

## Major Reform to French Civil Code: Back to Civil Law!

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October 1<sup>st</sup>, 2016 is a landmark in history of French contract law. Indeed, until this day, Napoléon's 1804 Civil Code had remained virtually unchanged, as far as contract law principles were concerned. For instance, specific rules regarding offer and acceptance had never been addressed by the Civil Code, whether at the Code's creation or at any time thereafter. As a result, case-law gained increasing importance over the years, to the extent that it could be questioned whether French contract law had not in fact become based on common law.

To a large extent, the reform aims at including well-established case-law principles into the Civil Code, so as to clarify the framework of French contract law. In fact, the reform aims at fostering the very principles of civil law: ensuring accessibility, and hence higher security, predictability as well as stability of agreements.

In addition, the reform also includes wholly new provisions into French contract law. We highlight below some of the new provisions which appear particularly relevant to our practice.

- **Greater contractual flexibility:** generally, the reform offers the parties a greater flexibility in the structuring of their agreements. In effect, the new Civil Code provisions are intended to simply supplement the terms and conditions of the parties' agreements, except those provisions which are defined by the Code as public order provisions.
  - Therefore, subject to the public order limitation, parties' agreement may freely depart from the Civil Code provisions.
- **Pre-contractual duties:** good faith expected from the parties is no longer limited to the sole performance of the agreement; it further extends to the period preceding the entry into the agreement. The new Civil Code also provides disclosure and confidentiality duties among the parties as from the negotiation phase.
  - During the negotiation phase, a party may be liable for damages on the grounds of contract liability in case of failure to either (i) disclose an important information to the other party, or (ii) keep confidential information which was exchanged. Therefore, in non-disclosure agreements, letters of intention, etc., the scope of disclosure or confidentiality obligations should be carefully defined.
- **Specific performance:** the new Civil Code provides increased certainty regarding the binding and irrevocable nature of unilateral undertakings such as undertakings included in put or call option agreements. Before the reform, when there was a breach in the performance of a put or call option agreement, there was always uncertainty as to whether the beneficiary of the option would be entitled to enforce the performance of any such option.
  - Thanks to the reform, the beneficiary of any such option may request specific performance before a judge.
- **Hardship:** traditional case law dating back to 1876 considered that a judge was not entitled to change the terms and conditions of an agreement upon the occurrence of a non-foreseeable change of circumstances which rendered the performance of an agreement unduly costly for a party.
  - From now on, either party may request from the other party (and as the case may be the judge) to renegotiate an agreement upon the occurrence of any such event. To avoid having to face a potential renegotiation of the agreement, the parties have to specify in the agreement that they initially accepted to bear the financial risks arising out of a potential change of circumstances. This principle gives the judge an

increased power as to the appreciation of the economics involved in the parties' agreement.

- **Unilateral termination:** the reform confirms current case law which provides the right for a party to an agreement to terminate the agreement in the event of a serious breach by the other party.
  - Such right is subject to providing the defaulting party formal notice to cure the breach, and such notice remaining ineffective.
- **Specific performance:** as far as unilateral undertakings are concerned (such as in option agreements), the new Civil Code provisions are contrary to the traditional (but controversial) French case law so far; it used to be considered that in the event a promisor was in breach of its commitments, the other party's sole remedy was the allocation of damages.
  - From now on, either parties may request specific performance of a commitment letter before the judge, unless its performance is either impossible or overly disproportionate, as regards to its costs for the committing party and its benefits to the beneficiary of the commitment letter; in practice such new provisions will considerably strengthen the legal value of various corporate law mechanisms such as "leaver", tag-along or drag-along clauses. Indeed, in case of a put option for instance, the judge will be enabled to force the sale.

It should be noted that the reform is applicable to any agreement entered into after October 1st 2016, bearing in mind that fixed-term agreements tacitly renewed after October 1st 2016 are deemed new agreements, and therefore subject to the new rules.

Clearly, the drafting of any new agreement requires to ensure that the new rules have been duly considered.

## CONTACTS

**Raphaël Dalmas**  
[rdalmas@astura.fr](mailto:rdalmas@astura.fr)  
T +33 (0)1 84 16 24 32

**Matthieu Mélin**  
[mmelin@astura.fr](mailto:mmelin@astura.fr)  
T +33 (0)1 84 16 24 31

[www.astura.fr](http://www.astura.fr)

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