

French Contract Law Reform

After a decade of discussion and the failure of several previous reform projects, French contract law has finally been reformed by way of an ordinance ("*ordonnance*") published on 11 February 2016.

Introduction

The objectives of the reform are notably the simplification, modernisation and, ultimately, attractiveness of French contract law.

The reform codifies in particular a number of principles that have emerged in case law, thus stabilizing these solutions and improving legal certainty (e.g., in varying degrees, in respect of good faith in the pre-contractual phase, certain unilateral remedies or assignment of contract).

At the same time, the reform does away with certain previous concepts (like the doctrine of "*cause*", a key feature of traditional French contract law), whilst introducing new ones that are often borrowed from other theories of law, such as 'hardship' and the control of 'unfair contract terms'.

On certain aspects, the reform has been seen by some as an enhanced protection of the "weak" party and an increased interference by the courts in the life of the contract. This being said, the final version of the ordinance takes account of some of the comments and criticisms raised in this respect. For instance, as regards 'unfair contract terms' and the notion of 'significant imbalance', as further described below, the new regime introduced by the reform now applies to standard-form contracts only ("*contrats d'adhésion*"), a more limited scope

than that envisaged in the preliminary draft of the ordinance of February 2015.

Although the reform continues to raise certain questions and concerns, it nonetheless makes various improvements and useful contributions to French contract law, many of which have been called for by scholars and practitioners.

Moreover, the changes introduced further reinforce the importance of adopting appropriate drafting of contractual provisions.

This article discusses some of the key aspects of the reform.

Judicial control

One important feature of the reform is the extension of the role and powers granted to the judge. The courts will indeed be entitled to review and declare null and void or amend the terms of a contract on an increased number of topics, such as 'unfair contract terms' and 'hardship'. These role and powers have been framed in several cases however.

Pre-contractual phase

■ Good faith

Currently, the French Civil Code expressly provides for an obligation to act in good faith in respect of the performance of the contract.

Following the entry into force of the reform, this will be extended to cover the negotiation and conclusion of contracts.

Although some authors claim that this could lead to an increase in the number of disputes, the reform is in actual fact basically only codifying the existing situation. Indeed, the French courts already make an extended application of the current provision of the French Civil Code on good faith, and apply it in the pre-contractual phase too (as well as in respect of the termination of contracts), as in the landmark *Manoukian* decision in 2003 for instance.

By setting out the good faith principle among the introductory provisions, the reform openly presents it as a fundamental principle of contract law. Furthermore, it is explicitly stated to be a 'public policy' provision ("*disposition d'ordre public*").

■ Wrongful termination of negotiations

French case law, including the aforementioned *Manoukian case*, recognises a right to damages in the case of 'wrongful' termination of negotiations, although limits have been placed on the type of damages that can be obtained in this context. This case law principle is now also codified. The reform specifies that the initiative, conduct and termination of pre-contractual negotiations are free, but must comply with the requirements of good faith. It then goes on to provide that damages for a 'fault' committed in the negotiations cannot be aimed at compensating the loss of the 'advantages' expected from the contract that has not been concluded. This principle is helpful with regard to the lack of clarity on the sanctions associated to a failure to

comply with the obligation to negotiate in good faith.

The final wording of the ordinance does not indicate whether liability for 'wrongful' termination of negotiations is extra-contractual or not, contrary to what was envisaged in the preliminary draft of the ordinance. It can however be expected that these issues will be dealt with in the new reform on civil liability, which is still to come.

- 'Duty to inform'

A duty to provide one's counterparty with certain information has been developed under French case law. Based on this case law but going further still, the reform codifies a broad 'duty to inform'. It is extended to any type of contract and to any party provided that (i) the information is 'critical' to the consent of the other party and (ii) the latter, legitimately, ignores the relevant information or 'trusts' the counterparty. Moreover, the parties will not be entitled to limit or exclude this duty.

The final ordinance has dropped the reference to the related liability being extra-contractual, in line with the position taken for wrongful termination of the negotiations as mentioned above. On the other hand, it is now specified that this duty does not apply to the estimation of the value of the subject-matter of the contract ("*valeur de la prestation*").

- Confidentiality

The reform introduces a specific legal regime with respect to confidentiality during the negotiations phase.

It is now expressly provided that a party who uses or discloses confidential information obtained during a negotiation, without the other party's consent, may be held liable for damages, even in the silence of any contract that may have been concluded.

Unilateral promises

The Government's reform chooses not to follow the established but controversial case law solution applied in the case of breach of a unilateral promise to sell. Pursuant to this solution, in the event the promisor revokes its offer to sell before the promisee exercises the option, the promisee can only claim damages and cannot seek to enforce the contract.

The reform overturns this solution, giving full effect to a unilateral promise to enter into a specified contract (e.g. a unilateral promise to sell). Accordingly, the revocation of the offer during the period granted to the beneficiary to exercise its option will not prevent the formation of the promised contract, i.e. the other party will be entitled to enforce the contract.

Economic duress

The French courts have taken a restrictive approach in respect of 'economic duress'.

The reform provides that abusing of a party in a state of 'dependence' ("*état de dépendance*"), which leads such party to agreeing to a commitment which it would not have agreed to had it not been under such pressure, and obtaining a manifestly excessive advantage, may lead to the contract being voided. As is apparent from the text, this is not limited to economic duress.

The final text has evolved since the preliminary draft of February 2015, with the deletion of the – criticised – reference to 'state of necessity' ("*état de nécessité*"), and the addition of a second condition, which is that the coercion must result in a manifestly excessive advantage.

Considering the courts' reluctance so far and the additional condition added in the reform, it is possible that 'economic duress' will continue to be rarely applied in practice.

Unfair contract terms

Another key feature of the reform is the regulation of 'unfair contract terms'.

- Firstly, the reform codifies and extends the case law principle pursuant to which a limitation or exclusion of liability clause cannot be enforced if it empties the debtor's essential obligation of its substance.

The first case in 1996, and the subsequent sagas "*Affaire Chronopost*" and "*Faurecia*", considered limitation of liability clauses as void ("*reputées non écrites*") where they were in contradiction with, or emptied, the 'essential obligation' under the contract. This case law developed based on the doctrine of "*cause*".

Despite doing away with the doctrine of "*cause*", the reform codifies the principle developed under the aforementioned case law, whilst in fact extending it to cover any contractual term – not only limitation or exclusion of liability clauses.

- Secondly, the reform completes the legal arsenal for striking out 'imbalanced' clauses, adding a further layer to what already exists in the field of consumer contracts and commercial contracts.

The reform provides that a clause creating a 'significant imbalance' between the parties' rights and obligations may be considered as void by the courts ("*réputée non écrite*") and hence be withdrawn from the contract. This does not apply, however, to the subject matter of the contract ("*l'objet principal du contrat*") or to the adequacy of the price. This new regime is clearly based on that applicable to 'unfair contract terms' in consumer contracts, although it doesn't provide lists of clauses presumed to be 'significantly imbalanced'.

The provision in the preliminary draft of the ordinance was criticised. The criticism was aimed, notably, at the uncertainty created in terms of interaction of this new regime with the other existing legal regimes on 'unfair contract terms'. Moreover, some concerns were voiced regarding the reduction of the parties' freedom of contract, as their common assessment of fair balance was left to the discretion of the judge, a solution especially criticized in bespoke contracts.

The final draft of the ordinance has taken some of these comments into account, and hence limits the new regime to 'standard-form' contracts ("*contrats d'adhésion*"). These are defined as contracts whose general terms and conditions (and not only their 'essential terms', as was initially envisaged) are not subject to negotiation and are determined by one of the parties in advance.

Hardship

The doctrine of 'hardship' ("*imprévision*") has long been rejected under French private law, going all the way back to 1876 and the famous *Canal de Craponne* case.

And this, even though some more recent cases have been interpreted as somewhat paving the way towards the recognition of 'hardship', based on other theories of law such as the absence of "*cause*" or good faith.

The reform now provides a right to renegotiate the contract, in the limited scenario of a change of circumstances unforeseen at the time of conclusion of the contract, which makes performance excessively more onerous for a party, and provided such party has not accepted to bear the risk. If the other party refuses the renegotiation or the renegotiations fail, the parties may together agree on the termination of the contract or ask the court to adapt it. A party may also, alone, seek the termination of the

contract before the judge if the parties fail to reach agreement within a reasonable timeframe. Moreover, the ordinance now also adds that a party may unilaterally ask the judge to revise the contract in that case. The latter increases significantly judicial intervention.

Assignment of contract

Assignment of contract is generally not expressly treated as such at law, and it was seen for a long time as an assignment of rights and/or obligations.

Based on commercial practice and existing case law, the reform makes it a standalone concept, with its own legal regime and set of rules. In essence, a party will be entitled to assign its capacity as party to the contract, with the prior written consent of the other party.

The final wording of the ordinance has added the possibility of agreeing in advance to the right to assign the contract. Furthermore, the assignment will need to be in writing, or it will be void.

The ordinance, in its final version, also incorporates the principle that, unless provided otherwise, the assignor will remain jointly and severally ("*solidairement*") liable with the assignee for the performance of the contract (and not just for the debts of the assignee, as previously drafted), and the securities ("*sûretés*") provided by the assignor will remain enforceable.

Unilateral remedies

The French Supreme Court, in a landmark decision in 1998, recognised the right for a party – in the silence of the contract – to unilaterally terminate a fixed-term contract for material breach. In such a case, this is at the terminating party's 'risk', but judicial control of the termination intervenes only after the termination.

The reform basically codifies this principle, whilst adding several conditions in this respect. It also goes further, compiling and creating other extra-judicial and unilateral remedies.

In addition to the right to unilaterally terminate a contract, the non-defaulting party will in certain cases be entitled, unilaterally, to suspend the performance of the contract (based on the current doctrine of "*exception d'inexécution*"), request a reduction in the price, and/or seek specific performance of the contract ("*exécution forcée*").

These remedies, which will be without prejudice to the right to seek damages for breach of contract, will be cumulative and enforceable in principle without judicial intervention.

Specific performance

Specific performance of a contract ("*exécution forcée*") will be at the non-defaulting party's discretion, but subject to prior notice. The non-defaulting party will be entitled to either (i) compel the defaulting party to perform the contract, as long as this is not impossible (either legally, morally or materially) and there is no manifest disproportion between the cost of performance for the debtor and the interest for the non-defaulting party, or (ii) elect to perform the contract itself or have it performed by a third party. The defaulting party will bear the costs in any case.

The final ordinance has changed the test with respect to the obligation for the defaulting party to perform the contract; previously, it was based on whether or not the costs of performance were manifestly unreasonable.

Articulation with other specific legal regimes

One of the key comments that arose during the public consultation, and which we also shared, was on the need to have clarity as to the

articulation and interactions between the rules introduced by the reform and the specific legal regimes already in place, not least regarding 'unfair contract terms'. Although a specific provision has been added to seek to clarify the interaction between the general rules set out in the ordinance for all contracts and the specific rules applicable to certain types of contracts, it does not address all concerns and questions.

Entry into force and next steps

A law to ratify the ordinance must be submitted to the Parliament within six months of its publication. It may still be modified in the context of this ratification procedure.

The reform will come into force and be effective from 1 October 2016. All contracts concluded prior to its entry into force will remain subject to the previous regime. However, a limited number of articles will be effective immediately from the date of coming into force of the ordinance.

Should the ratification law not be submitted to the Parliament within the aforementioned six months, the ordinance will become void however.

This reform of French contract law ought to be shortly followed by the reform of the French law on civil liability. The Government has announced that it will call for a public consultation on the matter in the coming weeks.

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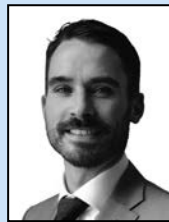
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