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Reform of French contract law: Is the Civil Code victim of the spirit of the times?

Much has already been written about the reform of French contract law that became effective on October 1, 2016. Some legal writers complained that concepts that were specific and clearly defined by case-law have been replaced by vague and uncertain notions. To characterize the inspiration of these new provisions, a legal writer has used the term “tempered socialism”.

Several hundred articles have been completely redrafted following a window dressing public consultation process. Have the remains of the former Napoleonic Code been the victim of the spirit of the times?

Much has already been written about the reform of French contract law that became effective on October 1, 2016.

The articles previously published in our monthly e-newsletter provide only limited insight into the numerous areas affected by this complete rewriting of French law of contracts and obligations^[1].

Since its promulgation in 1804, the Napoleonic Code has inspired the civil codes of many countries around the world, including most of the European countries and French-speaking countries of the North Africa and Sub-Saharan Africa of course, but also other countries as unexpected as Turkey, Japan, Brazil or Iran among many more!

As such, it is to be considered as an historic landmark, just like the Louvre or the Eiffel tower.

In the early 2000's, almost half of the Articles of the Napoleonic Code that addressed properties, contracts and obligations were still included in the French Civil Code.

Several hundred articles have been completely redrafted on the quiet by means of a mere Ordinance, following a window dressing public consultation process (that lasted only two months, from March to April 2015) and without any parliamentary debate.

This is a major overhaul. It is almost as if it was decided to change the look of the Eiffel tower (for the Louvre, this has already been done with the Pei's pyramid).

The new provisions concern the general regime of obligations and constitute the general law applicable to all types of civil or commercial contracts and obligations.

Our firm has recently co-organized in Lyon a colloquium on the impact that the new French law of contracts and obligations will have on the negotiation and drafting of commercial agreements for the purchase and sale of products and services^[2].

This colloquium gave us the opportunity to reflect about the inspiration of the main innovations brought about by the Ordinance of February 10 2016^[3].

- *Strengthened obligation to act in good faith*

Under former Article 1134§3 of the French Civil Code, contracts had to be performed in good faith.

None of the former provisions of the French Civil Code addressed the negotiation phase and nothing, apart from the provisions on vitiated consent (error, duress and fraud), restricted the principle of contractual freedom under French general contract law.

Henceforth, pursuant to new Article 1104 of the French Civil Code, *contracts must not only be performed, but also negotiated and formed, in good faith. This provision is a public policy provision.*

- *A duty to disclose information*

New Article 1112-1 of the French Civil Code imposes a general duty to disclose information during the pre-contractual phase, a duty that may be neither restricted nor excluded.

The deliberate concealment by one of the contracting parties of a piece of information that he/she knows is decisive for the consent of the other party is henceforth considered as a fraud (just like maneuvers and lies).

An error that results from a fraud is a ground for nullification of the contract, even if such error concerns the

value of the subject-matter of the contract.

- *Sanction in case of abuse of the state of dependency of a contractual partner*

The abuse of the state of dependency (not only economic dependency) of a contractual partner to obtain from the latter a commitment is henceforth considered as duress. The concept of “abuse of a state of dependency” is thus introduced in French general law of contracts and obligations.

- *Sanction for abusive clauses in so-called “standard form” contracts (contrats d’adhésion)*

Prior to the reform, abusive clauses set forth in “standard form contracts” – the general terms and conditions of which are excluded from negotiation and determined in advance by one of the parties – were only sanctioned pursuant to specific legislations in order to protect a party in a weak position (in particular pursuant to French consumer law in order to protect non-professionals and consumers).

The sanction for such clauses is henceforth enshrined in French general contract law, with the introduction of new Article 1171 of the French Civil Code according to which any abusive clause in a “standard form” contract that creates a significant imbalance between the rights and obligations of the contractual parties shall be deemed unwritten (i.e. ineffective).

- *Obligation to justify pricing in framework agreements*

While new Article 1164 of the French Civil Code provides that the price may be unilaterally set by a party to a framework agreement (i.e. a long-term agreement that defines general provisions governing the relationship between the parties), the party setting such price must be able to provide justification for it.

- *Judge’s power to adapt the contract in case of unforeseeable change in circumstances*

For more than 150 years, the *Cour de cassation* (French Supreme Court) has denied to judges the power to adapt a contract in case of an unforeseeable change in circumstances.

New Article 1195 of the French Civil Code henceforth grants this power to the judge wherever a change in 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. It is difficult to think of a definition that would be any vaguer than this.

This non-exhaustive inventory shows that French contract law has been inspired by the spirit of the times: Protection of the weak and transparency as a new religion. Contrary to the Anglo-Saxon approach that merely imposes compliance with ethic rules that ensure free competition.

This is, to some extent, the old debate between equality, that does not admit the strong, and equality of opportunity that gives the small the hope of eating the big one day.

To characterize the inspiration of these new provisions, a legal writer has used the term “tempered socialism”.

As the saying goes, “The road to hell is paved with good intentions”.

Some legal writers complained that concepts that were specific and clearly defined by case-law have been replaced by vague and uncertain notions.

Others expressed their concern about the imperfect interplay between the new general contract law and some specific legislations set forth in the French Commercial Code, the French Consumer Code and even the French Labor Code. Will these two types of legislation be applied concurrently? Or not?

While some of the new provisions are indisputably mandatory (i.e. public policy) or auxiliary, doubts remain for others.

The judge will be given an enhanced role to ensure compliance with the new principles introduced by the reform: He may, as appropriate, decide either to award damages, rescind or terminate the contract, acknowledge that the contract is null and void or invalidate it. In certain specific cases, he will even be entitled to amend the content of the contract.

Will the judge abuse his extended powers? What area will still be covered by contractual freedom? How will this new French contract law be viewed by foreign entities doing business with French companies?

These are all questions that are very difficult to answer today.

[1]

<https://www.soulier-avocats.com/en/blog/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/>

<https://www.soulier-avocats.com/en/blog/french-contract-law-reform-what-consequences-on-the-rules-of-representation-within-corporate-groups/>

<https://www.soulier-avocats.com/en/blog/reform-of-french-contract-law-to-take-effect-on-october-1-2016-important-changes-that-caught-our-attention/>

<https://www.soulier-avocats.com/en/blog/french-contract-law-reform-consequences-on-contractual-practices-in-distribution-arrangements/>

<https://www.soulier-avocats.com/en/blog/the-impact-of-the-reform-of-french-contract-law-on-transactions/>

[2] The PPT handover materials (in French only) are available at:
<https://www.soulier-avocats.com/wp-content/uploads/prev/2017/01/Présentation-Soulier-réforme-droit-des-contracts-10-01-17-VDEF.pdf>

[3] The main innovations brought about by Ordinance of February 10, 2016 are detailed in the PPT handover materials (in French only) available



at: <https://www.soulieR-avocats.com/wp-content/uploads/prev/2017/01/Présentation-SoulieR-réforme-droit-des-contrats-10-01-17-VDEF.pdf>

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