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N E W S L E T T E R

CONTRACT LAW REFORM IN FRANCE

The objective behind the decree n° 2016-131 dated February 10, 2016 reshaping the French contract law is to give a more comprehensive view of the contract law favoring a smoother applicability and thus increasing its attractiveness.

The new rules apply since October 1st, 2016 whereby a significant part of the provisions fall under non-mandatory law and, hence, may be waived or regulated in a different way by the contracting parties.

Please note that as a result of this reform the French Civil code has undergone a wide renumbering of its articles.

Hereinafter, we propose an excerpt of the most important modifications including practical clues for your business with a view to ensuring conformity and/or mitigating risks.

1. Preamble

The principle of good faith („*bonne foi*“) has been embedded into the law as a public-order provision („*ordre public*“) which has to be complied with not only during the contract implementation but also while initiating business relations and concluding the contract.

During the negotiation phase applies the obligation to disclose information. Article 1112-1 of the Civil code expressly provides that if one party is in possession of information relevant for the decision-making process of the other party, whether to conclude a contract or not, such party has to disclose this information to the other party.

2. Content of the General Terms and Conditions

For the first time the legislator defines the standard form contract („*contrat d'adhésion*“) as a contract by application of general terms and conditions, pursuant to article 1110, paragraph 2 of the new French Civil code („*Code civil*“):

„The standard contract is a contract whose terms and conditions are set out beforehand without any possibility of discussion."

a. Unfair Clauses

Article 1171 however, sets limits to such standard contract:

„In a standard contract any clause resulting in a significant imbalance between the rights and obligations of the contracting parties is considered as not having been written."

Nevertheless, this article expressly excludes from this principle the matter of the contract and the appropriate ratio between price and performance.

In the past, unfair clauses were already prohibited (see articles L132-1 and L121-2 et seq. of the French Consumer protection Code and L442-6 of the French Commercial Code), whereas they did not become void but triggered liability claims. How far future case law will adapt its interpretation of the notion „significant imbalance" to the decisions related to such unfair clauses remains yet to be seen.

Hereunder fall in particular:

- inappropriate clauses limiting liabilities or liability disclaimers,
- exclusion of the purchaser's general terms and conditions,
- unilateral possibility to modify delivery deadlines without compensation, etc.

PRACTICAL CLUES FOR YOUR BUSINESS:
For your current business, this means you have to check whether the clauses of your general terms and conditions contain a significant imbalance detrimental to your client/business partner. In this case, we recommend modifying them accordingly to avoid that they will be considered as not written. Failing that, common law applies (e.g. unlimited liability).

b. Contradictory Clauses

Article 1119 of the French Civil code provides :

„In case of inconsistencies between the general terms and conditions invoked by the contracting parties, incompatible clauses are invalid."

As a consequence, common law applies unless the contracting parties agree in writing specific rules which then prevail.

Hereunder fall in particular:

- Agreements on jurisdiction: if the relevant terms and conditions of the contracting parties indicate as place of jurisdiction the headquarters of their respective company, the jurisdiction is set at the defendant's headquarters.

- Agreements on payment deadlines: if the relevant terms and conditions of the contracting parties indicate different rules, common law applies, that is a deadline of 30 days.

PRACTICAL CLUES FOR YOUR BUSINESS:
For your current business, this means upon the conclusion of contracts to which apply general terms and conditions, you should avoid to refer to the contradictory terms and conditions of the other party. To mitigate risks and ensure legal certainty between the contracting parties, we recommend concluding an additional agreement. Please note in this context, that the exclusion of the terms and conditions of the other party is considered as invalid and deemed not to be written.

c. Force majeure (unavoidable cause)

The notion of force majeure has been defined by law for the first time in article 1218 of the new French Civil code as follows:

„Force Majeure in contractual relations applies to an event beyond the control of the debtor, which upon conclusion of the contract was reasonably impossible to predict and the consequences of which could not have been prevented by appropriate measures, thus hindering the fulfillment of the contractual obligation".

Pursuant to the new rules, it must be checked if in presence of a case of force majeure the service to render has only become impossible for a limited time, so that a suspension of the contractual obligation will be sufficient, as such event does not simply trigger, as in the past, the cancellation of the contractual obligation.

PRACTICAL CLUES FOR YOUR BUSINESS:
For your current business, this means that in presence of an event of force majeure in case you want to be fully released of the service obligation and not only for a limited period of time, you have to incorporate an appropriate clause in your general terms and conditions or in a specific agreement.

3. Validity of the General Terms and Conditions

The new rules explicitly state in article 1119 of the new Civil code:

„The general terms and conditions of one contracting party are only opposable to the other contracting party if they have been disclosed to them and have been accepted by them."

Consequently, two conditions must be fulfilled for the valid acknowledgement of the general terms and conditions: the contracting part must have been informed of those terms and conditions and must have accepted them. This implies that the contracting party received the

general terms and conditions upon conclusion of the contract at the latest and in a readable manner, that is in an appropriate character size and in a clearly structured format.

A simple note referring to a web site where these general terms and conditions may be accessed is not sufficient.

PRACTICAL CLUES FOR YOUR BUSINESS:

We recommend you to collect the signature of the contracting party on the document of your general terms and conditions. By doing so, please take care that the undersigned is fully invested with the power to act as the legal representative of the company. The signature of a person of the purchase department who confirms the acceptance of the general terms and conditions by email is not valid. Your staff members should be informed accordingly.

4. Date of entry of a contract under general terms and conditions

Pursuant to article 1121 of the new Civil code, the contract is legally binding *„beginning on the date of reception of the approval declaration by the seller/provider, on the place of reception"* which means not already at the date of sending such declaration.

Contrary to former current case law, the seller/provider may not withdraw his offer at any time. For a withdrawal once the offer received, the seller/provider may be held liable for damage payments.

Upon reception by the seller/provider of the offer‘s approval, the contract is definitely entered into force excluding an withdrawal.

PRACTICAL CLUES FOR YOUR BUSINESS:

According to the new legislation, the purchaser determines the date on which the contract enters into force. This rule falls under non-mandatory law and, hence, a different rule may be provided in the general terms and conditions or negotiated between the contracting parties. Naturally, an offer may also be granted for a limited period of time.

5. Terminating the contract

Pursuant to the law reform, a unilateral termination of the contract may occur in the following event: the contracting party requires the service fulfillment while setting a deadline in case of non-fulfillment and this deadline expires without reaction.

Exploiting a relationship of dependency may be interpreted as a „violent" inducement to sign a contract insofar one contracting party draws an unjustified, excessive profit out of it. The contract may be challenged grounded on a vitiated consent.

The reform introduces into the French law the notion of “frustration of contract” („*révision pour imprévision*“). According to this notion, henceforth a considerable change of the framework conditions - after the contract’s conclusion - disfavoring one party may be grounds to check and readjust the contract’s content or even terminate it (article 1195 Civil code).

6. Further modifications

According to the new rules, an obligation on an open-ended basis is deemed valid, whereby the termination must comply with a reasonable notice period.

With the approval of the contracting parties, a contract may be transferred to a third party. Such transfer has to be implemented in writing. Please note, that the contract transfer does not automatically release the departing party from its contractual obligation. In this context, a specific regulation is required.

For the first time, the law provides for a possibility to cease an obligation to a third party.

Furthermore, the debtor has to pay at the creditor's address.

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We remain at your disposal for any questions you may have regarding this contract law reform as well as to check your general terms and conditions and draft tailor-made propositions to readjust them according to the new obligations and possibilities offered.

Kind regards

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