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REFORM OF CONTRACT LAW AND OF THE OBLIGATIONS' GENERAL AND EVIDENCE RULES: THE ORDINANCE IS PUBLISHED

IT and Data Protection Intellectual Property, Media, and Art Law Competition, Retail and Consumer Law
Commercial and International Contracts | 19/02/16 | Mahasti Razavi Alexandra Berg-Moussa

The ordinance n° 2016-131 dated February 10, 2016 on the reform of contract law and of the obligations' general and evidence rules (the «Ordinance»), was published in the Official Journal dated February 11, 2016. Its provisions shall be applicable on October 1, 2016, subject to ratification by the Parliament within six months from its publication date.

The Ordinance will apply to contracts concluded after October 1, 2016, and contracts entered into before this date shall remain governed by the previous law, except for the provisions relating to interrogatory actions which will be applicable, as of October 1, 2016 but also to ongoing contracts concluded before this date.

Elaborated inter *alia* after a public consultation phase, the Ordinance aims at bringing simplification, clarification, balance and predictability in the life of a contract (from its formation to performance until termination), including by enshrining and codifying a certain number of adopted case law.

In particular:

The principle of **good faith** is being enshrined at the pre-contractual negotiation and contract formation phases (new articles 1104 and 1112 of the civil code). During the negotiation phase, « *The party who is aware of an information which is essential for the consent of the other party, shall inform such other party of the same insofar as the later legitimately ignores such information or trusts its co-contracting party* ». If the burden of proof of a breach of the information duty lies with the claimant party, such a breach of the information duty (which may not be excluded or limited contractually) may trigger the nullity of the contract on the ground of vitiated consent and the liability of the breaching party (new article 1112-1 of the civil code).

Regarding the **parties' agreement and intent to enter into the contract**, the Ordinance expressly deals with the touchy matter of an exchange of contradictory general conditions and confirms the well known case law solution of the cancellation of contradictory provisions. In this respect, new article 1119 of the civil codes specifies on the one hand that « *The general conditions invoked by one party are effective towards the other party only if they have been made known to and accepted by such other party* », and on the other hand that « *In case of contradiction between general conditions invoked by the parties, no effect shall be given to the provisions of the same which are incompatible.* ». In such case, the general principles of statutory law shall apply. In addition, « *In the case of a contradiction between general and specific conditions, the later shall prevail over the first* ». These provisions may be contractually modified subject inter alia to good faith and to a potential significant imbalance, which is introduced in the code civil with respect to non-negotiated contracts (contrats d'adhésion) (see below). Lastly, the case law principle according to which silence shall not amount to acceptance is also affirmed « *unless it results otherwise from the law, usages, business relationships or specific circumstances* » (new article 1120 of the civil code).

On the **conditions for the validity of a contrac**t, the former requirements of a « *subject matter that is certain* » and of a « *licit causation* » are replaced by a « *content that is licit and certain* ». The consent of the parties and their capacity to enter the contract remain applicable (new article 1128 of the civil code). Defects in consent remain the same: error, fraud and duress. The concept of « error on the mere substance of the thing » is replaced by the concept of « error on the essential features of the service » (and – we assume - of the thing). In order to protect the weak party, the Ordinance creates a new case of duress in the abuse of a state of dependency. Indeed, «*There is also duress when, abusing from the state of dependency of the other, one party obtains from the other a commitment which wouldn't have been obtained in the absence of such a constraint and is conveyed an obviously excessive advantage therefrom.* » (new article 1143 of the civil code).

Regarding the **content of the contract**, the Ordinance enshrines two major case law principles in prohibiting in the first place any provision that deprives one's essential obligation from its substance and, in the second place specifically regarding non-negotiated contracts (contrats d'adhésion), any provision which creates a significant imbalance between the rights and obligations of the parties (similarly as what already exist in the consumer code and in the commercial code). Such provisions shall be deemed unwritten (new articles 1170 and 1171 of the civil code). Noteworthy, the assessment of the existence of a significant imbalance shall not be based on the main subject matter of the contract or on the adequacy of the price to the service.

On the **binding effect of the contract**, the Ordonnance enshrines and introduces into the civil code the notion of frustration which allows one party to a contract to request a renegotiation to the other party if « *a change of circumstances, unpredictable when the contract was executed, renders the performance of the same excessively onerous for one party which did not accept to bear the risk deriving therefrom.*». The party requesting the renegotiation shall continue to perform its obligations during the renegotiation but, if the other party refuses to renegotiate or if the renegotiations fail, the parties may agree on the conditions under which the contract shall terminate or, together or at the initiative of one party, ask a judge to revise or terminate the contract (new article 1195 of the civil code). This revision mechanism by the judge is however not qualified as being mandatory in the Ordinance, which means that it can be set aside by the parties contractually or even further organized, similarly as what may already exist in practice by inserting « hardship » provisions in contracts.

Regarding **performance of the contract**, it is now possible for a party which suffers a breach of contract, after sending formal notice to the other party, to *inter alia*:

(i) seek specific performance, insofar as performance is possible and does not trigger tangible disproportion between the costs for the breaching party and its interest for the non-breaching party (new article 1221 of the civil code) ;
(ii) ensure performance itself or by a third party, at the costs of the breaching party without having to obtain prior authorization of the judge (unless if the non-breaching party wants to obtain an advance payment from the breaching party). The judge would then only intervene afterward, if necessary, if the breaching party refuses to reimburse the costs engaged by the non-breaching party (new article 1222 of the civil code) ;
(iii) accept incomplete performance and solicit a price decrease without having to go before the judge. The price reduction requested shall be proportionate to the incomplete performance concerned and if the non-breaching party has not yet paid the agreed price, it shall notify its decision to the breaching party within the best timeframe (new article 1223 of the civil code) ;
(iv) unilaterally terminate the agreement once again without having to go before the judge. This option, which was recognized by case law, adds to the possibility to proceed to a judicial termination of the contract. Thus, in the absence of a contractual termination clause, one part may now unilaterally terminate the contract for breach of the other party. The text provides that (a) except in emergency cases, there shall be a prior and clear notice to cure the breach within a reasonable timeframe, (b) the notice shall expressly mention the risk of sanction (termination of the contract) if the breach is not cured and (c) there shall be a new notice confirming the termination and the reasons for it, should the breach remain. Noteworthy, the non-breaching party shall be able to evidence the seriousness of the breach giving rise to termination in case of a claim by the breaching party, as the unilateral termination always occurs at the terminating party's own risks, which is specified in the first paragraph of the text and is compliant with current case law (new article 1226 of the civil code). Noteworthy also, the parties may always insert a termination clause in the contract specifying the obligations which, if breached, may trigger termination of the agreement (new article 1225 of the civil code).

The Ordinance creates **three interrogatory actions**, such mechanisms aiming at allowing one party to put an end to situations which may be ambiguous and at bringing greater legal security. The first one allows one to ask in writing to the beneficiary of a pre-emption agreement to confirm the existence of such an agreement and, if any, its intent to take advantage of it (new article 1123 § 3 and 4 of the civil code). The second one allows one to eliminate the doubts that may exist on the powers of the representative authorized to enter into an agreement, by asking the same to confirm in writing its due authorization (new article 1158 of the civil code). These two first actions are submitted to timeframes (which shall be reasonable) set forth by the party taking the initiative of the relevant interrogatory action. The third interrogatory action aims at allowing one party, facing a potential nullity of an agreement (provided the ground of nullity has ended), to ask that the other party confirms the contract or proceeds with an action for nullity. This action has for purpose of eliminating potential defects from a contract and is submitted to a 6 months' timeframe (new article 1183 of the civil code). Those different actions may be used, as from October 1, 2016, including for contracts concluded before such date.

Lastly, regarding provisions on the various **forms of evidence**, let's point out the new provision which specifies that a « reliable copy » shall have the same probative value as the original. If the reliability of a copy is left to the judge's assessment, the new article 1379 of the civil code provides for an irrefutable presumption of reliability regarding the enforceable or authentic copy of an authentic written document, and for a rebuttable presumption of reliability regarding all other copies « *resulting from an identical reproduction of the form and content of an act, which integrity is ensured in time through a process compliant with conditions that shall be set forth by a Conseil d'Etat decree* ».*/*.

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