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NEW STEP TOWARD ADMITTING THE THEORY OF UNFORESEEABILITY INTO FRENCH LAW

Traditionally, the French courts have always refused to acknowledge the theory of "unforeseeability", i.e., the theory whereby the parties or the courts can, if necessary, revise or terminate a contract in the event of an unforeseeable change of circumstances (this has been standard case law since the "Canal de Craponne" decision in 1872).

Although there has not yet been a complete turnaround, some decisions have nevertheless, over the past few years, marked a shift in this case law to the extent of encouraging the parties to renegotiate the contract if the context has changed, not on the basis of unforeseeability but of good faith and fairness when the change of context would make the contract ruinous for one of the parties (Cour de cassation, Commercial Chamber, November 3, 1992; Cour de cassation, Commercial Chamber, November 24, 1998) or would at least expose it to serious difficulties (Court of Appeals of Nancy, Commercial Chamber, September 26, 2007).

A recent decision of June 29, 2010 handed down by the Commercial Chamber of the Cour de cassation appears to go even further: in this case, two companies, SEC and Soffimat, had entered into a 12-year industrial equipment maintenance agreement in 1998 providing for the payment of an annual fee. Since signing the agreement, the cost of the spare parts used by Soffimat for the maintenance had tripled to such an extent that the annual fee had become derisory. Soffimat asserted this change in the economic context as an argument to refuse to perform the agreement, which it deemed had become null and void. SEC sought an injunction against Soffimat to obtain the enforced performance of the agreement. SEC won the case before the first-instance and appeal court.

However, the Court of Appeal's decision was quashed by the Cour de cassation on the grounds that the Court of Appeal should have examined whether or not any "change in the economic circumstances […] had caused […] an imbalance in the contract's overall economy […] and thus denied Soffimat of valuable consideration for the commitments it had made."

Therefore, the Cour de cassation implicitly admitted the possibility for the judge to hold a contract null and void in the event of an unforeseeable circumstance.

However, the exact scope of this ruling still remains uncertain, namely because it has not been published in the official bulletin.

In any event, it would appear that the Cour de cassation is limiting the scope of the "unforeseeability" theory only to "extreme" cases where a change of economic circumstances does not simply disrupt the balance of a contract but actually rids a contractual obligation of valuable consideration and, accordingly, of its "cause".

It is worth noting that a proposed reform of the law of obligations is currently being examined and recommends introducing the theory of unforeseeability into the French Commercial Code (as this theory already exists in many European countries and in the USA) when an "unforeseeable and unsurmountable" change of circumstances makes performing the contract "excessively costly for a party". The current trends in case law should create a favorable context for this reform, which has been put off for several years now.

Sale of computers with pre-installed software – a case-by-case approach

After many long and hard debates on doctrinal issues, initiated namely by supporters of "freeware", the Cour de cassation eventually validated in a decision of June 5, 2008 the sale of computers with pre-installed software. The Cour de cassation indeed ruled that this practice did not qualify as a tie-in sale – prohibited by Article L.122-1 of the French Consumer Code – and stated that customers had the possibility of being refunded for any software they did not want.

More recently, the Cour de cassation (1st Civil Chamber, November 15, 2010) ruled on a case where the customer did not have the possibility of being refunded for the pre-installed software: the customer could get a refund for the entire purchase but not only for the software.

The Cour de cassation quashed the first judgment which had dismissed the consumer's claim for a refund of the software. The Cour de cassation asserted the principles laid down in a decision of the ECJ of April 23, 2009 and ruled that the judges should have checked whether the alleged commercial practice constituted an unfair practice within the meaning of Directive 2005/29/EC of May 11, 2005 before dismissing the consumer's claim. Now although the Cour de cassation does not necessarily consider the practice to be unlawful, it does however object to a general validation of practices where computers are sold with pre-installed software and invites the lower courts to make a case-by-case analysis.

Therefore, although selling computers with pre-installed software is not necessarily illegal per se, it may be invalidated by the courts (not on the basis of tie-in sales but on the basis of unfair commercial practices), particularly when customers are not offered the possibility of a refund of the software.

The professional seller's duty to provide advice – a "heightened" best-efforts obligation

In a landmark decision of October 28, 2010, the Cour de cassation (Civil Chamber) ruled that professional sellers are required not only to provide their customers with all useful information to help them make their choice but also to advise their customers on the appropriate choice depending on the particular usage they intend to make of the purchased product.

In this case, a couple had purchased terracotta tiles to go around their swimming pool. The customers did not however tell the seller how they exactly intended to use the tiles when they bought them. Once the tiles had been laid, they disintegrated.

An expert assessment found that this disintegration was not due to a defect in the tiles but to an incompatibility between the terracotta and the treatment for the swimming pool water. The lower court had dismissed the customers' claim for damages finding that although sellers have a duty to provide all useful information to their customers about the product and to advise them on their choices, customers also have a duty to inform the seller of how they intend to use the product they are ordering.

This decision was quashed by the Cour de cassation as it found that the seller's duty to provide advice implied it should "ask what the buyer's needs are so that it can inform the customer about whether the proposed object is appropriate for the use the customer intends to make of it."

The Cour de cassation therefore "heightened" the professional seller's duty to provide advice.

Mahasti Razavi, Partner

Florence Chafiol-Chaumont, Partner