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Departure from existing case-law: The limitation of liability clause survives the rescission of a contract

In a decision dated February 7, 2018, the *Cour de Cassation* (French Supreme Court) overturned existing case-law by holding that the limitation of liability clause survives the rescission of a sale transaction despite the retroactive cancellation of the sale contract.

By ruling so, the *Cour de Cassation* aligned its case-law with the new provisions introduced in the French Civil Code as a result of the reform of French contract law that came into force on October 1, 2016. Indeed, according to some of these new provisions, certain contractual clauses survive even in case of rescission of the underlying contract. This decision of the *Cour de Cassation* also provides the opportunity to go back over these new provisions.

1/ The *Cour de Cassation* departs from previous rulings

In the case commented herein[1], the seller of a boiler installed in a plant operated by the purchaser had performed repair works on such boiler. As new leaks were detected, the purchaser asked an expert to investigate the matter. The expert concluded that the identified defects stemmed from the repair works carried out by the seller. The purchaser then brought a legal action seeking the rescission of the sale contract and the payment of damages in compensation for the material loss sustained and the operating losses suffered. As a line of defense, the seller relied on a limitation of liability clause included in the sale contract.

The Court of Appeals ordered the seller to compensate the purchaser without applying the limitation of

liability clause because the rescission of the sale transaction implied the retroactive cancellation of the contract and the restoration of the parties to their pre-contract position.

The stance adopted by the appellate judges was consistent with the existing case-law of the *Cour de Cassation*.

Indeed, the *Cour de Cassation* considered so far that, because of the retroactive nature of the rescission of a contract – that has the effect of restoring the contractual parties to the position they were in before the conclusion of the contract – it was inappropriate to apply the clauses that governed the conditions for, and consequences of, the termination[2]. This reasoning applied *inter alia* to limitation of liability clauses[3].

From a legal perspective, only a number of clauses were until then considered as autonomous from the main contract in which they were inserted, which means that such clauses should not be affected by the ineffectiveness of the legal instrument. This type of clauses included dispute resolution clauses (jurisdiction clauses[4] or arbitration clauses[5]), as well as liquidated damages clauses[6] (which differ from limitation of liability clauses insofar as they set a pre-determined lump sum indemnity to serve a compensation in the event of a contractual breach).

In its February 7, 2018 decision, the *Cour de cassation* departed from previous rulings and extended the list of clauses that are legally considered as autonomous, reversed the appellate judgment and held that "***wherever a contract is rescinded for non-performance, clauses that provide for compensation for the harm caused by such non-performance remain applicable***"[7].

This decision, even though related to facts that occurred while the previous rules were applicable, seems consistent with the new provisions of the French Civil Code that deal with rescission and its effects and that entered into force on October 1, 2016[8].

2/ The new provisions of the French Civil Code concerning the effects of rescission

New Article 1230 of the French Civil Code stipulates that "*Rescission shall not affect the clauses concerning the resolution of disputes, **nor those intended to apply even in the case of rescission**[9], such as confidentiality and non-compete clause*".

These new provisions probably led the *Cour de Cassation* to depart from existing case-law.

Indeed, the limitation of liability clause is precisely designed to address the consequences of contractual non-performance that prompted the rescission of the contract, such as the condition in which the party affected by the non-compliance is to be compensated. Quite logically, this clause should remain applicable notwithstanding the retroactive cancellation of the contract.

It should be noted that in the decision commented herein, the clause at issue was a limited indemnification clause that merely set a cap on the indemnification that could be claimed by the party as a result of non-compliance by its co-contracting party.

It can, however, be expected that this new solution is more generally applicable to any limitation of liability clauses governing the conditions in which the liability of the contracting parties can be sought.

[1] Commercial Chamber of the *Cour de Cassation*, February 7, 2018, n°16-20352

[2] Commercial Chamber of the *Cour de Cassation*, May 3,2012, n°11-17779

[3] Commercial Chamber of the *Cour de Cassation*, October 5, 2010, n°08-11630

[4] Commercial Chamber of the *Cour de Cassation*, July 5, 2017, n°15-21894

[5] Second Civil Chamber of the Cour de Cassation, March 20, 2003, n°01-02253

[6] Third Civil Chamber of the *Cour de Cassation*, February 15, 2005, n°04-11223

[7] Emphasis added

[8] Ordinance n°2016-131 of February 10, 2016 for the reform of contract law, the general regime of obligations and proof of obligations

[9] Emphasis added