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Reform of French contract law – Ratification Law published on April 21, 2018: Main changes impacting business law

While it did not drastically alter the changes brought about by Ordinance n° 2016-131 of February 10, 2016, the Ratification Law n° 2018-287 of April 20, 2018 did modify some aspects of French contract law and introduced a distinction between substantive amendments that will become effective as from the entry into force of the Ratification Law, i.e. October 18, 2018, and so-called "interpretative" amendments that will apply retroactively to contracts entered into on and after October 1, 2016.

This article provides a non-exhaustive overview of the provisions of the Ratification Law which have a practical implication on business law, in particular at the formation of the contract and throughout its performance.

For a comparative overview of all the provisions of the French Civil Code impacted by the Ratification Law n° 2018-287 (the "Ratification Law"), we invite you to consult the article entitled "*Reform of French contract law – Publication of the Ratification Law on April 21, 2018: General Presentation*".

1. **Application over time**

Pursuant to Article 16 I §1 and §2 of the Ratification Law n° 2018-287, "*this Law will enter into force on October 1, 2018*"; it shall apply to "*legal acts entered into or drawn up as from its entry into force*".

On the other hand, it must be noted that some provisions of the Law "*are interpretative in character*" and will consequently be effective retroactively. These provisions will apply to legal acts entered into as from October 1, 2016, date of entry into force of the February 10, 2016 Ordinance.

2. **Provisions applicable at contract formation**

- **Redefining standard-form contracts and the concept of significant imbalance**

The February 10, 2016 Ordinance introduced into the French Civil Code the concept of standard-form contract as "*one* [contract] *whose general terms and conditions, excluded from negotiations, are determined in advance by one of the parties*". New Article 1110 §2 of the French Civil Code, as modified by the Ratification Law, now defines the standard-form contract as "*one* [contract] *that contains a set of non-negotiable clauses determined in advance by one of the parties*". This provision shall apply to contracts entered into as from October 1, 2018.

This change, and in particular the deletion of any reference to "*general terms and conditions*" obviously entails an extension of the concept and scope of application of standard-form contracts. These contracts are no longer limited only to standard agreements but also cover any other contract that contains "*a set of non-negotiable clauses*" which are "*determined in advance by one of the parties*". It will be up to French courts to define in the future these news conditions, in particular what is precisely meant by the concept of "*set of non-negotiable clauses*".

Indeed, while it is clear that a contract can be considered as a standard-form contract even though some of its clauses may have been negotiated, it seems necessary to establish a criterion for determining the conditions in which the existence of non-negotiable clauses will lead to the classification of the contract as a standard-form one. By analogy with French consumer law provisions that afford a protection against abusive clauses, the most pertinent criterion seems to be that of the significance of the non-negotiable clauses.

In addition to the redefinition of the standard-form contract, the rules governing such type of contracts have also been amended. Article 1171 §1 of the French Civil Code now stipulates that "*In a standard-form contract, any non-negotiable term, determined in advance by one of the parties, which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written* [i.e. ineffective]". Article 1171 §1 further stipulates that "*The assessment of the significant imbalance may be based neither on the main subject-matter of the contract nor on the adequacy of the price to the service*".

It follows from this provision that any clause that creates a significant imbalance shall be deemed abusive only on the two-fold condition that (i) it has been stipulated in a standard-form contract, and (ii) it has not been negotiated. Moreover, clauses that concern the subject-matter of the contact and the price cannot be set aside by the judge.

In addition, these general rules will not apply wherever specific rules do. In these conditions, a "business partner" within the meaning of Article L. 442-6 I 2° of the French Commercial Code will not be entitled to initiate proceedings before a civil court to seek the recognition of the existence of an abusive clause on the basis of Article 1171 of the French Civil Code.

Lastly, Article 1190 of the French Civil Code establishes a *contra proferentem* rule according to which "*in case of doubt, [...] a standard-form contract* [must be construed] *against the party who has proposed it*". This provision has not been amended by the Ratification Law and consequently applies to the contract as a whole. However, for consistency purposes and to adhere to the spirit of the new Articles 1110 and 1171 of the French Civil Code, it would be necessary – just like for the similar provisions of the French Consumer Code – to think in terms of non-negotiable clauses and to apply these rules only to such clauses.

- **Change in the scope of application of the abuse of economic dependency**

Article 1143 of the French Civil Code now provides that "*There is also duress wherever a party, abusing from the state of dependency of his contractual partner on it, obtains from the latter a commitment that would not have been agreed to in the absence of such constraint, and derives a manifestly excessive benefit*".

As a result, the state of dependency of a contractual partner is not to be analyzed only in light of its own person but in connection with its relationships with its contractual partner. In other words, the concept of abuse of economic dependency has not been reduced solely to economic duress.

This provision is "interpretative" and applies retroactively to all contracts entered into on or after October 1, 2016.

- **Exclusion of fraudulent concealment of the value of a service**

Article 1137 §2 of the French Civil Code reads as follows "*The intentional concealment by one party of information, where it knows that such information is decisive for the other party, is also considered as fraud*". The Ratification Law added a third paragraph to this Article: "*The fact for a party not to disclose to the other party the estimated value of the service is not considered as fraud*".

While this change seems consistent with Article 1112-1 of the French Civil Code according to which the duty to provide information does not apply to the assessment of the value of the service, it appears to conflict with Article 1139 of said Code according to which: "*A mistake induced by fraud is always excusable. It is a ground of nullity even if it bears on the value of the service or on a party's mere motive to contract*".

With the changes brought about by the Ratification Law, any contracting party who negotiates in bad faith and conceals the estimated value of the service – whereas it is fully aware that this lack of information will entail a decisive error in the consent of the contracting party – will not be sanctioned by the nullity of the contract. This provision shall apply to contracts entered into on or after October 1, 2018.

In this context, it may appear that excluding the fraudulent concealment of the estimated value of the service from the concept of fraud ultimately amounts to adopting a particularly narrow definition of the concept of fraud.

- **Termination of a service agreement in case of abuse in the fixing of the price**

Drawing on the provisions set forth in Article 1164 of the French Civil Code with respect to framework contracts and under which "*In case of abuse in the fixing of the price, a claim for the award of damages and, as the case may be, for the recession of the contract, may be filed with the judge*", the legislator has amended Article 1165 of such Code that deals with contracts for the provision of services.

Henceforth, in case of abuse in the fixing of the price, the debtor may seek, in addition to damages, "*as the case may be, the termination of the contract*". Such change applies retroactively to all contracts entered into on or after October 1, 2016, including continuing performance contracts (*contrats à exécution successive*).

3. **Provisions applicable during the performance of the contract**

- **The debtor's good faith conditions the exception of forced performance in case of manifest disproportion**

Pursuant to Article 1221 of the French Civil Code, "*The creditor of an obligation may, after having given notice to perform, seek performance in kind unless performance is impossible or unless there is a manifest disproportion between its cost to the debtor in good faith and its interest for the creditor*".

From now on, only the "*debtor in good faith*" may rely upon this provision against his creditor. It should be noted that this provision applies retroactively to all contracts entered into on or after October 1, 2016.

While this amendment appears to be superfluous in view of Article 1104 of the French Civil Code according to which "*contracts must be negotiated, formed and performed in good faith. This provision is a public policy provision*", it does however raise the question of the definition of the debtor's bad faith. As French law does not provide for any such definition, it will be up to French courts to delineate the scope of application of this Article.

- **Enhanced exceptions to the principle according to which payment in France of monetary obligations must be made in Euros**

Although the February 10, 2016 Ordinance provided that payment in foreign currencies was possible whenever the underlying obligation "*arises under an international contract or a foreign judgment*", new Article 1343-3 of the French Civil Code henceforth stipulates that "*payment may be made in another currency if the underlying obligation arises under an international transaction or a foreign judgment. The parties may agree that the payment will be made in another currency if it is performed between professionals and when the use of a foreign currency is commonly accepted for the transaction in question*". The exception will apply to contracts entered into on or after October 1, 2018.

With this new change, the scope of application of this exception is extended to any "*international transaction*", thereby endorsing current practices and conforming to established case-law under which payment in a foreign currency was possible whenever the payment was "*international*".

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