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NEWSLETTER – OCTOBER 2016

FRENCH CONTRACT LAW REFORM: IMPACT ON NEGOTIATION AND DRAFTING OF CONTRACTUAL PROVISIONS

French Government has recently adopted an ordinance (*Ordonnance n°2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, which will enter into force on October 1st, 2016 – the "**Ordonnance**"), which modernizes, simplifies and reinforces attractiveness of French contract law. The reform, which codifies the main principles arising from French case law, will undoubtedly have a significant impact on negotiation and drafting of contractual provisions.

The **Ordonnance will come into force and be effective from October 1st 2016, and only for agreements entered into after October 1st, 2016**.

Key aspects of the reform, set out in the present newsletter (which shall not be considered as exhaustive), are the following:

- Recognition of legal obligations during the negotiation phase
- Strengthening of unilateral promises
- Enforcement of preference agreements
- Consequences of unfair contract terms
- Recognition of the doctrine of hardship
- Codification of remedies for breach of contract

✓ Recognition of legal obligations during the negotiation phase

• *Good faith*

The **obligation to act in good faith** during the performance of the contract is now expressly extended to the **negotiation of the contract**.

• *Wrongful termination of negotiations*

It will be expressly provided, in the French Civil Code, that the initiative, conduct and termination of pre-contractual negotiations are free, but must comply with the requirements of good faith. Therefore, **the French Civil code will provide for a right to damages in the case of wrongful termination of negotiations**.

• *Duty to inform*

Based on case law, the reform codifies a broad duty to inform, in any type of contract and for any party provided that (i) the information is "critical" to the consent of the other party and (ii) the latter, legitimately, ignores the relevant information or "trusts" the counterparty.

• *Confidentiality*

The reform introduces a **specific legal obligation of confidentiality during the negotiation phase** (although it will still be recommended, in practice, to negotiate non-disclosure agreements to specify the nature of the confidential information, the scope of the confidentiality obligation, the process of transmission, restitution, destruction of such information and the duration of the confidentiality obligation).

✓ Strengthening of unilateral promises

The reform, overturning a very criticized case law relating to breach of unilateral promise to sell (according to which, in the event the promisor revokes its offer to sell before the promisee exercises the option, the promisee can only claim damages and cannot seek to enforce the contract), now provides that **the revocation of the offer during the period granted to the beneficiary to exercise its option will not prevent the formation of the contract, the other party – the promisee – being entitled to enforce the contract**.

✓ Enforcement of preference agreements

The reform confirms French case law relating to remedies in case of breach of preference agreements. Where a party breaches a preference obligation to another party (e.g., obligation with respect to preemptive rights, rights of first offer or refusal), the defaulting party will be held liable. **Also, should any third party enters into an agreement with the defaulting party knowingly in violation of the other party's preference rights (i.e., provided the third party knew (i) the existence of the preference agreement and (ii) the intention of its beneficiary to rely on it), the beneficiary of the preference obligation may seek to have the judge cancel the agreement or substitute such party for the third party. Furthermore, the reform introduces a specific interrogatory action**, according to which the third party is allowed to make a written request, asking the beneficiary to confirm, within a reasonable time limit, whether a preference agreement in fact exists and whether the beneficiary intends to invoke it.

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✓ **Unfair contract terms**

The reform provides that, **in standard-form contracts, a clause creating a "significant imbalance" between the parties' rights and obligations may be considered as void by the courts** and hence be withdrawn from the contract.

Also, following French case law, the reform codifies the principle according to which **a limitation or exclusion of liability clause cannot be enforced if it empties the debtor's essential obligation of its substance**.

✓ **Recognition of the doctrine of hardship**

The reform, overturning the famous *Canal de Craponne* case law (rejecting the doctrine of hardship) now provides for a **right to renegotiate the contract, in the limited scenario of a change of circumstances unforeseen at the time of conclusion of the contract, which makes performance excessively more onerous for a party, and provided such party has not accepted to bear the risk**.

It is also now provided that a **party may unilaterally ask the judge to revise the contract in such case** – such mechanism significantly extending the role and powers granted to the judge.

✓ **Codification of remedies for breach of contract**

- ***Remedies***

The reform **codifies remedies for breach of contract and clarifies the circumstances**, previously set by case law, under which a creditor may either (i) suspend the performance of its own obligations, (ii) seek specific performance – *see details below*, (iii) seek a price reduction, (iv) terminate the contract or (v) seek damages.

- ***Exception to specific performance***

The non-defaulting party can request specific performance of the contract (*exécution forcée en nature*), subject to prior notice, **unless** such performance is impossible, or – and this is what has been introduced by the reform – **the cost of such performance is disproportionate in comparison to the interest for the other party**.

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The present newsletter is provided for information purpose only and is not designed to provide legal or other advise.