

ARTICLE

ARTICLE 1161 OF THE CIVIL CODE: SOON FREEDOM FOR LEGAL ENTITIES BUT NOT THE END OF ITS APPLICATION TO M&A TRANSACTIONS

Private Equity M&A | 25/05/18 | Julien Aucomte Virginie Desbois

Since its introduction through Order no. 2016-131 of February 10, 2016, enacting a reform of contracts law, of the general regime and of evidence for obligations (the "Order"), the scope of Article 1161 of the Civil Code, which, subject to invalidity, prohibits the same person from representing several parties to a contract and the conclusion of a contract between a represented party and his representative, has elicited many questions regarding the representation of companies.

Faced with the concerns raised by lawyers, Act no. 2018-287 of April 20, 2018, which ratifies the Order, modified this article so that the representation of legal entities would not be within its scope. This modification was introduced as of the first version of the ratification bill adopted by the Senate, and the parliamentary reports indicated that, "according to the Government, Article 1161 was first conceived to protect natural persons, but did not aim to call into question companies' practices."

The new version (containing the modifications reproduced below) will apply to instruments concluded or established as of October 1, 2018:

"In terms of representation of natural persons, a representative shall not be able to act on behalf of several parties to a contract with opposed interests. A representative shall not be able to act on behalf of the two parties to the contract or to contract on his own behalf with the represented party. In these cases, the executed instrument shall be null and void unless the law authorizes it or the represented party has authorized or ratified it."

We can infer the following insights from the new wording:


- regarding instruments concluded or established as of October 1, 2018, the fact that this article does not apply to the representation of legal entities is no longer in doubt: only the specific rules of corporate law will govern their representation and any conflicts of interest (notably conflicts related to regulated contracts);
- the prohibition against multiple representation will continue to pertain to natural persons
- however, as of October 1, 2018, multiple representation of several natural persons will be prohibited only if they have opposing interests; and
- in any event, a represented natural person will retain the possibility of explicitly authorizing or ratifying the multiple representation.

Must one conclude that lawyers in M&A transactions will soon no longer have to worry about application of this article? One must answer in the negative.

Indeed, application of this article will continue to be an issue when the same person represents several natural persons in a contract, for example, a sales agreement (involving natural person sellers), a shareholders' agreement or share purchase options (involving natural person managers). Will one be able to consider that these persons have the same interests and, consequently, may be represented by the same person in accordance with the new wording of this article? What about in case a clause is inserted designating a joint agent shared by several natural person parties for the purpose of implementing the contract, for example, the final determination of the price or the settlement of claims based on a liabilities warranty?

Indeed, Article 1161, as amended, does not define the notion of opposing interests. The legislative history points out that this concept, "is already known in the civil code, in particular in the comparable configuration of the property regime of minors or adults protected under guardianship or curatorship (see, e.g., Articles 383, 387-1 or 508 of the Civil Code)." Certainly, at the time of the contract's execution, the aligning of interests between the various natural person sellers or the managers seems to be able to be proven. Nevertheless, will this alignment of interests always be as evident throughout the life of the contract in case a joint agent is designated in charge of its management? In any event, if in doubt, the represented party will always be able to authorize the multiple representation in the power-of-attorney or in the clause designating the joint agent.

In addition, the scope of Article 1161 covers the performance of contracts. Consequently, its role should not be to apply to representation in general meetings involving the signing of minutes. However, in certain corporate forms [e.g., in the simplified joint-stock company (*société par actions simplifiée*) or the civil partnership (*société civile*)], collective decisions may result from the consent of all shareholders as expressed in an instrument. Must one consider that this document is contractual by nature and that, accordingly, Article 1161 applies if certain shareholders give the power to sign it in their name and on their behalf to the same shareholder[1]?



Lastly, so as to avoid confusion about the application of this article to representation of legal entities, the delegations of authority granted by the legal representative should be clearly drafted. Indeed, it is preferable to explicitly state that the agent acts in the name and on behalf of the legal entity, and not in the name and on behalf of the legal representative (natural person) of the company (even if the company gives a power-of-attorney to the agent in this capacity).

[1] In practice, however, if this process is used, it is preferable for each shareholder to sign directly.
