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How the French contract law reform impacts your contracts: key points

On 1 October 2016, the French contract law reform introduced by the Ordinance of 10 February 2016 took effect (the "**Reform**"). Below is a brief overview of certain key points to consider, in the light of the Reform, when negotiating and drafting contracts going forward. This overview focuses on certain issues that affect most, if not all, contracts. The Reform has, however, a much wider scope, impacting other important aspects of French law such as, for instance, the regime applicable to the assignment of receivables or the assignment of debt, rules of evidence or extra-contractual liability.

If you would like more information on the Reform or any of the issues referred to in this briefing, or assistance in the context of your negotiations or the review and drafting of your contracts in the light of the Reform, please do not hesitate to contact us.

Introduction

The Reform has aimed at simplifying French contract law and ensuring greater legal certainty. For instance, it has sought to codify and specify certain principles developed over the years under French case law and established practice, as well as to simplify and clarify certain regimes. The Reform has also introduced important new rules or overturned previous solutions.

The impact of the Reform on negotiations and contract drafting, as well as the uncertainties and questions of interpretation that remain, should not be overlooked. For some provisions introduced by the Reform, it is expressly provided that they are 'public policy' provisions or that contractual provisions to the contrary will be unenforceable. For the rest, where their mandatory nature is not explicit, the rules introduced by the Reform are, in principle and as a general rule, supplementary and hence will apply unless the parties agree otherwise. Negotiators and contract drafters therefore need to consider how the Reform impacts their negotiations and contracts going forward, what aspects can be validly addressed or adapted contractually and, for each contract on a case-by-case basis, what aspects should then be addressed or adapted. In so doing, they will also need to consider other mandatory rules and regulations that may apply and how they all interact (for instance as regards the rules applicable to commercial negotiations, 'significant imbalance' and 'sudden termination' under the French Commercial Code).

Duty to inform: a reinforced obligation to inform the other party during the negotiations

Whilst such a principle already existed under French case law, this 'pre-contractual' duty to inform has been reinforced. The Reform introduces an express obligation to disclose, during the negotiations, all information that is critical to the other party's consent. When approaching negotiations, it is important to bear in mind that: (i) the parties cannot limit or exclude this duty and waive their related rights; (ii) this duty applies where the other party is, 'legitimately', unaware of the information or 'trusts' the disclosing party; and (iii) the disclosure obligation is wide-ranging, covering all information having a 'direct and necessary link' with the content of the contract or the parties (it does not concern, however, the value of the 'subject-matter' of the contract ("*estimation de la valeur de la prestation*")). Failure to disclose could result not only in liability but also in the annulment of the ensuing contract. Parties need to put in place reliable, yet not too burdensome, processes establishing compliance with this requirement, taking into account the Parties' respective nature, expertise and knowledge.

Unilateral promises: the revocation of the promise does not prevent the formation of the promised contract

The Reform puts an end to the uncertainty around the enforceability of unilateral promises to contract.

Previously, unilateral promises such as put and call options could be revoked by the promisor and 'specific performance' of the promised contract was not available. With the Reform, a promise to contract will not prevent the beneficiary of the promise from enforcing the contract that was promised, unless the promise states otherwise.

Double representation: the potential invalidity of the contract

Various provisions of the Reform address the authority of representatives. Amongst the key points, it is now provided that a representative may not act on behalf of both parties to a given contract. The contract would be null and void, unless: (i) this situation is permitted by law; or (ii) the represented party has consented or ratifies the contract. It is unclear whether corporate officers are 'representatives' in this context. Until case law or an amendment of the Reform clarifies the new provisions, the parties therefore need to ensure that appropriate authorisation mechanisms are put in place, to avoid the risk of invalidity.

Contractual 'balance': greater control still of 'unfair contract terms' and the like

Increasingly, contract parties will need to ensure that their contracts are balanced. Indeed, certain types of clauses, deemed to significantly impair the contractual balance, are now deemed invalid.

This is the case of clauses that empty the debtor's essential obligation of its substance, which are now deemed unenforceable ("*réputées non écrite*"). The new provision introduced by the Reform is inspired by existing case law on limitation / exclusion of liability clauses but it goes further still and in principle applies to any type of clause.

Further, where 'standard-form contracts' (as defined in the Reform) are used, any clause that creates a 'significant imbalance' between the rights and obligations of the parties will also be deemed unenforceable. The assessment of a 'significant imbalance' does not cover, on the other hand, the main object of the contract ("*l'objet principal du contrat*") or the question of the adequacy of the price. This rule is clearly based on the existing regime applicable to 'unfair contract terms' in 'consumer' contracts (although the new rule is much less detailed), and it will in principle be interpreted in its light. The Reform has added another layer to the control of 'unfair contract terms', in addition to what already existed for instance in the context of business to consumer / non-professional relationships, as well as in the context of business to business relationships under the French Commercial Code.

Force majeure: an express definition and the clarification of the consequences

The Reform sets out a specific definition of 'force majeure' and details its consequences, a regime that will apply in the silence of the contract. Notably, where a party is temporarily prevented from performing its obligations, performance is suspended, unless the delay this would cause 'justifies' the termination of the contract. If performance is prevented definitively, the contract will terminate automatically ("*résolution de plein droit*").

The parties will need to consider to what extent they intend this legal regime to apply to their contract, including to what extent it can and should be adapted, or even excluded, in the light of the contractual

provisions they are considering introducing, *e.g.*: specific contractual definition vs. the legal definition; events the parties want to automatically qualify as 'force majeure' or that would, on the contrary, be excluded from this notion; specific contractual arrangements around the consequences of 'force majeure' and interaction with the consequences described in the new legal regime, including in relation to the 'automatic' termination of the contract; etc.

'Hardship': from renegotiation of the contract to its revision by the judge

French law has long rejected the doctrine of 'hardship' in the context of private law.

This has now changed, and the Reform introduces a specific mechanism to address certain evolutions arising in the course of performance of a contract. Indeed, if an unforeseeable change in circumstances occurs and renders performance 'excessively onerous' for a party that had not accepted to bear the risk, then that party has the right to ask the other to renegotiate the contract. The mechanism then entails further stages, which include the potential involvement of a judge to revise, or even end, the contract in certain cases.

This new regime increases judicial intervention in the contractual sphere, albeit in relatively limited cases. The parties may ultimately find themselves in a situation where a judge is modifying their contract… Some have argued that this may push the parties to try, by all means, to find a mutually acceptable solution *via* renegotiation, avoiding the judge's intervention. Maybe more importantly, it should encourage the parties to consider, upfront, whether this regime should apply to their contract at all given the uncertainties and issues it raises, or whether they should define a specific contractual mechanism to apply *in lieu* of the legal regime.

Assignment of contract: a specific legal regime at last

Based on existing case law and established practice, assignment of contract (described in the Reform as the assignment of one's quality as party to a contract) is now expressly recognised as a standalone concept, with its own set of rules.

The assignment is subject to specific formalisation in writing, failing which it could be declared null and void. Moreover, it requires the counterparty's consent. This can be anticipated however, for instance in a bespoke clause to that effect in the original contract itself. Also, the assigning party will in principle be held jointly and severally liable following the assignment, unless the parties specifically contract out of this, discharging the assigning party for the future.

Breach of contract: a whole arsenal of possible remedies

The non-breaching party has a wide range of possible remedies available, in the silence of the contract, in the event of breach.

In principle, these remedies can be cumulated – at least, to the extent not 'incompatible' – and damages can always be claimed. However, the Reform does not expressly prohibit adapting and tailoring the remedies for breach. Close attention should be paid to these remedies and how to address them on a case-by-case basis, taking account of the specific provisions and conditions set out in the Reform. For instance, the parties should consider whether certain remedies should be excluded or certain aspects specified for the purpose of their contract. They should also assess to what extent their envisaged contractual provisions are compatible with the legal provisions, or how they need to be adapted to work with the legal provisions.

The remedies for breach of contract include:

Terminating the contract.

There are various different cases covered by the Reform. First of all, the parties can include a specific termination clause in their contract. This in itself is not a novelty (although it wasn't expressly provided previously), and the parties would always have been well-advised to carefully craft their termination clause. However, even more care will now need to be taken when drafting such types of clauses and specific points will need to be considered for each contract, in particular to avoid the inadvertent application of rules provided at law in the silence of the contract (*e.g.*: what breaches? What of the need to provide prior notice? What contents for the notification?). Moreover and beyond the principle that the parties can always go before a judge to obtain termination, it is now expressly provided that a party can also under certain circumstances terminate a contract by way of notification, if the breach is 'sufficiently serious'. Clauses adapting the relevant rules should be possible.

Refusing to perform one's own obligations.

As in the past, this will be possible to the extent the other party's breach is 'sufficiently serious'.

Further and more importantly, the new provisions now allow the non-breaching party to suspend the performance of its own obligations *in advance* of a breach by the counterparty, even if the breach has not actually materialised. Indeed, where it is clear ("*manifeste*") that the counterparty will not perform its obligations on time, the other party can suspend performance of its own obligations provided the consequences of the non-performance are 'sufficiently serious'. The party suspending its performance will need to notify the suspension as soon as possible ("*dans les meilleurs délais*").

Obtaining 'specific performance' ("*exécution forcée en nature*").

In principle, this will not apply where performance is impossible or where there is a 'manifest' disproportion in terms of cost vs. benefit. Moreover, in certain cases, the non-breaching party can also itself have the obligation(s) performed or, with the judge's prior authorisation, destroy what has been done in breach, in each case at the breaching party's cost. Here, again, contractual adjustments are in principle authorised.

Accepting a 'defective' performance and paying less.

The Reform introduces, explicitly, the principle that the non-defaulting party can accept an incomplete or defective performance ("*exécution imparfaite*"), and 'solicit' a reduction in the price to be paid for the said performance.

This being said, the new regime continues to raise certain questions, including as to its implementation in practice.

"*Clauses pénales*": a simplified regime

Parties to a contract remain entitled to agree, in advance, on an amount that will be payable in the case of breach (so-called "*clause pénale*").

The parties cannot contract out of the powers granted to the judge to revise the amount agreed in certain cases (*i.e.* where the amount is manifestly excessive or derisory, as well as where the obligation has been performed in part).

On the other hand, there are aspects that the parties will need to consider when it comes to drafting a "*clause pénale*", including what happens if the loss actually suffered is higher than that which is compensated by the "*clause pénale*". In this respect, the Reform appears to introduce more flexibility than in the past.

Entry into force: some rules apply to situations that already existed on 1 October 2016

Contracts concluded before 1 October 2016 will remain governed by previous law. However and by way of exception, the Reform sets out some new rules that are applicable immediately as of entry into force of the Ordinance, *i.e.* on 1 October 2016, and which therefore can apply to situations that already existed at that time. This is the case of several provisions now entitling a person to request confirmations or the exercise of rights from another, within given timeframes (*i.e.* in relation to preference rights ("*pactes de préférence*"), the authority of representatives or actions in annulment of a contract). Moreover, there may also be questions concerning the application of the Reform in respect of other situations, *e.g.* where a framework contract was entered into prior to 1 October 2016 and implementation contracts are concluded after that date.

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