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AVOCATS À LA COUR

FOCUS ON THE IMPACTS OF THE CIVIL LAW REFORM ON BANKING AND FINANCES PRACTICES

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Since October 1st, the French civil code has been totally reformed in order to clarify and secure the French contract law, hence this reform as also an impact in finance law. This abstract summarize at a glance the major repercussions of this reform in the financial contractual practice.

1. THE INTRODUCTION OF A MATERIAL ADVERSE CHANGE CLAUSE PRINCIPLE INTO THE FRENCH CIVIL CODE

Pursuant article 1195 of the French Civil Code the courts are now allowed to review the agreement in case of "*unpredictable change of circumstances*" making it execution "*excessively onerous*" for one of the parties "*who had not agreed to assume the risk*". This article reverses a centenary court decision, which did not recognize the ability for a court to modify or terminate the agreement in case of "*unpredictable change of circumstances*". In practice this is equivalent to introduce a principle of a Material Adverse Change clause in all agreements, except if all parties decide to waive this provision which is not consider as a public order provision (disposition d'ordre public).

However, if the evolution seems to be a good thing, the notions of "u*npredictable change of circumstances*" and "*enforcement excessively onerous for one of the party*" are not precisely defined by law. Consequently, they leave to the court a discretionary power to interpret them that creates legal uncertainty. For the banking and finance practice standpoint, this brand new article is not a big revolution because the parties will continue to opt for conventional MAC clauses, in order to carefully plan and prevent all events allowing the revision of these agreements and hence alleviate any revision of these latter by the court.

2. THE NECESSITY FOR EACH ACT TO CONTRIBUTE TO ACHIEVE THE CORPORATE PURPOSE (*UTILES À LA RÉALISATION DE L'OBJET SOCIAL*) OF THE COMPANY, A NEW LIMITATION OF COMPANIES CAPACITY

Pursuant article 1145 paragraph 2 of the French Civil Code "*the capacity of legal persons is limited to acts that contribute to achieve their purposes as defined by their articles of association and acts that are their accessories [...]*".

The notion of "*contribute to achieve their purpose*" is very vague, because not defined by case law. Accordingly, it would seem possible to terminate the agreements concluded by

the company when they will not, or will no more "*contribute to achieve their purposes*". Hence, we have adapted our legal opinions by providing a specific assumption in this respect.

Generally speaking, it seems necessary to adapt the current articles of association by inserting a specific provision with respect to this notion during a future extraordinary general meeting, in order to alleviate any legal risk.

3. THE INTRODUCTION OF THE DEBT ASSIGNMENT (*CESSION DE DETTE*) IN FRENCH LAW

After many doctrinal discussions, the debt assignment is now fully admitted in French law. This mechanism allows a debtor to transfer its debt to a third party who will pay the debt to the lender. Pursuant article 1327 of the French Civil Code, the debt cannot be transferred without the lender approval. This transfer must be notify to the lender, except if he is involved to the debt-transfer agreement.

If the French law admitted another mechanism called "*delegation*" (*délégation*) in order to transfer the debt, this new mechanism is totally different from the delegation. Contrary, to the delegation which creates a new obligation, the debt assignment is based on a transfer. Therefore, for the party who would take over the debt, or for the original debtor, this mechanism may be interesting because pursuant article 1328 of the French Civil Code, the new debtor and the original debtor, if the latter remains obliged, may oppose to the lender all debt-related defences, and also all defences which are personal to him. Moreover, for the creditor, the debt assignment has the advantage to maintain all collaterals and guarantees which have been granted to him by the original debtor.

4. THE RECOGNITION OF THE AGREEMENT ASSIGNMENT (*CESSION DE CONTRAT*) IN FRENCH LAW

Articles 1216 to 1216-3 of the French Civil Code introduce into French law a mechanism of agreement assignment. A point draws our attention, as article 1690 of the French Civil Code is not repealed, but now intends to apply to all "*transfer of right*" (*transport d'un droit*), and according this article, the agreement assignment is considered as a transfer of right, the assignment must be served, or notify by authentic act to the lender in order to be valid.

5. THE MODERNIZATION OF THE RECEIVABLE ASSIGNMENT (*CESSION DE CRÉANCES*)

All formalities necessary to serve and notify to third parties the receivable assignment as provided by article 1690 of the French Civil Code are, from now on, not applicable to this kind of assignment.

6. THE RECOGNITION OF THE LEGAL QUALITY OF REPRESENTATIVE OF THE AGENT OF THE LENDERS (*AGENT DES PRÊTEURS*)

Before the introduction of articles 1153 to 1161 of the French Civil Code with respect to "*the representation*", the agent of the lenders was often qualify as a proxy. However, this legal quality was discuss and this despite the article 2328-1 of the French Civil Code which provides that "*any security may be constituted, registered, managed and realized for the account of the creditors of the obligation guaranteed by a person whom they name for that purpose in the act that establishes this obligation*". Thus, the brand new articles 1153 to 1161 of the French Civil Code, offer a solid legal ground for the recognition of the agent of the lenders as lenders representative.