



Covid-19 – Ordinance of the French government relating to the extension of expired or expiring time periods

Impacts on contracts governed by French law
30 March 2020

Introduction

The ordinance of the French government relating to the extension of expired or expiring time periods (the *Ordinance*),¹ one of 25 ordinances issued pursuant to the Emergency Act passed to address the Covid-19 epidemic,² has a number of impacts on French law governed contracts.

Please note that some provisions of the Ordinance are unclear and subject to different interpretations. A circular issued by the French Ministry of Justice on 26 March 2020 (the *Circular*)³ has provided some further clarification, and as at the date of this note, is the best form of guidance available for the Ordinance. This note summarises some of the primary impacts of the Ordinance on contracts governed by French Law, in light of the guidance provided in the Circular. Given the evolving situation, definitive conclusions on the scope and impact of the Ordinance cannot yet be made, and certain of its provisions remain open to interpretation.

¹ Ordinance no 2020-306 of 25 March 2020 relating to the extension of time limitation periods expired during the health emergency period and the adaptation of processes during this period (Ordonnance relative prorogation des délais échus pendant la période d'urgence sanitaire et à l'adaptation des procédures pendant cette même période) (<https://www.legifrance.gouv.fr/eli/ordonnance/2020/3/25/JUSX2008186R/jo/texte>)

² Emergency Act n°2020-290 of 23 March 2020 to address the Covid-19 epidemic (Loi n°2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19) (<https://www.legifrance.gouv.fr/eli/loi/2020/3/23/2020-290/jo/texte>).

³ Circular CIV/01/20 presenting the provisions of Title I of Ordinance n° 2020-306 of 25 March 2020 relating to the extension of time limitation periods expired during the health emergency period and the adaptation of processes during this period (Circulaire CIV/01/20 de présentation des dispositions du titre I de l'ordonnance n° 2020-306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d'urgence sanitaire et à l'adaptation des procédures pendant cette même période) (<http://www.justice.gouv.fr/bo/2020/20200327/JUSC2008608C.pdf>)

Suspension period – relevant time periods⁴

The provisions of the Ordinance apply to time periods and associated provisions that have expired or are due to expire during the period starting on 12 March 2020 and ending one month following the date on which the French government declares that the state of health emergency is at an end⁵ (such period the *Suspension Period*).

As at the date of this note, it is anticipated that, subject to any extension or early termination of the health state of emergency, the Suspension Period will end on 24 June 2020.

Exclusion of financial obligations and related collateral agreements⁶

The Ordinance does not apply to “financial obligations and related collateral arrangements” within the meaning of articles L. 211-36 et seq. of the French Monetary and Financial Code, which are the provisions of French law implementing the “Collateral” Directive. “Financial obligations” notably correspond to (i) obligations resulting from transactions in financial instruments where one of the counterparties is a “qualifying entity”, and (ii) obligations resulting from any contract giving rise to a cash settlement or the delivery of financial instruments entered into between two “qualifying entities”. For these purposes,

⁴ Article 1 of the Ordinance.

⁵ The state of health emergency is defined under articles L. 3131-12 et seq of the French Public Health Code (Code de la santé publique) and may be declared in the event of a health disaster which, by its nature and severity, endangers the health of the population. The Emergency Act n° 2020-290 of 23 March 2020 addressing the covid-19 epidemic declared a state of health emergency for a period of two months following its enactment date, i.e. until 24 May 2020. The length of the state of health emergency may however be terminated early by decree of the Council of Ministers (Conseil des Ministres) or extended in accordance with certain legal provisions.

⁶ Article 1 of the Ordinance.

“qualifying entities” mainly refer to French and foreign authorised financial institutions (in particular credit institutions and MiFID firms) as well as certain public entities such as, for instance, the Banque de France, public institutions and local and regional governments. On that basis, transactions in financial instruments (e.g. derivatives) entered into by market participants (irrespective of the status of their counterparty), as well as nearly all other agreements (provided they give rise to a cash payment or the delivery of financial instruments) entered into between two qualifying entities (e.g. a loan extended by a bank to a collective investment scheme) remain outside the scope of the Ordinance. Similarly, collateral arrangements securing the aforementioned obligations will not be impacted by the Ordinance, provided they fall within the scope of article L. 211-38 of the French Monetary and Financial Code.

Extension of statutory and regulatory time periods and deadlines⁷

The time periods and deadlines for the bringing or taking of actions required by law or regulation (such as legal actions, appeals, formalities, registrations, declarations, etc.) which fall during the Suspension Period shall be extended for such period of time following the end of the Suspension Period as is legally required to bring or take such action, subject to a maximum period of two months following the end of the Suspension Period.

These provisions of the Ordinance apply equally to time periods or deadlines for payments imposed by law or regulation that fall due during the Suspension Period.

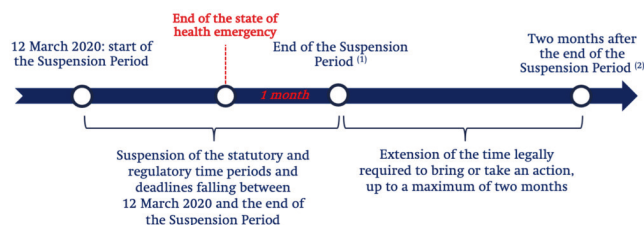
These provisions of the Ordinance do not apply to actions required by law or regulation which fell due prior to 12 March 2020 or that will fall due after the end of the Suspension Period.

These provisions of the Ordinance do not apply to contractual terms, actions or deadlines.

Difficulty of interpretation: how do you determine the time legally required to bring or take an action?

- On a plain reading of the Ordinance and having regard to general legal principles applicable to the suspension of proceedings, only that part of the legally required time period that falls during the Suspension Period would be deferred to and restart from the end of the Suspension Period (subject to the two-month maximum).
- However, the Circular provides for an interpretation more favourable to those required to comply with time periods and deadlines, where the entire time period prescribed by law restarts at the end of the Suspension Period (subject to the two-month maximum period).

Example: A pledge of business assets (nantissement de fonds de commerce) is put in place on 2 March 2020 and, but for the Ordinance, would be required by law to be formally registered within the 30-day period falling thereafter (and would be deemed invalid in the absence of such registration). The Ordinance, as interpreted in accordance with the Circular, provides for the entire 30-day time period for registration to be deferred until after the end of the Suspension Period, without any need to deduct the period of time elapsed prior to 12 March 2020.



⁽¹⁾ As at 30 March 2020, it is anticipated that the Suspension Period will end on 24 June 2020, unless the state of health emergency is extended or terminated at an earlier date

⁽²⁾ As at 30 March 2020, based on the current Suspension Period, it is anticipated that the two-month period following the end of the Suspension Period will run until 24 August 2020

Freezing of penalty payments, penalty clauses, termination rights and forfeiture clauses⁸

Clauses sanctioning contractual non-performance during the Suspension Period

Any penalty payments (*astreintes*), penalty clauses (*clauses pénales*), termination clauses (*clauses résolutoires*) and forfeiture clauses (*clauses de déchéance*) that would be triggered by non-performance by a party of its obligations during a period falling during the Suspension Period shall be deemed not to come into force or not to take effect until one month after the end of the Suspension Period.

⁷ Article 2 of the Ordinance.

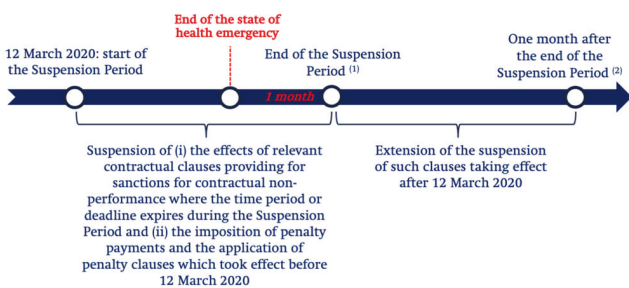
⁸ Article 4 of the Ordinance.

This freeze is temporary, and such clauses shall become effective again at the end of the month following the end of the Suspension Period in the absence of the relevant party having fulfilled its obligations during that period.

Difficulty of interpretation: how do you assess whether non-performance of obligations is covered by this freezing provision?

- On a restrictive interpretation of the Ordinance, the failure to perform obligations prior to 12 March 2020 would not be able to benefit from the freezing of the abovementioned provisions during the Suspension Period.
- However, the Circular opts for a more flexible interpretation by considering not the period within which the relevant obligation had to have been performed, but rather the time period within which the relevant provision sanctioning non-performance would apply.

Example: A contract includes a penalty clause. One party to the contract (Party A) fails to perform an obligation that fell due by 2 March 2020, and the other party (Party B), in accordance with the penalty clause, sends a formal notice to Party A instructing Party A to remedy the non-performance within 15 days. Under the terms of the penalty clause, a penalty will become effective at the end of such 15-day period. As the 15 day period expires during the Suspension Period, the penalty clause shall not take effect in respect of Party A's non-performance until the date falling one month following the end of the Suspension Period, nor shall Party A be required to comply with the relevant obligation until such time, regardless of the fact that Party A's non-performance occurred prior to 12 March 2020.



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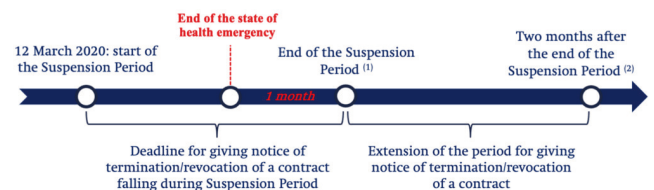
⁽²⁾ As at 30 March 2020, based on the current Suspension Period, it is anticipated that the two-month period following the end of the Suspension Period will run until 24 August 2020

Penalty payments and penalty clauses that had effect prior to 12 March 2020

The Ordinance suspends, for the Suspension Period, the imposition of penalty payments and the application of penalty clauses that had effect prior to 12 March 2020. The imposition of penalty payments and the application of penalty clauses will resume with full effect at the end of the Suspension Period.

Extension of time periods for termination of contracts expiring during the Suspension Period⁹

The Ordinance extends, for a period of two months following the end of the Suspension Period, the time periods for revoking (*dénoncer*) or requesting the termination of a contract, where the relevant contract is able to be revoked or terminated during the Suspension Period.



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⁽²⁾ As at 30 March 2020, based on the current Suspension Period, it is anticipated that the two-month period following the end of the Suspension Period will run until 24 August 2020

Q&A

Does the Ordinance automatically defer all statutory and regulatory time periods and deadlines for two months following the end of the Suspension Period?

No: The Ordinance does not provide for the general suspension of or delay to all statutory and regulatory time periods and deadlines for a two-month period following the end of the Suspension Period. The Ordinance only provides for an extension of statutory and regulatory time periods and deadlines where such time period or deadline falls during the Suspension Period, and provides that any action validly brought or taken during the subsequent two-month period shall not be treated as being late.

Example: The deadline for a particular registration formality falls after the end of the Suspension Period. The Suspension Period set out in the Ordinance does not provide for nor allow any deferral of such deadline.

Does the Ordinance allow for an extension of all contractually agreed terms?

No: The Ordinance does not provide for the deferral of all contractual terms and deadlines. The deferral provision set

⁹ Article 5 of the Ordinance.

out in the Ordinance only applies to actions required to be brought or taken by law or regulation.

Example: The Ordinance does not provide for the deferral of a contractual obligation in a sale and purchase agreement (SPA) to file an application for merger control authorisation beyond the time periods for doing so provided in the relevant SPA.

Example: A put option agreement (option de vente) provides for a put option which may be exercised within a period that expires during the Suspension Period. The Ordinance does not permit the extension of the option exercise period beyond the period contractually agreed in the put option agreement.

Does the Ordinance impose a moratorium on contractual due dates for payments?

No: The Ordinance does not impose any moratorium (moratoire) on payments and does not provide for the deferral of payments due, including payments that have become due during the Suspension Period.

Example: The Ordinance does not allow a debtor to defer the payment of amounts contractually due by it during the Suspension Period. However, the creditor cannot claim any loss resulting from the debtor's failure to make any such payment, unless the debtor fails to pay before the expiry of the one-month period following the Suspension Period.

Does the Ordinance suspend any legal recourse in the event of non-performance of contractual obligations?

No: The Ordinance only suspends the effects of the contractual clauses that it expressly mentions. Accordingly, the Ordinance does not freeze other remedies that may be available to a party to a contract in the event of non-performance by the other party during the Suspension Period (for example, a party's rights to plea non-performance of a contract (exception d'inexécution), claim for damages or bring an action requesting judicial termination of a contract).

Does the Ordinance extend, until after the Suspension Period, the time periods for the revocation (dénonciation) of a contract that expired before 12 March 2020?

No: The time limitation periods for revocation (dénonciation) of a contract which expired before 12 March 2020 are not extended.

This note is for information purposes only and does not constitute legal advice.

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