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Reform of French contract law - Ratification Law published on April 21, 2018: General Presentation

Ordinance n°2016-131 of February 10, 2016 for the reform of contract law, the general regime of obligations and proof of obligations came into force on October 1, 2016. This reform was primarily aimed at codifying established and settled case-law principles but it also introduced new legal concepts and obligations.

Law n° 2018-287 dated April 20, 2018 - which ratifies the aforementioned Ordinance - was published in the Official Journal on April 21, 2018. This Law does not only ratify the February 10, 2016 Ordinance. It also brings about a number of changes. Some of them are quite significant, others without any real impact. Most of these changes will become effective on October 1, 2018 but some others will apply retroactively as from October 1, 2016.

Ordinance n°2016-131 of February 10, 2016 for the reform of contract law, the general regime of obligations and proof of obligations came into force on October 1, 2016^[1].

Before this reform, the provisions of the French Civil Code on the general law of obligations had little evolved

since 1804, thereby leading to an abundant case-law, a true source of law, designed to clarify, supplement and modernize statute law by taking into account the evolution of lifestyles, morals, technologies and practices.

As such, the reform had basically the effect of restoring statutory law to its rightful place, by making it more accessible and predictable in order to guarantee modernity and legal certainty.

One year and a half after the entry into force of this reform, the French Parliament eventually passed the Law that ratifies the February 10, 2016 Ordinance (the “Law”).

This was the opportunity to correct the “shortcomings” of the reform denounced by legal practitioners.

Discussions revealed disagreements between the Senate and the National Assembly on the changes that the Law was to bring about. The joint committee (i.e. a committee composed of an equal number of members from both Chambers) reached an agreement on March 14, 2018.

The Law makes a distinction between two types of changes incorporated into the French Civil Code as a result of the reform.

It brings about so-called “interpretative” amendments that will apply retroactively as from October 1, 2016 and substantial amendments that will become effective only as from October 1, 2018.

1. **Substantive amendments**

Article 16 of the Law specifies that such Law will enter into force on October 1, 2018. The substantial amendments brought about by this Law will only apply to contracts entered into after October 1, 2018. Contracts entered into before that date will continue to be governed by the provisions that were incorporated into the French Civil Code as a result of the February 10, 2016 Ordinance.

The table below identifies the substantial amendments, brought about by the Law, that will become effective on October 1, 2018. Changes appear in red.

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Article of the French Civil Code in force prior to October 1, 2016

Article of the French Civil Code in force from October 1, 2016 to October 1, 2018

Article of the French Civil Code in force as from October 1, 2018

No pre-existing provision

Art. 1110. - A bespoke contract is one whose provisions are freely negotiated by the parties. A standard form contract is one whose general terms and conditions, *excluded from negotiations, are determined in advance by one of the parties.*

Art. 1110. - A bespoke contract is one whose provisions are **negotiable** by the parties. A standard form contract is one that contains a set of **non-negotiable clauses** determined in advance by one of the parties.

No pre-existing provision

Art. 1117 - An offer lapses on the expiry of the period fixed by the offeror or, if no period is fixed, at the end of a reasonable period. It also lapses in the case of incapacity or death of the offeror.

Art. 1117 - An offer lapses on the expiry of the period fixed by the offeror or, if no period is fixed, at the end of a reasonable period. It also lapses in the case of incapacity or death of the offeror, **or in case of death of the recipient of the offer.**

Art. 1116. - Fraud is a cause of nullity of an agreement wherever the contrivances used by one of the parties are such that it is clear that without them the other party would not have entered into the agreement. Fraud is not presumed and must be proven.

Art. 1137. - Fraud is the fact for a party to obtain the consent of the other party through contrivances or lies. The intentional concealment by one party of information, where it knows that such information is decisive for the other party, is also considered as fraud.

Art. 1137. - Fraud is the fact for a party to obtain the consent of the other party through contrivances or lies. The intentional concealment by one party of information, where it knows that such information is decisive for the other party, is also considered as fraud. **However, the fact for a party not to disclose to the other party the estimated value of the service is not considered as fraud.**

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Article of the French Civil Code in force prior to October 1, 2016

Art. 1123. - Every person has the capacity to contract, except if declared incapable of doing so by law.

No pre-existing provision

Article of the French Civil Code in force from October 1, 2016 to October 1, 2018

Art. 1145. - Every natural person has the capacity to contract, except in case of lack of capacity provided for by law.
The capacity of legal persons is limited to acts that contribute to the achievement of their corporate purpose, as defined in their by-laws, and to ancillary acts, in accordance with the rules applicable to each of those persons.

Art. 1161. - A representative may not act on behalf of both parties to a contract nor may he contract on his own behalf with the person he is representing.
Where he does so, any act which is concluded is a nullity unless legislation authorizes it or unless the person represented has authorized or ratified it.

Article of the French Civil Code in force as from October 1, 2018

Art. 1145. - Every natural person has the capacity to contract, except in case of lack of capacity provided for by law.
The capacity of legal persons is limited **by the rules applicable to each of those persons.**

Art. 1161. - **Regarding representation of natural persons, a representative may not act on behalf of several contractual parties with conflicting interests** nor may he contract on his own behalf with the person he is representing.
Where he does so, any act which is concluded is a nullity unless legislation authorizes it or unless the person represented has authorized or ratified it.

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Article of the French Civil Code in force prior to October 1, 2016

Article of the French Civil Code in force from October 1, 2016 to October 1, 2018

Article of the French Civil Code in force as from October 1, 2018

No pre-existing provision

Art. 1171. - In a standard-form contract, any term which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written [*i.e. ineffective*].
The assessment of the significant imbalance may be based neither on the main subject-matter of the contract nor on the adequacy of the price to the service.

Art. 1171. - In a standard-form contract, any **non-negotiable term, determined in advance by one of the parties**, which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written [*i.e. ineffective*].
The assessment of the significant imbalance may be based neither on the main subject-matter of the contract nor on the adequacy of the price to the service.

No pre-existing provision

Art. 1223. - The creditor may, after having given formal notice to perform, accept an incomplete contractual performance and seek a proportional reduction of the price. If he has not yet paid, the creditor must give notice of his decision to reduce the price as quickly as possible.

Art. 1223. - **In case of incomplete performance of the service, the creditor may, after having given formal notice to perform, and if he has not yet paid for all or part of the service, notify without delay the debtor of his decision to reduce the price proportionally. The debtor's acceptance of the creditors' decision to reduce the price must be set forth in writing.**
If the creditor has already paid the price and in absence of an agreement between the parties, the creditor may ask the judge to reduce the price.

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Article of the French Civil Code in force prior to October 1, 2016

Article of the French Civil Code in force from October 1, 2016 to October 1, 2018

Article of the French Civil Code in force as from October 1, 2018

No pre-existing provision

Art. 1327. - A debtor may assign his debt to another person with the agreement of the creditor.

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The assignment must be made in writing; otherwise it shall be null and void.

No pre-existing provision

Art. 1343-3. - Payment in France of a monetary obligation must be made in Euros. However, payment may be made in another currency if the underlying obligation arises under an international contract or a foreign judgment.

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However, payment may be made in another currency if the underlying obligation arises under an international transaction or a foreign judgment. The parties may agree that the payment will be made in another currency if it is performed between professionals and when the use of a foreign currency is commonly accepted for the transaction in question.

2. **The so-called “interpretative amendments”**

Article 16 of the Law stipulates that “the amendments made under this Law to Articles 1112, 1143, 1165, 1216-3, 1217, 1221, 1304-4, 1305-5, 1327-1, 1328-1, 1347-6 and 1352-4 of the French Civil Code are interpretative in character.”

These interpretative amendments apply retroactively as from October 1, 2016. This means that any contracts entered into after October 1, 2016, including those concluded before October 1, 2018, shall be governed by these provisions.

This is a derogation – permitted by existing case-law – from Article 2 of the French Civil Code according to

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which “Legislation provides only for the future; it has no retroactive effect.”

The table below identifies the amendments – which are minor on the whole and undoubtedly interpretative in character – brought about by the Law and that will apply retroactively as from October 1, 2016. Changes appear in red.

Article of the French Civil Code introduced by the February 10, 2016 Ordinance in force as from October 1, 2016

Art. 1112. – The initiative, conduct and termination of pre-contractual negotiations are free. They must mandatorily satisfy the requirements of good faith. If a fault is committed during the negotiations, the indemnification of the resulting harm may not be aimed at compensating the loss of the benefits which were expected from the contract that was not concluded.

Art. 1143. – There is also duress wherever a party, abusing from the state of dependency of his contractual partner, obtains from the latter a commitment that would not have been agreed to in the absence of such constraint, and derives a manifestly excessive benefit therefrom.

Article of the French Civil Code introduced by the April 20, 2018 Ratification Law that apply retroactively as from October 1, 2016

Art. 1112. – The initiative, conduct and termination of pre-contractual negotiations are free. They must mandatorily satisfy the requirements of good faith. If a fault is committed during the negotiations, the indemnification of the resulting harm may not be aimed at compensating the loss of the benefits which were expected from the contract that was not concluded, **nor the loss of opportunities to obtain such benefits.**

Art. 1143. – There is also duress wherever a party, abusing from the state of dependency of his contractual partner **on him**, obtains from the latter a commitment that would not have been agreed to in the absence of such constraint, and derives a manifestly excessive benefit

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Art. 1165. – In contracts for the supply of services, in the absence of an agreement by the parties in advance of the performance of such contracts, the price may be fixed by the creditor, subject to the latter's providing a reason for its amount if such price is challenged.
In case of abuse in the fixing of the price, a claim for damages may be filed with the judge.

Art. 1216-3. – If the assignor is not discharged by the assigned party, any guarantees previously granted remain in force. Otherwise, guarantees granted by third parties remain in force only with their agreement.
If the assignor is discharged, any joint and several co-debtors remain liable, to the extent which remains after deduction of the share of the discharged assignor.

Art. 1217. – A party towards whom a commitment has not been performed or has been performed only partially, may:
-refuse to perform or suspend performance of his own obligation;
-seek the forced performance in-kind of the obligation;
-request a reduction of the price;
-rescind the contract;
-claim compensation for the consequences of non-performance.
Remedies which are not incompatible may be combined; damages may always be added to any of such remedies.

Art. 1165. – In contracts for the supply of services, in the absence of an agreement by the parties in advance of the performance of such contracts, the price may be fixed by the creditor, subject to the latter's providing a reason for its amount if such price challenged.
In case of abuse in the fixing of the price, a claim **for the award of damages and, as a case may be, for the rescission of the contract**, may be filed with the judge.

Art. 1216-3. – If the assignor is not discharged by the assigned party, any guarantees previously granted remain in force. Otherwise, guarantees granted **by the assignor or** third parties remain in force only with their agreement.
If the assignor is discharged, any joint and several co-debtors remain liable, to the extent which remains after deduction of the share of the discharged assignor.

Art. 1217. – A party towards whom a commitment has not been performed or has been performed only partially, may:
-refuse to perform or suspend performance of his own obligation;
-seek the forced performance in-kind of the obligation;
-**obtain** a reduction of the price;
-rescind the contract;
-claim compensation for the consequences of non-performance.
Remedies which are not incompatible may be combined; damages may always be added to any of such remedies.

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Art. 1221. – The creditor of an obligation may, after having given notice to perform, seek performance in kind unless performance is impossible or unless there is a manifest disproportion between its cost to the debtor and its interest for the creditor.

Art. 1221. – The creditor of an obligation may, after having given notice to perform, seek performance in kind unless performance is impossible or unless there is a manifest disproportion between its cost to the debtor **in good faith** and its interest for the creditor.

Art. 1304-4. – A party is free to waive a condition which has been stipulated for his exclusive benefit, as long as the condition has not been met.

Art. 1304-4. – A party is free to waive a condition which has been stipulated for his exclusive benefit, as long as the condition has not been met or **fulfilled**.

Art. 1305-5. – The loss of the benefit of a time-line by a debtor has no effect against his co-debtors, even if they are joint and several.

Art. 1305-5. – The loss of the benefit of a time-line by a debtor has no effect against his co-debtors, even if they are joint and several, **and against his guarantors**.

Art. 1327-1. – If the creditor consented in advance to the assignment or if he has not taken part in the assignment, such assignment may be enforced against him or he may avail himself thereof only from the day when he was notified of it, or once he has acknowledged it.

Art. 1327-1. – If the creditor consented in advance to the assignment **and** if he has not taken part in the assignment, such assignment may be enforced against him or he may avail himself thereof only from the day when he was notified of it, or once he has acknowledged it.

Art. 1328-1. – Where the original debtor is not discharged by the creditor, any guarantees remain binding. Otherwise, guarantees given by third parties remain binding only if they agree.
If the assignor is discharged, any joint and several co-debtors remain liable to the extent which remains after deduction of the share of the discharged debtor.

Art. 1328-1. – Where the original debtor is not discharged by the creditor, any guarantees remain binding. Otherwise, guarantees given by the **original debtor** or third parties remain binding only if they agree.
If the assignor is discharged, any joint and several co-debtors remain liable to the extent which remains after deduction of the share of the discharged debtor.

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Art. 1347-6. – The guarantor may invoke against the creditor the set-off that took place between the creditor and the principal debtor.
The joint and several debtor may invoke the set-off that took place between the creditor and one of his co-debtors in order to deduct from the total debt the separate part of the debt owed by that co-debtor.

Art. 1347-6. – A guarantor may invoke the set-off of what the creditor owes to the main debtor.
The joint and several debtor may invoke the set-off that took place between the creditor and one of his co-debtors in order to deduct from the total debt the separate part of the debt owed by that co-debtor.

Art. 1352-4. – Restitutions owed to an unemancipated minor or to a protected adult are to be reduced in proportion to any profit earned from the act that has been annulled.

Art. 1352-4. – Restitutions owed by an unemancipated minor or by a protected adult is to be reduced up to any profit earned from the act that has been annulled.

[1] Cf. our article entitled “[Reform of French contract law to take effect on October 1, 2016: Important changes that caught our attention](#)” published in our [September 2016 e-newsletter](#).

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