REFORM OF FRENCH CONTRACT LAW AND THE NEW ROLE OF THE JUDGE

The determination of the price, the occurrence of unforeseen circumstances during the duration of the contract and specific performance are significant illustrations of the extension of the role and power of judges.

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The French law of contracts, the provisions of which largely date back to the Civil Code enacted by Napoleon (1804) and which have evolved mainly through the creation of jurisprudence, has been modernized and updated with the objective of enhancing the attractiveness of French law in the international landscape. The guiding principles of the reform are to ensure (i) greater legal certainty, (ii) greater efficiency and (iii) contractual justice between the parties. Consequently, the reform also led to the modification and reinforcement of the powers of the judge who, under French law, traditionally did not interfere with the content of the contract.

The determination of the price, the occurrence of unforeseen circumstances during the duration of the contract and specific performance are significant illustrations of the extension of the role and power of judges.

1. DETERMINATION OF THE PRICE

For many contracts, determining the price at the time of its conclusion is difficult, even impossible.

In consideration of these economic realities, the new Article 1863 of the Civil Code makes clear that if the benefit is to be "*possible*", "*determined or determinable*", the price does not have to be fixed upon the conclusion of the contract .

a) In the absence of an agreement on the price by the parties, the contract being validly formed, the judge may be asked to define the price. As regards to the determination of the price, the case law has previously set forth the criteria for the judge to use.

These criteria are "*professional qualification*", "*the quality of the work performed*", "*the importance of the services rendered*" and the difficulty of carrying out the service. In addition to the above criteria, one can conclude that the French judge will also apply the UNIDROIT principles and the principles of European law which include the notion of "reasonable" price.

b) Where the law permits the price to be defined by the obligee-creditor (framework and services agreements), the judge will be in charge of the control of the price and, in the case of a framework agreement, the termination of the contract may be submitted to the judge.

The law expressly provides for the possibility of unilateral pricing by the obligee-creditor with respect to framework and service agreements. In the case of a framework agreement, if the price determined by the obligee-creditor is challenged by the obligor-debtor, the law provides that the obligee-creditor must justify the price and if the obligor-debtor considers the price abusive, the latter may refer the matter to the judge for damages. Where appropriate and when a framework contract is inherently a successive contract, the judge may also be asked to terminate the contract.

As regards to contracts for the provision of services, where the price is not fixed prior to performance, the judge may also be requested to determine damages in case of abuse.

The role of the judge is thus clarified and French law becomes more coherent, thereby inducing the parties to obtain an agreement on the essential elements of the contract, failing which they submit to the judge the determination of the contract price.

2. UNFORSEEN CIRCUMSTANCES

Contract professionals have long introduced in their drafting the so-called "hardship" clause intended to allow the evolution of contractual provisions in the event of a circumstance extremely disruptive to the contractual balance.

This concept of unpredictability and its consequences is now established in French law by Article 1195 of the Civil Code.

The law defines an unforeseen circumstance, one that allows a contracting party to request the renegotiation of the contractual terms and eventually its termination, as an event (i) unpredictable at the conclusion of the contract and (ii) which renders the execution of the contract excessively onerous (thus excluding the mere temporary difficulties and predictable events) for a party (iii) who did not accept to bear such risk.

Once again, if the parties do not reach an agreement either on the renegotiation of the contract or the cancellation thereof, the judge may intervene.

In order to reconcile the contract, either of the parties may ask the judge to revise the contract or fix the date and conditions for its termination.

One could assume that the same criteria set out above for the determination of price by the judge may also be used by the judge to reconcile the contract, albeit with the assistance of an expert to assess the economic implications arising from the unforeseen event.

This new provision does not seem to be mandatory and the parties may exclude or adjust the intervention of the judge.

3. SPECIFIC PERFORMANCE

In order to ensure a greater efficiency of the contract, the new law also codifies the possibility for a non-defaulting party to obtain from the judge an injunction that requires the defaulting party to perform the obligation as it had been contractually provided for, or to have the obligation fulfilled by a third party under the supervision of the judge.

The only condition for such specific performance is that it requires the non-defaulting party to give formal notice of the obligation to perform.

The law makes a particular application of this specific performance, in terms of promise to perform, putting an end to many jurisprudential uncertainties. It is no longer possible to retract the promise to perform during the period given to the beneficiary to choose.

There are, however, two exceptions to specific performance:

- If execution is impossible

- If there is a clear disproportion between the cost of performance and the interest for the non-defaulting party

Finally, the judge may be asked to substitute for the original obligee-debtor with another obligor-debtor who will perform the contractual obligation.

The judge is thus the guarantor of the effectiveness of the contract, effectiveness realized by the performance of the obligation. According to the judge's use of this concept of disproportionate cost to the obligee-creditor, the theory of "*the efficient breach of contract*" may finally make an appearance in French law.

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In conclusion, the emergence and codification of the judge's powers give French law greater legal clarity and security and sheds light on the possible role of the parties and the role of the judge.

These changes lead to contractual virtue by clearly specifying the consequences for imprecise drafting, and encourages reasonable negotiation - possibly under the guidance of a chosen mediator - failing which, the parties risk being relieved of control of the contract.

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Guillaume and Marie are members of the Commercial Litigation team, providing counsel and representation in strategic litigation concerning commercial, corporate and economic law, particularly in crisis situations. Recognized for our strong expertise in industrial risk management and complex technical conflicts in regulated activity sectors, product liability and environmental litigation, we also have extensive experience in cross-border dispute resolution, including ADR.

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[1] This rule does not apply to a certain number of particular contracts and notably to sales.