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HEALTH CRISIS AND PUBLIC CONTRACTS.

A LEGAL SOCIOLOGY APPROACH.

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ABSTRACT

Health crisis and public contracts" is the first research theme chosen by the Chair of Public Contract Law of the Lyon Public Law Team. Through qualitative and quantitative field surveys, using legal sociology methods, the Chair has probed the practical implementation of public contract law rules and regulations during the Covid-19 health crisis. Studies of private law and comparative law completed this data to propose, in a report published on

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the Chair's website, a complete and exhaustive analysis accompanied by recommendations. This report is a presentation of this work.

1. INTRODUCTION

The past year has brought back practices and rules that were thought to have been buried in the past. Lockdowns, curfews and massive mobilization of public resources are just the most prominent examples. Venerable jurisprudential theories have in turn shown that they are not only reserved for timeless teaching but are simply dormant. Such has been the case with the theory of exceptional circumstances, invoked both by the Council of State[3] and by the Constitutional Council[4]. This has also been the case, considering more specifically public contracts, of the theory of unforeseeability, which has shown that it has not fallen into "disuse"[5]. We have even seen a resurgence of the idea of an "administrative force majeure", although it was threatened with extinction[6], like the fire of the old volcano that was thought to be too old.

In this context, the Chair in Public Contract Law of the Lyon Public Law Team chose to focus its first thematic report on the subject of "Health crisis and public contracts". Created in September 2020, the Chair's mission is to conduct, with the help of its public and private partners, field surveys aimed at collecting empirical data on the practical application

[3] Case law: CE, 22 Dec. 2020, Mme A. et autres, n°439804.

[4] Case law: CC, 26 March 2020, Loi organique d'urgence pour faire face à l'épidémie de covid-19, n°2020-799 DC.

[5] L. Clouzot, *"La théorie de l'imprévision en droit des contrats administratifs : une improbable désuétude"*, RFDA, 2010, p. 937.

[6] B. Plessix, *"La force majeure administrative: une occasion manqué"*, Dr. adm., 2019, marker 2.

of public contract law rules and regulations. By probing the substance of practice, which is often little explored by the doctrine, it is possible to make a more detailed assessment of the relevance of the rules and regulations and to formulate recommendations that give full meaning to the prospective function of the research. The latter, placed above the sometimes diverging interests of contracting authorities and economic operators, is well suited to make reasoned proposals.

The elements presented here are only the "broad outlines" of a much more exhaustive report published on the Chair's website, which the reader may usefully consult. As this presentation is the first of its kind, a presentation of the method will precede the results obtained and the recommendations made.

2. THE METHOD USED

General justification. According to J. Carbonnier, "legal sociology [...] sets itself the task of observing and explaining these social phenomena that are the phenomena of law"[7]. Little used in public law, with the exception of administrative science[8], the methods of legal sociology have never been used to probe the practical application of the rules of public contract law. However, public contracts have a considerable economic weight, around 10% of GDP, so that they are rightly considered as levers of economic recovery policies. Faced with an economic crisis of the magnitude of the one following the coronavirus pandemic, it appeared essential to be able to have field data in order to be able to assess the relevance of the rules applicable to public contracts, not only the general rules, but also the specific rules enacted to deal with the crisis and to formulate appropriate

[7] J. Carbonnier, *"La sociologie juridique et son emploi en législation", Communication to the Académie des sciences morales et politiques of 23 October 1967*, L'année sociologique, 2007/2, vol. 57, p. 393.

[8] J. Chevallier, *Science administrative*, 6th ed., PUF, 2019, p. 62.

recommendations. For this purpose, recourse to legal sociology and the empirical methods it promotes has become essential.

But recourse to empiricism is here envisaged only as a method based on "particular concrete experience"[9], not as a doctrine. The data thus collected are not abstracted from the "immutable paradise of notions and rules"[10], but are indeed confronted with these notions and rules, it being understood that the jurist remains "condemned to abstraction"[11], as Law cannot be reduced to a simple "science of facts"[12].

From then on, the "surprisingly complex reality"[13] of the application of the rules of public contract law revealed by empiricism is scrutinized in terms of the philosophy underlying these rules.

More specifically, the field survey was inspired by the method used in the 1960s by the Civil Affairs Directorate of the Ministry of Justice in matters of succession and matrimonial regimes. In order to enlighten the legislator with a view to reforming these legal systems, the Ministry had thus commissioned two surveys, both subdivided into two phases: a qualitative phase "consisting of in-depth interviews [...] according to a semi-structured, flexible interview guide"[14] and a quantitative phase, a "survey conducted on the

[9] T. Fortsakis, *Conceptualisme et empirisme en droit administratif français*, LGDJ, Bibl. de droit public, t. 152, 1987, p. 23.

[10] B. Chenot, *"L'existentialisme et le Droit"*, RFSP, 1953, n°1, p. 58.

[11] J. Rivero, *"Apologie pour les "faiseurs de systèmes"*, D., 1951, chron. 23, p. 99.

[12] C. Atias, D. Linotte, *"Le mythe de l'adaptation du droit au fait"*, D., 1977, chron. 34, p. 251.

[13] C. Atias, *Épistémologie juridique*, Dalloz, coll. "Précis droit privé", 2002, p. 208.

[14] J. Carbonnier, *op. cit*.

basis of a rigid questionnaire on a representative sample"[15]. To these two surveys were associated comparisons of domestic law and foreign law, in order to obtain the broadest view of the research theme.

The qualitative survey. The qualitative survey was based primarily on 18 interviews conducted with lawyers representing the Chair's partners and other public contracting stakeholders between mid-October and early December 2020. It involved representatives of contracting authorities, companies holding public contracts and specialized lawyers. It also covered a wide range of public contracts and sectors of activity, thus providing a broad view of the practical application of general and specific rules of public contract law in times of health crisis. It was carried out by means of a unique semi-structured questionnaire whose questions had been designed on the basis of an exhaustive analysis of the state of the doctrine on the subject and informal reflections collected from lawyers of contracting authorities and incumbent companies. The questionnaire was subdivided into several parts: suspension of the contract; termination of the contract; degraded performance; competitive bidding and finally proposals for improving the law.

The participants were systematically informed of the strict confidentiality of the exchanges and of the fact that the processing of their answers would be the subject of a report in which it would be impossible to identify them, allowing them to feel confident and to express their point of view in complete freedom.

The quantitative survey. The quantitative survey was based on an essentially directive online questionnaire with 101 questions, which included the sub-sections of the qualitative survey. However, these questions were not only inspired by the qualitative

[15] *ibidem*

survey that was in progress at the time of the launch of the quantitative survey, but were designed to be broad, so that this survey would not only confirm the results of the qualitative survey but would also be a potential source of new data. The questionnaire, carried out with the LimeSurvey software, was distributed between November 17 and December 6, 2020 via different channels. Although the website was not yet operational for this first survey, the Chair was nevertheless able to communicate about the opening of the online questionnaire via social networks as well as through its partners and certain federative bodies (Fédération Nationale des Travaux Publics, Fédération des Entreprises Publiques Locales, Association Nationale des Juristes Territoriaux and France Urbaine), which widely distributed the questionnaire.

The participants in the survey were informed that the answers to the questions were anonymous and it was made clear to them that they had the possibility of answering the questionnaire several times in different capacities, if they had found themselves alternately in the position of contracting authority and holder during the health crisis (this was the case for the lawyers of the mixed-capital companies and local public capital companies for example).

It should be pointed out that some questions called for a response according to pre-existing propositions, with the participant having to tick the one that suited him/her, while others allowed a written response. It is regrettable that for the latter, the participant's number appears, whereas it was impossible to trace this number for the answers to the "check-the-box" questions. The fact of knowing, by participant's number, all his answers could, in the future, be a precious tool to know at least the organic nature of the participant who hides behind each number without this being able to put at risk the principle of anonymity.

Finally, 141 people answered at least one question. Although the response rate decreased gradually as the questionnaire progressed, since 59 people completed it, the data collected was satisfactory and allowing an in-depth analysis. In particular, the panel offered a real diversity in the profiles of the participants and the contracts concerned. Of the participants, a majority (54%) were contracting authorities, 32% were holders of public

procurements or concessions, and 14% were legal advisors. As regards contracts, the trend is even more pronounced in favor of public procurements, since 84% of the participants were parties to at least one public procurement. Moreover, 15% of the participants were party to a concession and 1% to a partnership contract.

The doctrinal analysis of private law. The section on private law is more traditional and was written mainly with regard to the doctrinal publications that have dealt with the consequences of the health crisis on private contracts. It has been enriched by the reflections of some interviewees with knowledge of the subject matter and has made it possible to clarify certain aspects, in particular the question of the suspension of the contract in the face of an event of force majeure, envisaged by the Civil Code, but not by the Code of public procurement and concession contracts.

The use of comparative law. On the basis of a simplified English version of the quantitative survey questionnaire, five foreign university correspondents representing Germany, Spain, Italy, the United Kingdom and Poland were asked to specify the legal response to the health crisis in their countries with regard to public contracts. This comparative approach is intended to be used more widely in the Chair's future research themes.

3. RESULTS OBTAINED

Suspension of the contract. The health crisis has revealed that the suspension of contracts is something unthought of in public contract law. Nourished by the principle of continuity of public service, the law of public contracts simply does not deal with the hypothesis of suspension of contracts, unlike private law, which provides for it in the event of temporary impediment to performance due to force majeure (art. 1218 Civil C.) and in

the context of the exception of non-performance (art. 1220 Civil C.). Moreover, in certain foreign systems, the suspension of public contracts is provided for in ordinary law, as in Italy where the question is dealt with in article 107 of the Codice dei conttrati pubblici, whereas other States have opted for a very complete legal security of suspensions in a specific text, following the example of Spain[16]. In French public law, it is only with the ordinance of March 25th, 2020 that the hypothesis of suspension was apprehended, sometimes expressly, sometimes indirectly, always in a nebulous manner and subject to interpretation. Suspension is mentioned directly in Article 6(4) and (5), on the one hand to oblige the purchaser to continue payment of a suspended lump-sum contract, and on the other hand to prohibit, in the case of concessions, any payment to the conceding authority and to allow the payment of advances to the concessionaire. It is indirectly referred to in 1° and 2°, which allow for the extension of performance deadlines, the conclusion of substitute contracts and prohibit the application of penalties when the contractor cannot meet these deadlines or is unable to perform all or part of its obligations, in particular when the contractor demonstrates that he does not have the means necessary to continue the performance of the contract or that performance would require the use of means which would place a manifestly excessive burden on him. Needless to say that many questions were "left open"[17], in particular those of the procedure leading to the suspension of the contract and the formalization of this procedure, and of the compensation of the additional costs directly attributable to the suspension.

From this point of view, neither the objective rules applicable to all contracts, nor the contractual clauses, in particular the CCAG (« cahier des clauses administratives générales », i.e. General Administrative Terms and Conditions), were fully satisfactory for dealing with the situation, so that the surveys revealed a practice that was profoundly disparate and legally insecure as a whole. This profound diversity could first be observed

[16] Article 34 of Royal Decree 8/2020 of March 17th, 2020.

[17] F. Lichère, *"Catastrophes naturelles, calamités publiques et droit des contrats publics*", AJCT, 2020. 407.

on the questions of formalization and the moment of suspension. Thus, the formalization could be recorded in a service order or simply factual. It may have been decided by the contracting authority or by the contractor company. Its legal basis could be found in force majeure or in the contractual clauses, in particular relating to postponement[18], except that many contracting authorities have been reluctant to pronounce postponement taking into account the indemnity consequences that it entails. It is also the question of compensation for the additional costs associated with the suspension that has often proved thorny, since apart from adjournment and specific clauses, all the mechanisms of objective law have been ill-suited: force majeure is not a source of compensation, the theory of unforeseeability presupposes continued performance of the obligations, and the theory of the fait du Prince could only concern State contracts. Moreover, the provisions of the Ordinance of March 25th, 2020 were generally considered unsuitable, unclear and, in any event, unrelated to compensation issues. It was therefore often through negotiation that the parties were able, at times, to find the most appropriate solutions, although these were not entirely satisfactory.

Termination of the contract. While suspension has been widely practiced, termination has been reduced to a minimum, both in France and abroad. Moreover, it seems that this has only concerned contracts with short execution, those whose term was close or only the cancellation of purchase orders, on the basis of force majeure or, more rarely, of misconduct by the contractor. Nevertheless, it is possible to observe a notable diversity of situations, in particular at the level of the compensation process, which augurs difficulties in the future, especially since positive law does not provide much clarification on this issue.

Indeed, the Ordinance of March 25th, 2020, in its article 6, 3°, only refers to the hypothesis of compensation for costs incurred for the execution of a public procurement or a purchase order, excluding, in particular, loss of profit. Moreover, ordinary law is of no

[18] Article 49.1.1, CCAG Travaux (General Administrative Terms and Conditions for work activities)

help, since articles L.2195-1 to -6 of the Code of public procurement and concession contracts for public procurements and L.3136-1 to -6 for concessions never mention the issue of compensation. At most, article L.6 5° of the Code provides that when termination occurs for a reason of general interest, the contracting party has "the right to compensation", without any further specification.

Degraded performance of the contract. Drawn from practice, the expression "degraded" performance of the contract[19] encompasses all situations in which the continued performance of the contractual obligations cannot be carried out according to the initial forecasts of the parties, who have been overtaken by circumstances making it imperative to adapt the content of the contract. From this perspective, the question of extending the performance period has not been subject to any major practical difficulties, nor has the question of advances, as the actors in the public procurement sector have taken full advantage of the new possibilities offered by the Ordinance of March 25th, 2020. Two major issues, however, revealed the weaknesses of public contract law.

The first and perhaps most difficult question is that of compensation for additional costs. Overall, the general observation that can be made without much doubt is as follows: neither the contractual clauses (specific or drawn from the CCAG), nor the general rules applicable to administrative contracts were sufficiently adequate to deal with the performance difficulties caused by the health measures enacted in March 2020 by the Government, while guaranteeing contractors a certain degree of contractual security. More specifically, in the absence of a specific clause on compensation for additional costs related to an unforeseen situation, the contracts proved to be inadequate to deal with this issue. The CCAG applicable to public procurements do not contain such a clause and it was noted that the actors of public procurement have tried to activate certain clauses whose content did not really allow for an effective treatment of the issue. One thinks in particular of article 10.1.1. of the CCAG travaux, which excludes from the prices the normally foreseeable difficulties

[19] F. Lichère, *"La commande publique, la crise sanitaire et la relance économique"*, AJDA, 2020. 1105.

of all kinds, but which does not set any compensation guidelines. Moreover, the general rules applicable to administrative contracts have shown their shortcomings. Apart from the theory of the fait du Prince, applicable only to contracts entered into by the State, only the theory of unforeseeability offered a relevant basis for compensation. The theory of unforeseeability, which is of public order and can be invoked notwithstanding the contractual clauses[20], gives the right to partial compensation of the contracting party if, in the presence of an unforeseeable event external to the parties, the economic balance of the contract is upset[21]. However, there are significant uncertainties regarding two elements. On the one hand, the assessment of the disruption of the economic balance of the contract, which case law generally sets at between 5 and 10% of the initial amount for public procurements (but sometimes higher) and assesses in the light of the concept of operating deficit for concessions. These uncertainties have resulted, in practice, in a profoundly disordered use of the theory of unforeseeability, making clarification necessary in positive law. On the other hand, the rate of compensation for extra costs suffers from the same problems. Although case law generally compensates 80 to 95% of the additional costs in public procurement or the operating deficit in concessions, there is no rule for determining this rate. Here again, the survey revealed a highly disparate practice.

The second question, which is not entirely disconnected from the first, concerns the modification of contracts. While the data collected show that recourse to the rider has been favored over unilateral modification by the public authority, the fact remains that the limits that the objective law assigns to contract modification have sometimes acted as psychological brakes on modifications that are nevertheless authorized. This is the case, in particular, of the limitation of modifications to public procurements to 10 or 15% of their value, depending on their purpose, which was cited by purchasers as a reason not to modify their contracts. This argument is all the more surprising as there is little doubt that the

[20] Council of State case law: CE, Sect., 5 Nov. 1937, Dép. des Côtes-du-Nord.

[21] Council of State case law: CE, 30 March 1916, Cie générale d'éclairage de Bordeaux.

pandemic falls within the unforeseen circumstances of article R.2194-5 of the Code of public procurement and concession contracts, justifying a modification of up to 50% of the initial amount of the contract. Under these conditions, the widespread use of review clauses should be encouraged so that these "psycho-legal" blockages do not hinder the continued performance of a contract under deteriorated conditions.

From all points of view, the foreign systems surveyed also show similar weaknesses in the treatment of degraded contract performance.

Competitive bidding. Although the Covid-19 pandemic has mainly highlighted difficulties in the execution of public contracts, the question of adapting procurement procedures naturally arose. In addition to the possibilities offered by ordinary law, in particular the award of contracts without advertising or competitive bidding in cases of extreme urgency[22], Ordinance n° 2020-319 of March 25th, 2020 includes two provisions allowing for the adaptation of procedures during the period running from March 12th to July 23rd, 2020. On the one hand, article 2 allowed for an extension of the deadlines for the receipt of applications and offers, with the exception of orders that cannot suffer any delay. On the other hand, article 3 allowed, in compliance with the principle of equality between candidates, to adapt the modalities of the call for competition. The investigations revealed that it was mainly the extension of the deadlines that the contracting authorities had turned to.

Indeed, for procedures launched before the first lockdown, the extension of the deadlines for the receipt of applications and tenders was massively activated by the contracting authorities, which at the same time increased their recourse to the dematerialization of procedures. However, the surveys revealed that the competitive bidding procedures had little impact, as did the content of the contract, which was modified only marginally. This can probably be explained by the abnormality of the process and the

[22] Provided for in Article R. 2122-1 of the Code of public procurement and concession contracts.

vagueness of article 3 of the ordinance, which may have induced a certain fear of litigation among the contracting authorities.

4. THE RECOMMENDATIONS MADE

Clarifying the theory of unforeseeability in the Code of public procurement and concession contracts. Clarifying the notion of unforeseeability for public procurements and concessions would bring legal security to a theory that is widely criticized or misunderstood. The Chair therefore proposes a reform of articles R. 2194-5 and R. 3135-5 of the Code of public procurement and concession contracts. First, the Code could provide that, in the event of circumstances that a diligent contracting authority could not foresee at the time of the conclusion of the contract, a review clause could be inserted into the contract *a posteriori* without calling into question the initial conditions of the call for competition. Secondly, the notion of disruption of the economic balance of the contract and the rate of compensation for additional costs should be defined, in the manner of the circular of November 20th, 1974 and based on administrative case law and field surveys. For public procurements, the disruption of the economic balance of the contract could be characterized, in any case, if the additional costs exceed 10% of the initial amount of the contract. However, in order to give some flexibility to those involved in public procurement, provision could be made for this disruption to be characterized as from additional costs exceeding 5% of the amount, taking into account the particular situation of the holder. In the case of concessions, the disruption of the balance of the contract is characterized from the moment when the operation of the concession is in deficit due to the circumstances. In both cases, the compensation rate could be set at between 80 and 95% of the additional costs for public contracts and of the deficit for concessions. Such a range is consistent with case law and allows the parties flexibility to take into account specific contractual situations.

Codify administrative force majeure in matters of concessions. A praetorian creation[23] of limited practical use[24], the improperly named administrative force majeure could be incorporated into the Code of public procurement and concession contracts with regard to concessions. It would then be necessary to specify that if the disruption of the economic balance of the contract creates a definitive situation, the concessionaire is entitled to request, in the absence of an amicable agreement, the termination of the contract before the administrative judge. The concessionaire would then be entitled to compensation, depending on the circumstances of the case and exclusive of coverage of the loss of earnings.

Clarify the provisions of the Code of public procurement and concession contracts relating to exceptional circumstances. The law of December 7th, 2020 on the acceleration and simplification of public action codified certain mechanisms of the ordinance of March 25th, 2020 in the Code of public procurement and concession contracts, in two new sections relating to exceptional circumstances (one for public procurements, the other for concessions). However, these provisions were enacted without a real impact study being conducted: they were the result of a government amendment tabled in committee at the National Assembly, were not subject to an opinion from the Council of State and were not the subject of any real debate in Parliament. The Chair therefore proposed several formal improvements and the addition of two provisions concerning both public procurements and concessions. The first is to authorize the contracting authority to modify the conditions of an award procedure in progress when exceptional circumstances are declared, without requiring a new consultation and provided that the modifications are not substantial. A second proposal is to exempt from the opinion of the competent committees amendments that increase the value of the contract by more than 5%, as was provided for in

[23] Council of State case law: CE, 9 Dec. 1932, Cie des tramways de Cherbourg, Lebon 1050.

[24] The last Council of State case law occurrence is more than twenty years old: CE, 14 June 2000, Cne de Staffelfelden, Lebon 227.

the Ordinance. These proposals are intended to make purchasing procedures more fluid in times of exceptional circumstances.

Participation of the Chair in the reform of the CCAG. The Chair participated in the public consultation launched by the Legal Affairs Directorate of the Ministry of the Economy concerning the reform of the CCAG applicable to public procurements. It formulated proposals, related to its first research theme, aiming at the precision of the new suspension clause of public procurements and at the implementation of a device aiming at contractualizing the treatment of the consequences, notably financial, of unforeseeable circumstances. In the end, the Legal Affairs Directorate retained the creation of two distinct clauses to deal with such circumstances: a suspension clause and a general review clause to overcome the deteriorated performance of the contract, which is fully in line with the initial idea developed by the Chair.

The first clause allows, when the continuation of the execution of the contract is temporarily impossible due to circumstances, to pronounce the total or partial suspension of the contract, which can be requested by the contractor. A period of not more than fifteen days will then begin during which the parties will take note of the parts of the contract already performed, the supplies made and the fixed assets required, and agree on the obligations remaining to be assumed by the parties. Thereafter, within a reasonable period of time adapted to the circumstances and fixed by the parties, they shall agree on the terms of the takeover, the changes to be made to the contract and the distribution of the additional costs directly related to the circumstances.

The second clause allows the parties, whether or not there has been a suspension, to examine the contractual and financial consequences of unforeseeable circumstances which would have led to significant changes in the conditions of performance of the contract. This clause is independent of the application of the theory of unforeseeability. It

can be applied more broadly and is in any event an invitation to dialogue between the parties in the face of the most serious external contingencies[25].

[25] More exhaustive comments on these clauses are available on the Chair's website. The next report of the Chair will focus on the links between procurement rules and difficulties in the execution of public contracts. Fieldwork is currently underway and it will be published in the summer.