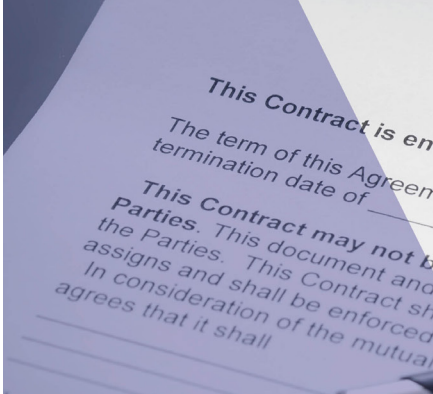




## Plus ça change or all change?

### How reforms of French Civil Law may affect your contracts



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Together with London and New York, Paris has long been hailed as one of the leading centres of international litigation. It remains to be seen however if recent proposals for a comprehensive rewrite of French contract law could have an impact on the attractiveness of litigation in France and French law as the substantive law of choice in international agreements. With the proposed changes likely to come into force in early to mid-2016, businesses operating in France are actively considering how they might react to the proposed changes, which threaten a substantial increase in the uncertainty of contractual obligations.

#### Why are these changes being proposed?

The current set of rules comprising French civil and contract law have remained substantively in their current form since their inception in the Civil Code under Napoléon I in 1804. There have been various projects and consultations over the years aiming to reform the law but all these have faltered until 2015, when French Justice Minister Christiane Taubira announced a significant overhaul of the regime as a means to 'simplify the law and bring it into line with international standards'. The three main areas of reform are listed as:

- making the law more accessible;
- protecting the weaker contracting party; and
- making the law more attractive to businesses.

#### What are the proposed changes?

A consultation on the draft proposals ended in April 2015 and whilst we have yet to see the final text, there are a number of important changes of principle that if enacted will have a major effect on contracts entered into going forward.

#### Codification

Codification is one of the less controversial aspects of the proposed changes, with the aim of consolidating the jurisprudence of the French Courts that has developed

over the period of more than 200 years since the Civil Code was put in place. Areas where the original Code made little provision will now be filled with the rules that have developed over time. For example, the jurisprudence that has developed around pre-contractual negotiations before a contract has been entered will be codified.

It has been said that the intention is to re-enforce rather than reform the pillars of French civil law, such as the importance of freedom of contracting parties, consensus and good faith. There is however some considerable debate over the extent to which some of these reforms represent innovation rather than mere codification. Whereas previously good faith was only required during the performance of a contract, in terms of the proposed changes it will be required throughout, including at the formation of the contract. Some have commented that the introduction of such a concept is a significant change, but others view it only as a reflection of decisions in the French Courts.

The reforms also update the outdated language used in the Civil Code to ensure it is maintained as the user-friendly text it was originally intended to be.

## Increased scope for challenging contracts once signed

The more controversial aspects of the reforms are new measures making it easier for a party to challenge parts of a contract in a variety of contexts. Set out below are some of the circumstances in which, following the reforms, it may be possible to challenge contract terms.

### 'Abuse of weakness' and unbalanced contracts

The reforms will allow a party to challenge parts, or all, of a contract that are considered to be an 'abuse of weakness'. 'Weakness' can take many forms under these provisions, but in general the reforms look set to protect those that were in an economically weak position during the negotiation of the contract. In these circumstances, if the Court reaches the view that a 'significant imbalance' between the rights and obligations of the parties has arisen as a result of one party's stronger bargaining position then it will be able to nullify the contract. Although this power is not unfettered, as the freedom of contract is protected to some extent, concern has been expressed that this goes too far in allowing Courts to effectively re-write any deal.

The proposed changes also open up other ways in which judges will be able to rebalance contracts in certain circumstances. For example, judges will be able to strike out unfair terms in certain contracts or change the price payable when one party has, in an abuse of its position, unilaterally fixed the price.

Importantly, while EU consumer law already provides some of these powers, it is envisaged that these changes will apply even where the contract is business-to-business and has been individually negotiated.

### Circumstances that had not been envisaged

Possibly the most controversial proposed change protects a party if:

- there has been a change of circumstances which was not envisaged when the contract was concluded, and as a result;
- the performance of the contract on the terms previously agreed would be 'excessively onerous for the party who had not accepted assuming the risk of such a change of circumstances'. In these circumstances one party can impose a renegotiation of the contract upon the other party or apply to the Court to terminate the contract.

### Remedies and termination

The proposed reforms also contain a chapter on the non-performance of contracts, designed to provide greater clarity over the remedies that are available when one party has not met its obligations. Notably the proposed reforms state that specific performance (the principal remedy rather than damages in French law) is not available if it would lead to a 'manifestly unreasonable cost'. The proposed changes also include for the first time the right to unilaterally terminate a contract by way of notification after non-performance by the other party.

## When will these proposed changes come into force?

The legislative procedure being used by the French government means that these reforms can be introduced relatively quickly. A bill for the ratification of the reforms will have to be submitted before 17 February 2016 and the intention is that the changes will come into force in the early part of 2016.

### How are these proposed changes regarded?

Opinion is divided. Those who are in favour of the proposed changes argue that this process mostly reflects what is already accepted practice, simplifies the law and brings it into line with most other European states. It is cited that currently only Belgium, Luxembourg, France and the UK do not fully recognise judicial power to modify or terminate a contract when there has been an exceptional change of circumstances rendering performance of the contract excessively onerous.

Those who oppose the amendments argue that they allow too much interventionism on the part of judges and will make French law uncompetitive. They argue that the changes will cause uncertainty in contractual relationships and are particularly concerned that judges without direct commercial background or experience will be asked to differentiate between a "significant imbalance" in a contract and a bad bargain. These fears have led to the suggestion that the reforms will undermine the tradition of freedom of contract and will make businesses operating in France consider using other legal systems to govern their contracts.

A further criticism that has been made is that the reforms are being rushed through without enough scrutiny and without sufficient consideration of how they fit in with other aspects of French law such as consumer and competition law. This makes the impact of some of the proposed changes hard to predict.

### What do the proposed changes mean for my business?

Companies doing business in France will need to be aware of the potential impact of these changes. The main concern for businesses is likely to be the increased ability for contracts to be challenged and the inherent uncertainty that creates.

It is easy to see how such reforms could help a party who was, as a result of economics or market forces, in a weak negotiating position compared with a more dominant party. It could also be viewed as a lifeline for a party for which the contract now represents a significant economic burden because of altered circumstances. If the proposed changes go through as envisaged then in both these situations there may be an opportunity to seek to renegotiate particularly onerous terms of the contract or even have the contract annulled.

The corollary is a fear that in providing escape routes for one party in these situations the proposed changes will decrease certainty for all parties entering into new contracts. The negotiation of any contract involves an

exercise of identification, assessment and assignment of risk, which has traditionally been navigated by negotiation of the precise terms of the contract in question. If these reforms increase the scope for a party to change a contract once it has been agreed, that risk assessment process is undermined.

### **What can I/my business do to avoid this risk?**

At this stage without the final text or any indication of how the judiciary will use their new powers, it is difficult to predict how companies will or should react. However, uncertainty involves increased risk, which is inevitably perceived as a negative for business. If the proposed changes are not a risk worth taking, businesses may consider looking to other internationally recognised systems of law, such as English or New York law, to govern and resolve their disputes.

For businesses that want to continue to have their contracts governed by French law, one initial practical step will be to address how contracts are drafted. Preparing contracts on a fairer, more balanced approach might decrease the risk of terms being viewed as unreasonable in the future, and reduce the possibility that the Court would re-write the terms. Particularly where one party is in a strong negotiating position, it may become important to ensure that the rights and obligations in a contract are reasonably balanced.

To discuss these proposed changes or to know more, please contact Jane Wessel, a partner specialising in international disputes and arbitration, or Mandy Deeley, a senior associate in our commercial litigation team.