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Ordinance of February 10, 2016 for the reform of French contract law: The principle of the binding force of contracts is considerably undermined by the new provisions of the French Civil Code

Ordinance of February 10, 2016 for the reform of French contract law that will become effective on October 1, 2016 introduces in the French Civil Code a number of new principles that are expected to significantly change the role of the judge in the resolution of disputes between contracting parties.

Particular attention should be given to the public policy character of the parties' obligation to negotiate and perform the contract in good faith, the parties' duty to provide information upon conclusion of the contract – a duty that they may neither restrict nor exclude – and the doctrine of *imprévision* (unforeseeability) that empowers the judge to revise or terminate a contract wherever an unforeseeable change of circumstances renders the performance of the contract excessively onerous for a party.

Law of February 16, 2015 empowered the Government to use Ordinances to modernize and simplify French contract law.

This has now been done with Ordinance of February 10, 2016 for the reform of French contract law that completely rewrites a whole section of the 1804 French Civil Code. Published on February 11, 2016, the provisions set forth in the Ordinance will become effective on October 1, 2016.

This rewriting should be the source of significant case-law developments.

New Article 1103 of the French Civil Code reproduces, with virtually no change, the wording of Article 1134 §1 that it is designed to replace: "*Contracts lawfully entered into have the force of law for those who have made them*".

However, Article 1134 §2, according to which "*[Agreements] may be revoked only by mutual consent, or for grounds authorized by law*", is deleted.

New Article 1104 of the French Civil Code stipulates that "*Contracts must be negotiated, formed and performed in good faith*" and specifies that this provision is a "*public policy provision*", while Article 1134 §3 merely provided that *"[Agreements] must be performed in good faith*".

Such a provision should give the judge a stronger role in the resolution of disputes between contracting parties. This is all the more true since the requirement of good faith is repeatedly recalled in the new wording of the French Civil Code chapters that are devoted to the sources of obligations, the general regime of obligations and the proof of obligations.

Pursuant to new Article 1112-1 of the French Civil Code:

> "*If one of the parties knows information which is of decisive importance for the consent of the other party, he must inform him thereof wherever it is legitimate that the other party does not know the information or relies on his contracting party*".

In other words, the new wording of the French Civil Code imposes on the parties a duty to provide information, a duty that the parties "*may neither restrict nor exclude*" by way of a contractual provision.

All of these represent opportunities for the judge to set aside "*the law of contract*" by rescuing the weaker or less informed party, in line with the French legal tradition.

Yet, what attracted the most attention is the introduction in the French Civil Code of a new ground for which a party may be released from contractual liability, i.e. *unforeseeability*, in addition to force majeure.

Pursuant to new Article 1195 of the French Civil Code:

> *"If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted to assume the risk of*

such a change, that party may ask the other contracting party to renegotiate the contract. It must continue to perform his obligations during renegotiation.

If renegotiation is refused or falls through, the parties may by common agreement decide to have the contract rescinded on such date and subject to such terms and conditions as they shall determine, or ask the court to set about the adaptation of the contract. If they cannot reach an agreement within a reasonable period of time, either party may ask the court to revise or terminate the contract, on such date and subject to such terms and conditions as it shall determine".

With few limited exceptions, the *Cour de cassation* (French Supreme Court) has so far refused to adapt, revise or terminate a contract because of an imbalance resulting from a sudden change – not foreseen by the parties – in the economic conditions that existed at the time of conclusion of the contract (collapse of a currency, considerable rise in the price of raw materials, etc.), on the ground that the *unforeseeability* doctrine conflicts with the principle enshrined in Article 1134 of the French Civil Code according to which agreements lawfully entered into have the force of law for those who have made them.

The vast majority of common law judges also refuse to apply the *commercial impracticability* doctrine on the ground that the parties may anticipate the occurrence of an economic event likely to affect the balance of the contract by incorporating a so-called *hardship* clause aimed at limiting or sharing the risks.

Time will tell how French judges will take on a new role for which they have not been prepared under the principles that prevailed so far. Assuredly enough to feed our firm's E-newsletter and Blog in the months and years to come…