued to him. Only the initially signed credit securities do not cover the period of extension. Unless customers sign a new schedule and correlative bills of exchange, the bank has no guarantee for the extended period.

- In France, the specifications for obtaining the State guarantee on loans granted to companies due to the COVID-19 crisis, was already published on March 24, 2020.

Conclusion

50- The COVID-19 crisis can be analyzed as a force majeure but it will not have as an effect the suspension of the borrower's monetary obligations.

The postponement provided for by the regulator as a customer support measure can be analyzed as a fact of the prince but the specificity of the credit operation does not allow attaching to this qualification the expected goals. It will be difficult to apply the suspensive effect without taking into consideration consecutive compensation.

51- In this way, on the one hand, the client can invoke force majeure and claim that the profit suspensive effect must be at no additional cost. On the other hand, the bank can invoke the fact of the prince constituting a case of force majeure and request exemption from any liability arising from its application of the postponement.

Relating to an ordinary carry-over agreement, the specificity of the carry-over measure adopted by the regulator resides in its compulsory nature which sometimes breaks the contractual balance and inevitably the general principles of law.

52- Banks are, above all, companies governed by private law. As important as their will to support and help can be, you cannot impose excessive sacrifices on them. In times of crisis, it is the State which must take charge of the collective interest and seek the adequate solutions. State institutions must act, private persons must interact. The regulator can only regulate and can never legislate.

53- Today, the fixing of the legal regime applicable to the postponement is essential. Such a solution will recognize the pandemic as a case of force majeure and provide the necessary and expected responses to the legal regime applicable to the postponement. All questions relating to the applicable interest rate or its support, customer consent and the payment guarantee for deferred deadlines must be well specified.

Tunis, April 7th, 2020