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Reform of French contract law to take effect on October 1, 2016: Important changes that caught our attention

The reform, which enshrines two hundred years of court decisions, amends, re-numbers, deletes and creates numerous articles of the *Civil Code of the French* derived from the Law of 30 ventôse of year XII under the French revolutionary calendar, which later became the Napoleonic Code and then the Civil Code.

While the French Civil Code abandons some concepts deemed obsolete or inappropriate, such as the notion of *cause* (within the meaning of French law), it codifies a number of essential case-law developments, e.g. contractual negotiations, unilateral promises, economic duress, theory of unforeseeability, fraudulent concealment, defense to non-performance, etc., with a view to modernizing French law and increasing legal certainty.

Ordinance n°2016-131 of February 10, 2016 for the reform of contract law, the general regime of obligations and proof of obligations (the "Ordinance") will come into force on October 1, 2016.

Except for a few isolated texts, the provisions of the French Civil Code (the "FCC") on the general law of obligations had not evolved since 1804, thereby leading to an abundant case-law, a true source of law, designed to clarify, supplement and modernize statute law by taking into account the evolution of lifestyles, morals, technologies and practices.

Yet, a law that is essentially based on case-law developments is unpredictable, source of legal uncertainty and, for non-legal practitioners, sometimes difficult to grasp, if not incomprehensible.

As such, the main effect of the reform will be to make statutory law more accessible and predictable in order to guarantee modernity and legal certainty. Some legal writers view the reform as a work of codification of the "*well-established case law as it currently stands*".

While the reform is primarily aimed at codifying established and settled case-law principles, it also introduces new legal concepts, grants new rights to, and imposes new obligations on, parties to a contract, and provides clarification on the criteria laid down by French courts.

This article summarizes key notions that will be abandoned or introduced in the FCC by the reform, effective as from October 1, 2016.

1. The concept of *cause* is abandoned

The FCC currently sets out four essential conditions for the validity of a contract: The consent of the party who undertakes to perform the obligation, his/her capacity to contract, a certain and determined subject-matter and a lawful *cause*[1] in the obligation (Article 1108 of the FCC in its version in force until October 1, 2016).

The concept of c*ause* – which does not exist in most other countries – remains abstract and is difficult to grasp.

French legal writers make a distinction between the subjective *cause* (also called "*cause of the contract*") – that refers to the intentions of the party who undertakes to perform an obligation and that is specific to that party – and the objective *cause* (also called "*cause of the obligation*") – that refers to the abstract and intangible consideration that exists for contracts of the same type.

For example, with respect to a purchase transaction, the objective *cause* for the purchaser will always be the acquisition of ownership and, for the seller, the payment of the price. Conversely, for contracts of the same type, the subjective *cause* varies from one contractual party to another. For example, with respect to the sale of a real estate property, the subjective *cause* for one specific purchaser may be the location of the property and for another, its general condition or its surface area.

The *Cour de Cassation* (French Supreme Court) has sometimes used the concept of subjective *cause* to restore the balance of the obligations imposed on the parties to a contract.

This subjective conception of the concept of *cause* – which is a source of legal uncertainty – has triggered criticisms and questions from legal practitioners and writers.

In order to reinforce legal certainty in contractual relationships, the reform eliminates this concept of *cause* and replaces it by rules that are less abstract and that produce a similar result.

Effective as from October 1, 2016, Article 1128 of the FCC replaces the concept of "*lawful cause in the obligation*" by the requirement of a "*lawful, certain content*".

In addition, the reform introduces in the FCC the concept of "*enrichment without cause*" that had been clearly

established by case-law but that remained so far unaddressed in the FCC. Yet, the Ordinance renamed this concept "*unjustified enrichment*" to ensure consistency with the abandonment of the concept of *cause*.

2. Recognition of economic duress

New Article 1140 of the FCC provides that "*There is duress where one party contracts under the influence of a constraint which makes him fear that his person or his wealth, or those of his near relatives, might be exposed to significant harm*."

The definition of the concept of duress – which is a ground of nullity for lack of consent – is virtually identical to that set forth in Article 1112 of the FCC and applicable until October 1, 2016.

One of the main innovations brought about by the reform is the introduction of Article 1143 according to which "*There is also duress wherever a party, abusing from the state of dependency of its contractual partner, 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 therefrom.*"

The Ordinance thus defines "duress" as the abuse of the state of dependency of a contractual partner, which has been acknowledged by the *Cour de Cassation* in recent decisions and which is described by French legal writers as "economic duress".

By referring to the "*state of dependency*" and not only to the state of economic dependency, the reform does not simply enshrine the existing case-law principle with respect to economic duress but goes one step further.

All potential states of dependency are covered, which ensures the protection of all vulnerable persons, not only the protection of companies in the framework of their relationships.

In order to limit the number of judicial proceedings for duress based on the abuse of a state of dependency, it must also be demonstrated that the abuse of the state of depency has resulted in a "*manifestly excessive benefit*".

3. Sanction in case of abusive clauses and introduction of the concept of significant imbalance between the rights and obligations of contractual parties

Another main innovation brought about by the reform is the introduction of the concept of abusive clauses in the FCC. New Article 1171 stipulates that "*In a "standard form" contract any clause that creates a significant imbalance between the rights and obligations of the contractual parties shall be deemed unwritten [i.e. ineffective].*"

The reform thus introduces in the FCC a concept that was already enshrined in the French Consumer Code and Commercial Code.

Indeed, concerning the relationships between professionals and consumers, the French Consumer Code

stipulates that clauses creating a significant imbalance between the rights and obligations of the parties are deemed unwritten (i.e. void) (Article L.212-1 of the French Consumer Code).

In contracts concluded between professionals, clauses that create a significant imbalance between the rights and obligations of the parties are sanctioned by the French Commercial Code since 2008 (Article L.442-6 I 2° of the French Commercial Code).

The scope of such abusive clauses is, however, limited to "standard-form" contracts which are defined by new Article 1110 of the FCC.

This provision is a public policy provision since as such clauses are deemed unwritten (i.e. void).

Lastly, new Article 1171§2 clarifies the notion of "*abusive clause*" by specifying that "*the assessment of the significant imbalance concerns neither the main purpose of the contract, nor the adequacy of the price to the service rendered* ".

4. Codification of the theory of unforeseeability

New Article 1195 is one of the most important innovations and certainly one of the most criticized. It stipulates as follows:

"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".

As such, the reform introduces the concept of unforeseeability in French contract law. This notion is recognized by administrative case law as the Government is authorized to provide the option for contractual parties to adapt their contract in case of an unforeseeable change in circumstances.

The recognition of this notion aims at combatting major contractual imbalances that occur during the performance of a contract, and is consistent with the objective of contractual justice pursued by the Ordinance.

For unforeseeability to be established, three conditions must be fulfilled: An "*unforeseeable*" change in economic circumstances that renders the performance of the contract "*excessively onerous*" for a party that did not agree to bear such risk.

This provision is only auxiliary, not public policy.

The parties may agree in advance to exclude the application of this new Article 1195 and elect to bear the consequences of any such circumstances that would disrupt the scheme of the contract.

In addition, the request for renegotiation does not relieve the party from the obligation to perform its obligations during the renegotiation process and, if negotiations fall through, until the Judge rules on the subsequent request for revision.

5. Codification of the 1996 Chronopost decision

The reform introduces in the FCC the rules set down in the so-called Chronopost decision rendered in 1996[2] concerning clauses that contradict the essential obligation of the debtor.

In this landmark case adjudicated by the *Cour de Cassation*, the company Banchereau entrusted, on two occasions, an envelope containing a tender submission to the company Chronopost. These envelopes were not delivered before noon on the following day, contrary to what Chronopost had committed to do. As such, Banchereau initiated proceedings against Chronopost to seek indemnification for the loss it had suffered. In defense, Chronopost relied on the clause in the contract that limited compensation for the delay to the transportation costs paid by Banchereau.

In 1996, the *Cour de Cassation* reversed the judgment of the Court of Appeals that applied the limitation of liability clause. It held that Chronopost, as a specialist in rapid transportation guaranteeing the reliability and swiftness of its service, had committed to deliver Banchereau's envelopes within a set timeframe, and that because of its failure to fulfill this essential obligation, the limitation of liability clause set forth in the contract, which conflicted with the scope of the commitment it had made, ought to be "*deemed unwritten*" (i.e. void).

New Article 1170 of the FCC enshrines this principle and stipulates that any clause which *"deprives a debtor's essential obligation of its substance is deemed unwritten [i.e. void]."*

Contrary to the findings of some decisions rendered by the *Cour de Cassation*, a limited liability clause that targets an essential obligation of the debtor shall not necessarily be deemed "unwritten" (i.e. void): Such clause shall be prohibited only if it conflicts with the scope of the relevant commitment by depriving this essential obligation of its substance.

6. Definition of force majeure

The FCC, in its current version, does not include any definition of force majeure.

This notion has been developed in decisions – that were sometimes inconsistent with each other – handed down by the *Cour de Cassation*.

The reform introduces new Article 1218 that defines force majeure as follows:

"In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor."

This wording embraces the definition developed by case-law as it refers to the unforeseeability and irresistibility requirements.

On the other hand, the externality of the relevant event does not need to be established. This requirement was abandoned by Plenary Assembly of the *Cour de Cassation* in 2006[3].

New Article 1218§2 addresses the consequences of force majeure and provides that:

"If contract performance is temporarily impossible, the performance of the obligation is suspended unless the resulting delay justifies the termination of the contract. If contract performance is permanently impossible, the contract is terminated by operation of the law and the parties are discharged from their obligations under the conditions provided for by Articles 1351 and 1351-1."

As a matter of fact, the reform merely codifies the solutions developed by French courts since 2006.

7. Codification of the defense to non-performance principle (*principe d'exception d'inexécution*) and introduction of the defense to non-performance as a preventive measure

The FCC, in its current version, does not contain any provisions concerning the famous and indispensable principle of defense to non-performance shaped by an abundant case-law.

New Article 1219 defines defense to non-performance as follows:

"A party may refuse to perform his obligation, even where it is enforceable, if the other party does not perform his own and if this non-performance is sufficiently serious."

By specifying that this defense can be raised only if the non-performance is "*sufficiently serious*", the reform prohibits the abusive and bad faith use of this means of defense to sanction minor non-performance.

As a matter of fact, the introduction of new Article 1219 is scarcely more than a codification of an established case-law.

However, the reform introduces a new concept that had not been yet established by French courts. It creates new Article 1220, according to which:

"A party may suspend the performance of his obligation as soon as it becomes evident that his contracting partner will not perform his obligation when it becomes due and that the consequences of this non-performance are sufficiently serious for him. Notice of this suspension must be given as quickly as possible."

As such, the creditor of an obligation will have the possibility to suspend the performance of his/her own obligations as a preventive measure, before it is established that his/her contractual partner is in default.

This new measure provides a means of pressure to prompt one's contractual partner to perform his/her obligation.

It is, however, more regulated than the mere defense to non-performance since, in addition to the requirement of a "*sufficiently serious*" breach, the decision to suspend the performance of the obligation must be notified to the other party as expeditiously as possible.

8. Clarification on how the reform will be applied over time

Even though the reform will take effect on October 1, 2016, it will probably take a few months, if not years, before judges actually and massively apply the articles of the FCC introduced by the Ordinance and before a case-law – possibly innovative – emerges.

Indeed, the reform specifies that, in contractual matters, the formerly applicable legislation will continue to apply.

As such, contracts entered into before October 1, 2016 will continue to be governed by the law that was in force as of the date of their conclusion.

There are, however, a few exceptions to this principle. Specifically, the so-called interrogatory actions (*actions interrogatoires*) created by Articles 1123§3, 1123§4, 1158 and 1183, will be applicable to all contracts, effective as from the entry into force of the Ordinance. These are procedural mechanisms that will not affect existing contracts, their performance and their interpretation.

Finally, still in the interests of legal certainty, the reform specifies that wherever a legal action has been brought before the entry into force of the Ordinance, such legal action continues and the dispute will be adjudicated according to previously applicable legal provisions. Such provisions will also apply in subsequent proceedings before Courts of Appeals and, as the case may be, the *Cour de Cassation*.

[1] The concept of *cause* means at the same time the consideration and the reason why a party enters into a contract.

[2] Commercial Chamber of the cour de Cassation, October 22, 1996, n° 93-18632

[3] Plenary Assembly of the *Cour de Cassation*, April 14, 2006, n° 04-18902 and n° 02-11168

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