ARTICLE

IN THE WAKE OF THE CONTRACT LAW REFORM, THE REFORM ON CIVIL LIABILITY IS UNDERWAY

| 28/10/16 |

Barely has the contract law reform entered into force (on October 1, 2016) than the one on civil liability is already being prepared. Indeed, the Ministry of Justice released a preliminary Bill on the subject and aims to submit it to Parliament before the next presidential election.

This reform, which seems to be consensual, should be introduced into French law regardless of the result of the 2017 presidential election.

While the preliminary Bill aims at codifying case law, it would also include innovations in the Civil Code, which are not favorable to the companies that will be targeted by liability claims.

I. Motivations behind the civil liability reform

To this day, only a few Articles of the Civil Code regulate contractual and tort liabilities. Those Articles have almost not evolved since 1804. Case law is therefore the main source of adaptation of the principles to changes in society, except in some specific fields (Ex.: 1985 Badinter Act on road accidents compensation; 1998 Act on defective products liability).

The preliminary Bill's first aim is therefore to codify case law principles in order to make them more accessible and understandable to citizens. The second aim assigned is to modernize provisions on compensation for physical injuries.

While both aims are desirable, a more controversial aspect of the reform is that it also purports to alter the balance of civil liability rules over defendants.

II. The issues raised by the civil liability reform

Several provisions of the preliminary Bill raise issues, especially those establishing civil fines and collective causation.

- **Civil fines**

The proposed new Article 1266 of the Civil Code creates a civil fine which may be ordered by the civil judge (and not the criminal judge) "*where the author of the damage deliberately committed gross misconduct, including where said misconduct generated a profit or saving for its author.*" The aim of this civil fine is clearly to condemn the author of a "lucrative wrongdoing", *i.e.*, misconduct which generates a profit for its author despite the compensation for the victim's injuries. It can happen in particular when there is an image infringement (Ex.: tabloids) or large-scale damage (especially in cases of competition law or consumer law breaches).

The new Article 1266 provides that, when the liable person is a legal entity, "*the fine may be set in an amount of up to 10% of the highest gross amount of worldwide turnover achieved during any of the past financial years*." The fine is allocated to a special compensation fund in connection with the type of damage suffered or, absent such fund, to the French Treasury (*Trésor public*).

The drafters of the preliminary Bill have in all likelihood been inspired by the French Market Authority (*Autorité des Marchés Financiers*, AMF) and the French Competition Authority (*Autorité de la concurrence*) sanctioning powers, even though the situations are different.

This provision of the preliminary Bill is problematic because it is similar, in its effects, to punitive damages. The fact that the fine is not allocated to the plaintiff does not constitute a sufficient safeguard against abuses. It is indeed likely that claimants requesting damages in a compensatory claim will also request a civil fine, mainly for strategic purposes. Faced with damages and civil fine claims, the defendant could then decide to negotiate in order to avoid the media and financial risks raised by the civil fine. These risks will indeed generally be disproportionate compared to the actual issues raised by the compensatory claim. This Article could therefore lead to *blackmail settlement* practices already seen in the United States.

- **Collective causation**

The new Article 1240 provides that "*When* [personal] *damage is caused by an undetermined member of a group of identified persons acting jointly or for similar purposes, each of these persons shall be liable for the whole damage, unless proof is offered that he cannot possibly have caused it.*"

It is a considerable broadening of case law about collective causation which is currently applied to accidents caused by collective sports (ex.: rugby) or leisure activities (ex.: hunting). In such cases, the French Supreme Court rules that where one cannot determine who exactly is the author of the damage, all members of the group are jointly and severally liable

towards the victim. To escape liability, they have to individually prove they did not cause the damage. Besides, recently the French Supreme Court applied the collective causation theory in the Distilbène case, in which the victim was not able to prove whether her mother took, during her pregnancy, princeps medicine or the generic medicine (*Cour de cassation*, September 24, 2009, docket No.08-16305). On referral, the Paris Court of Appeal found the manufacturers of the princeps and of the generic jointly and severally liable (Court of Appeal of Paris, October 26, 2012, docket No.10/18297).

The drafting of the new Article 1240 of the Civil Code will go beyond these limited cases by raising collective causation as a general principle of French civil law. If case law were to construe the expression of "*similar purposes*" broadly, this could lead to horizontal collective liability (Ex.: joint and several liability of competing companies marketing similar expendable goods, such as medicine, groceries, etc.) as well as a vertical collective liability (Ex.: joint and several liability of the companies belonging to a same group towards third parties).

In this context, it seems important that companies be aware of these considered evolutions and express their concerns to their institutional interlocutors.