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Newsletter Business Litigation & Contract Negotiation

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BREAKING NEWS : Creation of the International Chambers of the Paris Commercial Court and the Court of Appeal

On **February 7th, 2018**, two agreement protocols were signed by the French Ministry of Justice together with the Paris Bar Association, the Paris Commercial Court and the Paris Court of Appeal, which provide for the creation of a new chamber dedicated to International commercial matters within each Court.

Paris provided itself with the tools needed to assert itself as a leading center for cross-border commercial dispute resolution. Judges and clerks assigned to these specialized chambers will be proficient in English, qualified to work on *Common law* issues and sensitized to the subtleties of international litigation. Judges will apply the law governing the dispute.

Despite the ordinances of Villers-Cotterêts, the parties will be able to plead, testify and proceed to depositions in English. Exhibits may also be circulated in English without translation and simultaneous translation will be implemented during the hearings. The judge will issue a ruling in French, accompanied by a translation.

As a result, Paris's attractiveness as an international legal center has been boosted.

*Link to **the Court of Appeal's Protocole** and **the Commercial Court Protocole***

IN THE PIPES : UNCITRAL develops a Convention and a Model Law governing the enforcement of international mediated settlement agreements

Despite the continued growth of mediation and conciliation, the UNCITRAL (United Nation's Commission for International Trade Law) reported a hurdle to the development of alternative dispute resolution. In fact, « *the enforcement of settlement agreements resulting from international commercial conciliation/mediation can be more difficult than the enforcement of arbitral awards"* (Note, 62nd session, February 2015).

In **2014**, the UNICITRAL therefore tasked the **Working Group II – Dispute resolution** with considering the development of an instrument enabling the enforcement of cross-border international mediated settlement agreements.

As it stands after its 68th session, held in New York between February 5-9, 2018, the Working Group II has put forward (**i**) a draft convention (**ii**) a draft of a revised version of the UNCITRAL model Law on international commercial conciliation focusing on :

- The enforcement of settlement agreements reached through international commercial mediation or conciliation ; and
- The possibility for a party to raise the existence of such agreement as a defense against any claim, in order to prove that the matter has already been settled.

The two projects should now be examined in order to be completed by the Commission during the next session taking place between June 25th and July 13th. Afterwards, they will need to be adopted by the Member States. *Link to the **68th session Note, Feb. 2018***

WE PRETORIANS: An eye on case law

Nullity of a transfer of shares for derisory price

A spouse transferred shares of a company (*société civile immobilière*) to his wife in return for shares of a commercial company she sold him. A couple of years later, the wife transferred him back the shares of the company for a very low price, without receiving any shares of the commercial company in exchange. The aggrieved spouse claimed the nullity of the second transaction on the grounds of derisory price.

Besides denying the dismissal of the claim regarding the statute of limitation, the French Supreme Court (*Cour de cassation*) **assessed the balance sought by the parties** within the first transaction and **found that the second transfer was agreed for a derisory price because it did not fulfill the main consideration: a mutual transfer of shares.**

One should address the issue of the derisory nature of a price in light of the contractual balance of the transaction more broadly.

Link to ***Cass. Civ. 3rd, Nov. 30th 2017, n°15-22.861, FS-P+B+I***

Agreements can contravene the statutory evidentiary system: there is no absolute presumption

A licensee was sued for wrongful termination of a license agreement.

According to the license agreement, the licensee was given fifteen days, starting on the day the software was delivered, to report any dysfunction. The licensor considered, in the absence of any notification within the time limit, that the software had been regularly accepted.

The Supreme Court ruled in favor of the licensor who denied the compensation and termination claims of the licensee considering that "***Agreements governing evidence are valid when they address available rights***" and that "***no absolute presumption can benefit a co-contracting party*****".**

The jurisprudence thus uses the wording of the new article 1356 of the Civil Code, provided by the Feb. 2016 reform renewing the law of obligations, in the context of an agreement bound prior to its entry into force.

Link to ***Cass. Com., Déc. 6th 2017, n°16-19.615, FS-P+B***

Attempt at conciliation: the mandatory precondition cannot be fixed when the case is pending in Court

An entrepreneur filed a claim against a client in order to obtain the payment of the holdback and additional work. The supervisor was called in warranty.

The supervisor claimed that recourses against the guarantor must be dismissed because the contractual precondition ordering to refer to the architects' regional council first was not satisfied.

The Supreme Court overturned the ruling of appeal. The Court of Appeal denied the breach of the contract, analyzing the clause as a simple request of advisory opinion, subject to rectification throughout the pending action, instead of a mandatory conciliation procedure.

In order to overturn the decision of appeal, the Supreme Court maintained its anterior position (Cass. Mixte, Feb. 14th. 2003, n°00-19.423) and judged that **the non-compliance with the clause implementing a preliminary and mandatory conciliation procedure precludes the possibility of taking any legal action** (Art. 122 and 126 CPC). **One can not comply with the preliminary duty during the pending action.**

Link to ***Cass. Civ. 3rd, Nov. 16th 2017, n°16-24.642, FS-P+B***

Discovery measures for a dispute regarding practices restricting competition

A franchisee reported his co-contractor's practices (**i**) resulting in or attempting to result in his submission to duties creating a significant imbalance between the rights and duties of the parties (Art. L 442-6, I, 2° of the French Commercial Code) and (**ii**) generating anticompetitive effects (Art. L. 420-1 of the French Commercial Code). Based on the foregoing, the franchisee was allowed by the President of the Grenoble Commercial Court to seek discovery in anticipation of the trial ("mesures d'instruction *in futurum*"). The franchisor appealed the procedural order in front of the Grenoble Court of Appeal.

The Supreme Court approved the decision of appeal and ruled in favor of the franchisor. In order to request discovery measures on the ground of practices restricting competition, **one should bring its legal action in front of the specialized first instance Courts.** (Art. D. 442-3 and R. 420-3 of the Commercial Code).

Link to ***Cass. Com., Jan. 17th, 2018, n° 17-10.360, P + B + I***

Failing to provide the disputed points of the judgment in a statement of appeal results in nullity

As of Sept. 1st, 2017, statements of appeal must provide "*points of the judgment specifically disputed, framing the appeal, unless the appeal tends to annul the judgment or if the matter in dispute is indivisible*" (Art. 901 CPC).

In response to three requests of advisory opinion, the French Supreme Court ruled on the nature and status of the sanction incurred by a statement of appeal challenging the entire judgment without expressly stipulating the disputed points of the decision (whenever the appeal does not aim at the annulment of the judgment and the matter in dispute is not indivisible).

The Supreme Court indicates that such default is a **defect of form resulting in nullity** according to article 114 CPC. A new statement of appeal, within the statute of limitation to which the appellant is subject in order to file its brief, would fix the defect.

Link to ***Cass. Avis, Dec. 20th, 2017, n°17-70.034, n°17-70.035, n°17-17-70.036, P+B***

Discourse on the method : latest Courts' clarifications regarding wronfgul termination of trade relations

Here are the latest clarifications provided by the French Supreme Court and the Paris Court of Appeal, which has statutory jurisdiction over this subject-matter:

Regarding the scope: Article L. 442-6, I, 5° of the French Commercial Code does not apply to:

- Commercial agents and to any supplementary services they would provide (Cass. Com., Oct. 18th, 2017, n°15-19.531) ;
- Termination of loans (Cass. Com., Oct. 25th, 2017, n°16-16.839) ;
- Relations between companies of a same cooperative (Cass. Com., Oct. 18th, 2017, n°16-18.864).

Regarding the existence of long-term trade relations:

- **Reminder of the rule**: "*Establishing the long-term, regular, significant and stable nature of the existing business relation between the trading partners presupposing the ongoing relation*" (CA Paris, Sept. 20th, 2017, RG n°16/04711)
- **The established nature of the relation** cannot stem from the only contract agreed for a fixed-term of 10 years that has not been extended or renewed (CA Paris, Sept.20th, 2017, RG n°14/21611)

The length of the statutory notice must be assessed with respect not only to the duration of the relation and the professional agreement but also (**i**) to the economic dependency, (**ii**) the difficulty to replace the terminating partner by a similar partner on the market, (**iii**) the traded product's notoriety, (**iv**) the lack of equivalent, (**v**) the characteristics of the relevant market, (**vi**) the hurdles to industrial conversion regarding the length of the notice and costs of entering a new relation , and (**vii**) the importance of the investment undertook for the relation, neither yet depreciated nor convertible (CA Paris, Nov. 22nd, 2017, RG n°15/18782).

Regarding the amount of damages: It must be assessed with regards to **the variable costs margin** (CA Paris, Oct. 11th, 2017, RG n°15/2258 and CA Paris Oct. 18th, 2017, RG n°15/18283; see also drafts of the Court of Appeal relating to economic damages).

Regarding the exemptions grounds:

- **When the termination is due to an economic crisis**, the French Supreme Court states that "*a payer cannot be compelled to maintain his level of activity toward his subcontractor, whereas the market is decreasing*" and "*the payer cannot be held liable for cutback of incoming orders* […] *due to a market crisis*" (Cass. Com., Nov. 8th, 2017, n°16-15.285).
- **In case of serious misconduct of the co-contractor**, regardless of the formalities governing the termination, which would tend to restrain the breaches entitling to termination (Cass. Com., Nov. 8th, 2017, n°16-15.296).

DEEP LEARNING: Updates regarding the implementation of a newly passed law over time.

"Law only applies to the future and can have no retroactive effect ". According to the article 2 of the French Civil Code, a new law shall only govern forthcoming events, occurring after it comes into effect. Accordingly, it does not apply to prior situations. In contractual matters, the preponderance of the expectations of the parties implies to leave the contract under the law in effect at the time of the agreement. In other words, the new law would not have any effect on past agreements.

Even though the new law should bypass the contract, by way of exception, it can affect pending contracts.

The issue deserves even more attention regarding the new French law governing obligations, passed on February 10th, 2016, whose ratification gives rise to heated discussions. Should the new law apply to pending contracts?

This is not the position of the ordinance. The transitional provisions maintain the application of the old law, except for minor exceptions pertaining to "*actions interrogatoires*".

The foregoing provisions haven't kept several bold judges from applying the new law in advance, pretending they interpreted the old law in light of the reform, pointing out the public policy nature of a provision or referring to the notion of "statutory effect of the contract".

Ultimately, one must be very wise to assert that a contract signed prior to October 1st, 2016 escapes the authority of the new law. The stakes are however pretty high when it comes to doctrine of hardship, price decrease or enforcement of clauses resulting in « significant imbalance » in pre-formulated standard contract**.**

The Senate suggested, at the time the ratification law was being examined, to specify that the reform would not apply to contracts signed after it entered into force "*including to their statutory effects and to public policy provisions*".

This precision was at first perceived as useless by the National Assembly, which considered that the immediate implementation of several provisions by the Courts would contradict the spirit and letter of the law.

Fortunately, by the time of their second reading, the representatives endorsed the Senate position. The ratification law will eventually provide that the new law does not apply to pending contracts, including to their statutory effects and public policy provisions.

Has the darkness been dispelled? Far from it: Such provision will not keep the judge from applying the new law in advance by reading it in light of the new one. Caution is therefore advisable! *Link to **Dossier législatif de la réforme***

IN BRIEF: Publication of the "*Block chain*" ordinance

French law provides a set of rules governing the "*Block chain*"or "*shared software platform for digital assets*" enabling "*participants to a network to agree to transactions without the intervention of a central body* " (GD Public Treasury, Public consultation discussing the project of law pertaining to the Block chain, March 24th, 2017).

From now on, the issue or transfer of securities will be analyzed as a registration on financial securities account (Art. L. 211-3 of the Monetary and Financial Code).

The ordinance will come into effect with the publication of the decree implementing the ordinance, on July 1st, 2018 at the latest.

Link to the ordinance n° 2017-1674, Dec. 8th, 2017

ALTANANEWS

Récent :

- **December 4th**: "Wire transfer fraud: Watch out!" G. Forbin's article, published in Croissance Plus. *link to the **article***
- **January 18th, February 14th**: The Lawyer's Club ("Club des juristes") set up a press conference followed by a debate for the issuance of the Report "*Insuring the Cyber Risk"* by the Cyber Risk Commission, within which V. Lafarge-Sarkozy acts as General Secretary *Link to **the Report***
- **February 1st**: V. Lafarge-Sarkozy and P. Goossens co-hosted together with M. C. Torrisi, lieutenant-colonel, chief of the "economic security and company protection" section of the Gendarmerie nationale, a breakfast seminar on "*Cyber criminality : How to hedge against the risks ?"*
- G. Forbin is a member of the Commission reflecting on mediation, created by the Lawyer's Club ("Club des juristes") and the Center for mediation and arbitration (CMAP), whose report will be published in 2018.
- **February 9th**: V. Lafarge-Sarkozy took part in the closing plenary session of the 'AMRAE's Annual Risk Meetings, where she spoke about artificial intelligence.
- **February 9th**: Pr. L. Thibierge lectured the judges of the Aix-en-Provence Court of Appeal on the new French contract law.
- **March 8th**: V. Lafarge-Sarkozy spoke about administrator's liability at the Administrator's Circle ("Cercle des Administrateurs").
- **April 5-7**: G. Forbin, G. Gaillard and J.-N. Soret participated in the Spring Campus hosted by Croissance Plus.

Upcoming :

- **May 14th**: Pr. L. Thibierge co-organizes, together with the Legal Professions Club ("Club des Métiers du Droit"), a conference about "*Reforming the reform*" of the French law of obligation.
- **May 15th**: V. Lafarge-Sarkozy and Benjamin Dors organize a breakfast on administrator's liability
- **June 14th**: Pr. L. Thibierge will speak on the topic "*Judge's power and revision of the contract*" within the conference "*Private law and Administrative law contracts*" hosted by Paris-Saclay University under the direction of Pr. D. Houtcieff.

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