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Newsletter Business Litigation & Contract Negotiation *November 2017*

BREAKING NEWS: The Reform of French Contract Law

Last October 17th, the French Senate considered the draft ratification of the ordinance of **10 February 2016** reforming contract law. Some of the proposed modifications merely improve the text while others, on the contrary, raise some issues:

- Modification of the definition of the contract of adhesion introduced by the ordinance: the Senate proposes excluding **the reference to terms and conditions** in order to define it as a contract that "*includes* ***non-negotiable clauses, unilaterally***".
- Modification of the provision concerning the remedy of damages for fault during the negotiations: whereas the ordinance followed the "Manoukian" case which provides that damages for 'fault' committed during the negotiations cannot be aimed at "*compensating for the loss of expected 'advantages' from the contract not yet concluded"*, the Senate proposes adding that there can be no compensation for "***the loss of opportunity to obtain such 'advantages'"***.
- Modification of the definition of "deceit by omission": defined by the ordinance as "*the intentional concealment by one of the contracting parties of information* ***which he knows is essential to the consent of the other party***", the Senate proposes to define it as the information that "[one party] *should provide to the other* ***as required by law***".
- The removal of the new power of judicial review of a contract in cases of unforeseen circumstances, thus giving the judge only the possibility to cancel the contract by judicial annulment.
- Regarding the application of the law in time, the Senate specified that the rule according to which contracts concluded before 1st October 2016 are subject to the previous legislation, **also applies to their legal effects and the provisions of public order**.

It is now up to the French National Assembly to examine the version adopted by the Senate. To be continued…

Link to an article from the ***French Senate's website***

DISCOURSE ON THE METHOD: The Court of Appeal examines the assessment of economic harm

The questions concerning the assessment of economic harm are frequently encountered by all practitioners, whether they are a magistrate, a judge, a lawyer, an in-house attorney, an economist, a chartered accountant, faced with evaluating the difficulties and diversity of economic damage.

They are also often debated in texts or at conferences. However, it appears that practitioners do not have enough shared operational tools to determine the amount of compensation for economic damage.

Chantal Arens, first president of the Court of Appeal of Paris and Muriel Chagny, Professor at the University of Versailles-Saint-Quentin-en-Yvelines, envisioned, after a colloquium that was held at the Paris Court of Appeal on 22 September 2016 entitled "*The judge and the company: what perspectives for the compensation of economic damage?*" creating a **working group to initiate ideas aimed at improving these tools** and in particular to write methodological factsheets on the reparation of economic damage.

A first collection of fact sheets with a pedagogical purpose is now available to practitioners. Michel Jockey has actively participated in the efforts of this working group, composed of magistrates, Professors of Law, lawyers, economists and financial experts.

Link to the ***Court of Appeal's website and the fact sheets***

Autonomy, also the attribution clause

Several parties had entered into a partnership agreement, which contained a jurisdiction clause in favor of the Paris Commercial Court. This agreement was declared null and void. Pursued for unfair competition on the basis of this agreement, one of the former shareholders challenged the jurisdiction of the Commercial Court of Paris, availing itself of the lapse of the agreement to rule out the application of the jurisdiction clause.

The Court of Cassation confirmed the appeal decision which rejected the challenge, noting that "***the attributive clause, because of its autonomy in relation to the main convention in which it is inserted, is not affected by the ineffectiveness of the act***".

By this judgment, the Commercial Chamber aligns its precedent with that of the First Civil Chamber (*Civ. 1ère, 8 juil. 2010, n°07-17.788*) and recognizes the autonomy of such a clause that survives independently of the contract.

Link to ***Com., 5 juillet 2017, n°15-21.894***

The breach: international one day, contractual forever

After being assigned by its French distributor to the Commercial Court of Paris for the abrupt termination of their established business relationship (Art. L.442-6 I 5° of the French Commercial Code), the Belgian manufacturer challenged the jurisdiction of the French court in favor of the Belgian courts, relying on the provisions of Article 5.1 (b) of Regulation EC No 44/2001 which provides, in contractual matters for the sale of goods, that jurisdiction shall be the place of delivery.

The **Court of Cassation confirmed this positon and, in faithfully applying European provisions and CJUE case law** (CJEU, 14 July. 2016 C-196/15, Granarolo), found that the action for sudden termination of established commercial relations – even tacit – is not tortious but of a contractual nature. It further found the French courts to be incompetent in favor of the Belgian courts since, in the present case, the place of performance of the obligation, in terms of the sale, was the place of delivery in Belgium.

Link to ***Com., 20 sept. 2017, n°16-14.812***

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Suspected of unfair competition, a general insurance agent was summoned before the magistrate on the basis of Article 145 of French Civil Procedure Code for the disclosure of documents. The defendant contested the measure on the basis of business secrecy and asked instead for a forensic expertise to be conducted by a third-party subject to professional secrecy.

The Court of Cassation censored the appeal decision which dismissed the request for forensic expertise, reproaching the trial judge for not having checked whether the investigative measure entrusted to a third party subject to professional secrecy was proportionate to the plaintiff's right of proof and the preservation of the defendant's business secrets.

This decision of principle brings a new piece of jurisprudence on the measures that can be ordered on the basis of Article 145 of the Code of Civil Procedure and their possible development in order to preserve the secrecy of business, knowing that the jurisprudence considered that business secrecy did not constitute an independent defense (*in this respect* ***"About Article 145 of the Code of Civil Procedure: a modern tool for access to evidence", Michel Jockey, Petites Affiches***).

In fact, judges will now have to carry out **a proportionality check between the law of evidence and the preservation of business secrecy.**

Link to ***Civ. 1ère, 22 juin 2017, FS-P+B, n°15-27.845***

The bank folds but does not break

A bank renewed several credits given for several years, passing from an indefinite duration to definite. At the end of the term, the bank denounced all credits and asked the company to reimburse the debit balance of current accounts. The company and its guarantors assigned the bank liability for abusive and unfair breach of credit and nullification of sureties.

In addition to the rejection of the request for a declaration of invalidity, the Court of Cassation dismissed the action for liability noting that, on the one hand, the contract for limited duration, which at the time of the renewal replaced the contract of indefinite duration, was terminated "*by the occurrence of its term*" without the need to comply with a notice.

On the other hand, the Court underlined that the decision to terminate a credit "*is discretionary*", exclusive of liability and that the renewal of credit for a term which is no longer indefinite but determined, "*to which it terminated with notice, is not on its own likely to characterize the existence of a promise to extend credit beyond the term*"

Finally, the Court decided that **the provisions relating to liability for the abrupt termination of an established business relationship** (Art. L.442-6 I 5° of French Commercial Code) "***do not apply to the termination or non-renewal of credits granted by a credit institution to a company, an operation exclusively governed by the provisions of the Monetary and Financial Code***"

Link to ***Com., 25 oct. 2017, FS-P+B+I, n°16-16.839***

IN THE PIPES: a preliminary draft reform specific to special contracts

Last June 26, the Association Henri Capitant presented to the Chancellery **a preliminary draft law on special contracts reform**.

These proposals aim at renewing and adapting the material, the codification of which has not changed since 1804, taking into account the economic importance of special contracts and the imperatives of "*accessibility*" and "*intelligibility*". Some of these proposals deserve to be highlighted.

A title dedicated to special rights and obligations

In addition to the rules on special contracts, the preliminary draft proposes **introducing a new title dedicated to special obligations**.

Different types of contracts, whether named or unnamed, provide identical or similar obligations, such as the obligation to deliver, the obligation of restitution, or the personal right to quiet enjoyment, **which this set of rules would provide.**

Adaptation of the rules on the right of sale

The preliminary draft proposed amending the provisions on the right of sale include:

- **Restriction on the sale of other person's property by resolution** (no longer by nullity as is the case today)
- **Amendment to the duration of legal guarantee on latent defects**: 2 or 5 years from the delivery of goods depending on whether or not the seller was aware of such defect (instead of 2 years from the vice detection).

Dedication of the service contract

Hitherto forgotten in favor of lease of work, the service contract would have a dedicated title.

One chapter deals with certain forms of service contracts: transport contracts, brokerage and realization of a good (i.e. currently leased). The professionals of this subject area are already opposed to these proposals.

If the initiative of the Association Capitant responds to the need for obvious reform, it remains to be seen whether the Chancellor will decide to make it a bill.

*Link to **preliminary draft reforme***

DEEP LEARNING: Be present at the appeal

Several decrees, entered into force last May 11th and September 1st, recently modified certain rules of civil procedure, significantly impacting the management of the litigation. Here are some tips to avoid the main pitfalls.

End of the general call

Henceforth, "*the appeal places before the court the knowledge of **the points of decision it expressly criticizes** and those who depend on it*". Therefore, it is no longer possible to make a "total appeal" (Article 901 of French Civil Procedure Code) (except to obtain the annulment of the judgment provided that the subject of the dispute is indivisible).

New time limits applicable to the short circuit

The short-term circuit applies to cases of an urgent nature, as well as, henceforth, to the appeals of interim orders or in the form of interim measures and to the orders of the pre-trial judge terminating proceedings and allowing a provision (Art. 905-1 and seq of CPC).

Previously, the registry freely fixed the time limits in cases of short circuit according to the backlog of cases.

Henceforth, the appellant and the respondent each have, successively, a **one month period** to regularize their conclusions. This same period of one month applies, in the event of cross-appeal or provoked, for the conclusions of the voluntary or forced intervener or for the service of the conclusions to parties who are not represented by counsel.

New requirement to present all claims

Parties should present, from their first conclusions, "all their claims [lawsuit] on the merits", under penalty of inadmissibility, *ex facio* (Art. 910-4 of CPC). This does not seem to apply to the legal and factual grounds for the claims, which may be developed throughout the proceedings.

It will be possible to reply to opposing conclusions and exhibits, or in the event of revelation of a new fact or subsequent intervention of a third-party (Art. 564 of CPC)

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It should be noted in particular that, (**i**) the "contredit" is removed, (**ii**) the time limits for concluding from the long circuit are harmonized and (**iii**) new time limits are provided for in a post-cassation referral procedure.

In conjunction with Council, it will be necessary from the first stages of the Notice of Appeal to exhaustively determine the points of decision of first instance to be criticized, but also to react quickly in case of appeal of an interim order (short circuit). Moreover, it will be necessary, from the first set of conclusions, to define all of your claims.

*Link to **Decrees of 6 may 2017 n° 2017-891** and **n°2017-892***

IN BRIEF: The DGCCRF, the legal calculator

In accordance with Article L. 112-5, first paragraph of the French Consumer Code, the professional can now **request the DGCCRF to take a formal position on the conformity of consumer information on prices** using a downloadable form since October 1st, 2017 on its website (***www.economie.gouv.fr/dgccrf***) or ***www.service-public.fr***.)

This preliminary and optional formality will protect professionals from a change of appreciation of the DGCCRF.

ALTANA NEWS

Recent Events

- **13 June**: G. Forbin and M. Davy hosted a workshop on credit fraud with growth entrepreneurs. For more *Link to the **video***
- **20 July :** V. Lafarge-Sarkozy and J. Balensi hosted a breakfast on the reform of civil procedure
- **4 September :** "*About Article 145 of the Code of Civil Procedure : a modern tool of access to evidence*", Michel Jockey, Petites Affiches – No.176 *Link to the **article***
- **18 September** : G. Forbin, C. Lapp and S. Smatt co-hosted with the Association Capitant a conference on the "*Blockchain and Civil Law*"
- **25 September**: *"Cyberattack: the managers face their responsibility"*, V. Lafarge-Sarkozy and C. Hamouda in les Echos.fr *Link to **the article***.

Upcoming Events

- **November 2017:** publication of the first specification of the Commission on cyber risk, V. Lafarge-Sarkozy and C. Hamouda take part on "*Cyber risk insurance*".
- **28 November:** breakfast on the reform of civil procedure, hosted byV. Lafarge-Sarkozy and J. Balensi. ***To register***
- **6 and 7 December** : G. Forbin and M. Davy will participate in the Legal-Tech forum in Paris

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