COVID-19: is it really a threat to contractual freedom?

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Abstract
The concern of adapting the contract to the exceptional circumstances due to the pandemic obviously requires a common will of the parties to be in accordance with the theory of autonomy of the will. However, this is not always possible. The recourse to the judge is inevitable in the event of a disagreement. The legal process seems more predictable given the legal standards of contract law.

The article proposes legal mechanisms, referring to the guiding principles of common law and civil law, including good faith and the obligation to cooperate in mitigating the impact of coronavirus on the contractual standard.

Keywords:
Contractual freedom, breach of contract, solidarism, imprévision, force majeure, coronavirus.

Humanity has experienced terrible pandemics throughout history, the coronavirus COVID-19 described as such by WHO is certainly not the last.

This health crisis triggered by COVID-19 has also been officially recognized as a force majeure in many affected countries including Morocco; notably by the circular of the Ministry of Economy and Finance and the administration reform on 31 March 2020. Nonetheless, this decision does not bind the Moroccan courts, which remain free to determine the qualification of the state of emergency of force majeure in a case by case basis.

However, this crisis has jeopardized our contractual standard based on voluntarism and the freedom of contract.

A double question arises regarding this voluntarism as known under the aegis of the common law since its implementation:
First: Is it designed in the same way by our jurisprudence? i.e., does our jurisprudence favour the application of the principle of the binding force of the contract as provided for in section 230 of the DOC in a "normal" time or does it prefer the derogation?

Second: Does our legislation allow the judge to make this necessary derogation to deal with this period of crisis generated by COVID-19?

To answer these questions, we must first assess the role of the judge in a "normal time" to be able to do the same exercise in a "period of crisis". Then, see if our judges have the necessary legislative tools to carry out the contractual operations in times of crisis which become increasingly recurrent.

Judicial interventionism in "normal" times is becoming more and more regular, particularly in relation to contractual abuse linked to the fierce application of the principle of the theory of autonomy of the will, jeopardizing the freedom of contract as considered in Article 230 of the DOC (1.). Our textual arsenal does not possess enough mechanisms to deal with the unforeseen events due to "the exceptional circumstances" similar to those generated by COVID-19. The use of force majeure is not always a good solution, prevailing the guiding principles of the common law remains an option (2.).

1. Declining freedom of contract in favor of judicial interventionism

The judge's control over the contractual transaction in normal times (1.1) or in times of crisis (1.2) constitutes a disturbance to the principle of "PACTA SUNT SERVANDA". As a matter of fact, mentioning the existence of a pandemic or an epidemic can release both sides of their reciprocal obligations, which jeopardizes the safety and stability of contractual transactions, condemns the principle of "a contract is the law between the parties" referred to by the legislator in Article 230 of the DOC, and disrupts our economy.

1.1. The judge's agreement on the "normal" contract transaction

Legal voluntarism as provided for by the DOC is often confused by jurisprudence in what concerns safety or equality, which can go as far as the abrupt nullity of the contract by the judge. This was the case of a judgment of the Moroccan Court of Cassation, a business case, on 05/01/2015 published during the same year, where the judge decided the nullity of the contract that did not fulfill the training elements provided for in Article 618-3 of the DOC; whereas it was necessary to request the completion of the sale procedure.

Similarly, the Court of Cassation pronounced a judgment in a civil case 01/31/2011, i.e., canceling the contract, in the event of a promise of sale failed to fulfill the legal conditions of its formation.

We are indeed witnessing the emergence of a new theory confirming the judge's approach to control, whether in the pre-contract period or after the conclusion of the contract. The judge can even save the contract under Articles 307 and 308 of the DOC.
The judge can therefore proceed to annul any clause - source of nullity - without destroying the contract: Further, decisions bear witness in social and business fields.

The special law, on the other hand, enshrines this judicial interventionism by providing the judge with additional means to assess the nature of the conventional clauses, in particular the abusive nature through the means of the Law 31.08. The judge can therefore proceed with the annulment of the unfair terms while preserving the contract (this is what was confirmed by the judgment of the Court of Cassation on November 15, 2017, through cancelling a non-guarantee clause in a sale contract based on article 65 of Law 31-08).

In fact, Law 31-08 has only enshrined practices of Moroccan jurisprudence that run counter to the excessive application of the freedom of contract (like a decision made by the Commercial Court of Appeal of Casablanca in its judgment of 07/02/2005, by which it refused to combine the default interest clause with the penal clause in the same contract).

1.2 Article 269 of the DOC to put "the exceptional circumstances" to the test

According to the Moroccan law, contractual obligations are extinguished by their executions, by the nullity of the contract, or due to force majeure.

The qualification of a force majeure event raises the meeting of a number of conditions set out in Article 269 of the DOC in particular: the unpredictable, irresistible, and external nature of force majeure. Also, our obligations law requires that the debtor shall justify having taken all due diligence to avoid breaching the obligation (Article 269 paragraph 2 of the DOC), and that the performance is not only difficult or expensive, but impossible. Therefore, it is not apparent to evade its obligations under section 269.

Any affirmation of the existence of a case of force majeure must be analyzed at the time of the contract, which may or may not contain a force majeure clause defining the outlines and consequences of non-performance exceptions.

If the contract does not provide for a force majeure arrangement, it is necessary to check whether the situation meets the conditions of section 269, so the judge is invited to intervene to assess whether COVID-19 and the measures implemented by the government meet the conditions of externality, unpredictability and irresistibility likely to characterize a case of force majeure.

Nevertheless, the means granted to the judge "in normal circumstances" by the legislature are not sufficient to deal with situations such as those generated by the covid-19. In fact, a large part of the doctrine confirms that force majeure does not effectively combat all the injustices resulted from the spread of COVID-19, since force majeure will not always be easy to establish despite the various state measures. A causal link will have to be established between the impossibility of implementing and the various measures taken to fight against the epidemic. The judge must examine the impact of the COVID-19 epidemic on the contract and find that it prevents, totally or partially, the performance of contractual obligations, as COVID-19 "does not necessarily constitute a case of force majeure" (LANDIVAUX, 2020).
Thus, we have to look for other alternatives. Moroccan courts are then called upon to prevail in the guiding principles of the law of obligations: which are the principle of good faith (provided for by Article 231 of the DOC and the duty of collaboration, imposed by "exceptional circumstances".

These are practical solutions that integrate with the contractual ideal but oppose the "fierce" liberalism dictated by the theory of the autonomy of the will.

2. Prevailing the guiding principles of the common law to deal with the "damages" caused by COVID-19

The contractual standard has been, indeed, affected by the evolution of our society in the various sectors; revolutions that have transformed strictly personal relations between the parties to the contract into a means of economic exchange that escape the traditional theory of obligations and contracts. The contract is no longer just "a law between the parties" but an economic and political social dynamo.

The preservation of contractual relationships as dictated by the co-contractors no longer depends solely on the will of the parties but on a whole context outside the contract.

Tools such as good faith and the obligation of cooperation to enforce the contract, made available to the parties to the contract by the common law, deserve to be reconsidered in times of crisis.

2.1. Solidarism and good faith: for contractual justice

The judge is asked to be more responsive to the so-called "exceptional" situations, as this is the case with COVID-19. The government's effort to establish draconian measures to deal with the consequences of the pandemic can only be welcomed! In fact, more than 400 measures have been taken by government institutions in the economic, social, and health fields to counteract the spread of coronavirus and cover urgent spending, widespread containment, the pursuit of basic services, and the supply of markets.

Nevertheless, a legislator merely produces abstract and rigid rules; mostly unsuitable with the majority of cases of cash that can be raised by the contract at the time of a crisis. "An exceptional right" even if it is necessary, it insin sufficient (ROUINI, 2020). The jurisprudence that symbolizes the "living right" is the sole guarantor of safety and contractual justice, even if it remains unpredictable. Judgments in Moroccan jurisprudence confirm this by adopting a different path to what is sometimes provided by the legislation (such as the possibility for the creditor to opt for the resolution of the contract even if the performance of the debtor's share is possible against what is provided for in Article 259 of the DOC. This was stated by the Court of Cassation in a judgment on 06/12/1989, or the Court of Cassation on 05/10/2011 published in 2014. An appeal to the judge to prevail his common sense, which can only be in accordance with the guiding principles that accompanied the drafters of our civil law imbued with positive French law but above all with our Sharia law.
We are increasingly in need for a right based on fairness, loyalty, and an unprecedented solidarity, as developed by René Demogue\textsuperscript{20} (DEMOGUE, 1923), and taken up by an important current of contemporary thought\textsuperscript{21} (Alexander Niess, Maurice Vaïsse, Y, 2006; BOULE, 1907; AUDIER, S., BOURGEOIS, L., 2007), the theory of contractual solidarity is based in particular on the principle of good faith\textsuperscript{22}. It breaks with the individualistic conception of the contract, thus considering the contract as a work of loyal and fraternal cooperation between the contractors as supported by MAZEAUD (D. MAZEAUD, 1999)\textsuperscript{23} despite the criticisms from a large part of the doctrine that the contract is an economic instrument and not "a charitable work" - allowing "simply to do good business" as confirmed by PH. DELBECQUE, (SCARANO, 2004)\textsuperscript{24}.

2.2. unforeseeability and/or Mitigation: Mechanisms for the Crisis

Remedies are currently being adopted in comparative law to provide the judge with additional instruments to interfere even more in the contract, especially in France. The theory of unforeseeability\textsuperscript{25}, which prohibited\textsuperscript{26} the judge from amending a contract with successive executions that had become unbalanced due to economic circumstances that had occurred, was legally lifted by Article 1195 of the French Civil Code, which provides since 2016 the possibility of imposing the renegotiation on the opposing party, the adaptation or even the resolution of the contract in the event of an unpredictable change in circumstances that make performance excessively onerous for a party\textsuperscript{27}, or the mitigation theory\textsuperscript{28} (Cl. SCHMITTHOF, 1961; A. I. OGUS, 1973; H. MCGREGORI, 1980; G. H. TREITEL, 1983; G. C. CHESHIRE, C. H. S. FIFOOT and M. P. FURMSTON, 1986; BRIDGE, 1989; R. DAVID and D. PUGSLEY, 1985), which has its origins in Anglo-American contract law, and which consists of the obligation to minimize damage based on the principle of good faith.

The adoption of mitigation theory in the Anglo-Saxon world has led to the establishment of means and measures to mitigate effects, particularly in terms of risks (environmental, social, economic, health, epidemiological). Mitigation therefore allows precautionary measures to be taken to alleviate the damage in risky situations that cannot be prevented and made more bearable by the victim (in fact, the Covid 19 being a pandemic has had a damaging impact on the majority of contractual relations as a result of the change or alteration of the contract, you have the example of the employment contract with the change of the traditional mode\textsuperscript{29} as governed by the "telework" labour code\textsuperscript{30}, modern distribution contracts (for the concession, supply and franchise contracts, there has been a sudden shutdown of activity and you can imagine the consequences for contractual effects!)

Not to mention contracts related to the provision of services in several areas, including teaching, which has migrated from ‘presential teaching’ to ‘distance teaching, a situation that prompts the judge intervention to chart the relating new obligations through interpretation\textsuperscript{31}, but also by forcing the contract (Chazal. 2001), which allows the judge to extend the contractual scope well beyond what was originally foreseen by the parties without falling into the distortion of the contract.

Indeed, article 231 of the DOC authorizes the judge to discover obligations imposed on the parties even though they were not intended at the time of the contract.
This mechanism will allow the judge to consider, for example, the "obligation to adapt" the contract to the changing situation for successive contracts (as is the case for the employment contract or the private education contract) while relying on the principle of good faith. The judge's openness to comparative law is desirable in this case.

French jurisprudence, for example, is more likely to use the technique of contract forcing in order to change the terms, which in some cases may produce the same effects of a revision 32.

Our obligation and contract law needs to be modernized by impregnating tools that their utilities have already been proven in other legal systems to meet economic requirements but also to face crises that become cyclical.

Beyond the legal instruments available to operators, the impact of the Covid-19 will depend heavily on the circumstances of each case and the contractual stipulations agreed between the parties.

It is therefore necessary to anticipate the consequences of the current crisis by identifying contracts at risk of non-performance (by applying the mitigation theory to attenuate the impact of the crisis on victims of damages in a risky contractual relationship) and to analyse the key contractual stipulations relating to guarantees, conditions, force majeure clauses, or significant adverse change clauses (known by comparative law doctrine under MAC clauses)... etc. which could be invoked in the event of an impossibility of execution due to the epidemic.

Also identify the disclosure obligations that can or should be implemented, but above all, look for alternative that allow execution of obligations by resorting to the renegotiation of the contract in order to respond to the new difficulties engendered by the coronavirus "COVID-19" to allow benefits for example: longer payment times, relief of obligations, or the arrangement of contractual liability.). As the theory of unforeseeability.

3. Conclusion

This legislative and jurisprudential study based on a comparative approach demonstrates that:

a) The contractuel standard has been affected, by the evolution of our society in the various sectors, revolutions that have transformed strictly personal relations of the parties to the contract, into a means of economic exchange that escape the traditional theory of obligations and contracts,

b) the contract is no longer only "a law of the parties" but an economic and political social dynamo

c) The preservation of contractual relationships as enacted by co-contractors no longer depends solely on the will of co-contractors, especially at the time of crisis such as that caused by the coronavirus pandemic.

Hence the necessity
a. Declining freedom of contract in favor of judicial interventionism
b. Prevail over the guiding principles of common law to deal with "the damage" caused by "COVID-19"
c. Give priority to the renegotiation of the contract by the parties (like French contract law, in particular article 1195 of the French civil code as amended by the 2016 ordinance) so as to respond to the new difficulties caused by the coronavirus "COVID-19".

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Notes
1. WHO officially declared a state of public health emergency of international concern on 30 January 2020, calling it a pandemic. COVID-19- Chronology of WHO action. Joint statement
3. Dahir of Moroccan Bonds and Contracts (DOC)
4. Abusive conventional clauses such as the penal clause.
9. Following Sections 18, 19 and 20 of The Consumer Protection Measures Act 31-08, the judge may assess freely so-called abusive treaty clauses, since Parliament preferred to list them in an indicative manner, leaving the judge free to assert his discretion.
10. article 319 of the DOC.
12. A theory recently held in French law under Article 1195 of the French Civil Code as amended by Ordinance No. 2016-131 of 10 February 2016 on contract law reform, a party may request a renegotiation of the contract from its co-contractor if a change in unforeseen circumstances at the conclusion of the contract makes the performance excessively expensive and if it has not agreed in the contract to assume the risk.
13. In contractual matters, force majeure has been ruled out several times by French and Moroccan jurisprudence, for example, the French judge did not accept a breach of employment contracts without compensation based on force majeure, in the event of a fire destroying the workshops and stocks of a company belonging to a group because it was not established that the resumption of operation, after reconstruction, was impossible(Cass. soc. 7-12-2005 No.04-42.907: RJDA 2/06 No. 201). As for Moroccan jurisprudence, an earlier decision of the Casablanca Magistrates Court considered :'we're conventions that make enforcement impossible, not events that make enforcement difficult," decision of 4 March 1920, Bul. Review of Moroccan Legislation and Jurisprudence, 1921, p.146.
17. Judgment of the Court of Cassation, n°1410. doss.civ.n°2801/89, Bull. RJD : 142, p.72
19. Sourat ALMAIDAH (the table served), verse 2 : « And they're on the back. And the vomiting. ḍon't suffer on the promise and promise. ».
22. Article 231 of the DOC provides for What: "Everything commitment must be carried out in good faith and obliges, not only to what is expressed in it, but also to all the consequences that the law, use or fairness give to the obligation by its nature».


27. Before the date of 2016 the judge's review of the contract could only be carried out in cases Following: criminal clause (judge's estimate if the clause is excessive or derisory), indexation clause, abusive clause (nullity), payment clause (grace period).A trial is inevitable in these cases


29. Law 65-99 on the Moroccan labour code

30. Telework is not governed by labour laws in Morocco The work code provides for a single article for working from home.

31. The judge will he have no choice but to adopt the objective method of interpretation, to fill the contractual void, to refer to values outside the act, such as fairness or good faith.

32. So is the duty of care, for example, the French court of cassation has held that "all temporary work enterprise is required to be careful in recruiting the staff it provides," Civ. 1Ch. Feb.1991, Bull. civ. I, No.77; D.1991, 605, rating Ch.LapoyadeDeschamps. Or the obligation to provide information, the obligation to provide information, or still the obligation of the surveillance.v.supra J-P SCARANO, Contract Forcing, Op.cit. p122.