

The 2016 Amendment to the Napoleonic Civil Code: A French Revolution for Construction Contracts

Contracts under French law entered into after 1st October 2016 will be subject to a new legal regime, after the Ordinance of 10 February 2016 (the “**Ordinance**”) made significant substantive and structural changes for the first time in more than two hundred years to the Title on Contracts and Obligations (Articles 1100 to 1386) of the ancient 1804 Napoleonic Civil Code.

The new Articles of the French Civil Code are more than a mere facelift. They codify certain rules which had been established by case law over the last two centuries. Such codification aims at making the law of contracts and obligations more accessible, transparent, and foreseeable - all of which constitute a positive development for foreign parties relying on French law.

However, the new Articles also introduce significant innovations, some of which may have a significant impact on construction and other contracts. Foreign parties submitting their contracts to French law should accordingly be aware of these changes in order to avoid unwanted surprises. This note describes briefly some of the main innovations, refers to some of the risks involved and suggests ways to avoid, or at least attempt to minimize, the impact of the new rules.

1. Codification of Existing Case Law

Although France does not have a strict system of judicial precedence, French courts have in practice created over the last two centuries widely accepted civil law rules pertaining to contracts and obligations. Some of these rules attempt to adapt provisions of the text to the significant social and economic developments since the time of Napoleon.

The Ordinance has codified several of these court-created rules in order to improve the clarity of the legal text. The following are some of the main case-law rules now added to the Code:

- The express statement of the principle of contractual freedom (Article 1102).
- The freedom to terminate pre-contractual dealings, except in cases of fault (Article 1112).
- The general pre-contractual duty to provide information known by a party and which is decisive for the consent of the other party. This includes information having a necessary link with the content of the contract and the quality of the parties and excludes information regarding the value of the parties’ considerations. This duty cannot be excluded or limited by the parties (Article 1112-1).
- The prohibition against interpreting clauses which are clear and precise (Article 1192), which limits the effect of the general rule that the parties’ common intention governs contract’s interpretation (Article 1188).
- The possibility for a party, at its own risk, to unilaterally terminate a contract for breach, in addition to consensual and/or judicial termination (Article 1226).

2. Innovations

The Ordinance also includes entirely new provisions, some of which depart substantially from the previous legal regime and, in a few cases, from what is usually provided for in other jurisdictions which follow the Napoleonic civil law tradition. Such innovations may therefore surprise foreign parties contracting under French law.

The most controversial aspect of the reform is the reinforced power of the judge (and of arbitrators) to modify the content of contracts:

- First, the judge has the power to control the balance of rights between the parties at the time the contract is formed.
 - Article 1170, for instance, provides that contractual clauses which contradict a party's main obligation so as to deprive such obligation of substance shall be deemed as null and void.
 - Article 1171, which is perhaps of more concern, excludes clauses which create a "significant imbalance" between the rights and obligations of the parties from contracts of adhesion. The far-reaching character of this provision is augmented by Article 1110 of the Civil Code, which defines contracts of adhesion very broadly as contracts entered on the basis of general conditions predetermined in advance by one of the parties. It seems therefore that the category of contracts of adhesion is not limited to contracts with consumers or with other "weak" parties needing protection due to their personal circumstances, but to all contracts drafted and conceived unilaterally. Such contracts are a common practice in the construction industry, including (but not only) in contracts preceded by a tender process. Including wording confirming that the contract has been freely negotiated may therefore be advisable to mitigate the risk of this provisions from being applied, but it is uncertain whether such wording will be given effect if evidence shows that only one of the parties drafted the conditions of the contract. Until both the new Articles 1171 and 1110 are interpreted by French courts, parties should be mindful of the risk, when operating under French law, that clauses of their contracts might later be invalidated as forming part of a contract of adhesion, even in a non-consumer context.
- Second, the judge may interfere during the performance of the contract. Article 1195 grants the judge the power to terminate the contract or revise its clauses if it is established that there is an unforeseeable change of circumstances which renders the performance of the contract

too burdensome for a party. While rebalancing mechanisms are not unfamiliar to construction contracts, particularly in contracts with public entities, it is not that habitual that they the default rule applicable to private contracts. The Article provides, however, that this mechanism does not apply in respect of risks which have been assumed by the complaining party. Parties submitting their contracts to French law should therefore be aware of this provision and may limit its impact by establishing clear allocations of risks in their contracts - an advisable practice in the construction industry-, or simply by expressly excluding its application in all cases. While such a global clause expressly excluding Article 1195 would, in principle, be valid and enforceable, it cannot be fully ruled out, however, that if contained in a contract of adhesion, such a clause may nevertheless be seen as creating a significant imbalance and deemed as null and void pursuant to Article 1171.

Other important innovations include the following:

- Clarification of offer and acceptance: Article 1116 now provides that the withdrawal of an offer in breach of the period time during which it was valid gives rise only to the remedy of damages, but does not oblige the withdrawing party to enter into the contract. When an option is granted to a party to enter into a contract and all the elements to form the contract are predetermined, however, Article 1124 provides that withdrawal before the time granted does not prevent the conclusion of the contract.
- Contract interpretation: While, as mentioned above, the common intention of the parties remains the main rule for contract interpretation, the second paragraph of Article 1188 provides that when this common intention cannot be discerned, the contract is interpreted according to the meaning that a reasonable person placed in the same situation as the parties would have given to it. This provision introduces an objective approach to contract interpretation.
- Remedies for breach: In addition to the classic remedy of non performance, which allows a party to refuse performance in the face of the other party's breach (Article 1219), Article 1220 also allows a

party to refuse performance when it is clear that the other party will not perform its obligations and that this will have serious consequences for the non-breaching party. Furthermore, Article 1221 provides for forced performance in kind, under certain conditions, and Article 1223 establishes the reduction of price as a remedy generally available in case of breach.

- **Excuses for breach:** Article 1231-1 provides that the breaching party can only be exonerated from its liability in cases of force majeure. This wording seems to deprive the breaching party of other defences not amounting to force majeure, such as the fault of the non-breaching party.

While some of the innovations in the Civil Code have provoked strong criticism and given rise to a lively debate among French scholars and practitioners, it is still uncertain how they will be interpreted and applied by French courts and arbitral tribunals. Because of this uncertainty, foreign parties confronted with the option of submitting a contract to French law should take a cautious approach and seek legal advice before beginning negotiations.

Alejandro López Ortiz

Partner, Paris

E: alopezortiz@mayerbrown.com

T: +33 1 53 53 18 62

David Bakouche

Professor of Law, Lawyer, Paris

E: dbakouche@mayerbrown.com

T: +33 1 53 53 03 40

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