

The French Civil Code Reform--revival or suppression of trade?

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Commercial analysis: As French contract law undergoes radical reform Louis Vogel, managing partner at Vogel & Vogel and Isabelle Eid, counsel and head of knowledge management (representing the working group at DLA Piper involved in the French Civil Code reform public consultation), examine how the revision of the Napoleonic Code will affect trade

What prompted these plans to reform the French Civil Code?

Louis Vogel (LV): The reform of the French Civil Code is a response to the changes in contractual practices and the course of trade. New types of contracts have emerged since the code was enacted in 1804 such as distribution agreements, framework contracts, contracts involving sequential performance and electronic contracts, which all need to be addressed by contract law.

Isabelle Eid (IE): The changes were prompted by the need for 'modernisation and simplification of the law and procedures in the fields of justice and Home Affairs' (as described by the reform project--loi 2015-177 du 16 février 2015).

The reform essentially codifies the decisions of the courts and is partly driven by an intent to introduce a balance in the rights and obligations of each party in a contract. This is in keeping with the level of protection that French law provides to consumers (eg prohibition of unfair terms) and businesses (eg prohibition of a significant imbalance in the parties' respective rights and obligations) where a party appears weaker in the negotiation process.

How could this affect those in the UK and other jurisdictions?

LV: The reform of the French Civil Code could influence UK and other jurisdictions to review their own contract law. For instance, a proposal for an EU regulation on a Common European Sales Law (currently under discussion) could be amended in light of the French reform and competition of legal systems.

IE: The reform would essentially affect those concluding contracts under French law.

The reform has introduced some broad concepts which are likely to require further interpretation from the courts. This may bring about contractual unpredictability for those operating under French contract law.

What areas of the law will be most affected? Will there also be any changes to Arbitration?

LV: The impact of the reform will be major as it will affect one of the most important parts of the French Civil Code--contract law--and approximately 300 of its articles.

The draft reform innovates on major aspects of French contract law, such as:

- o contract formation--the principle of good faith will be extended to the formation stage of a contract (a whole section has been added on the conclusion of contracts, covering offer and acceptance, pre-contracts and electronic contracts)
- o contract life--the courts will be able to intervene in the case of abuse in the unilateral determination of the price by one of the parties
- o contract end--the courts will be able to remove unfair contract terms and terminate a contract in the case of unforeseeable circumstances rendering its performance excessively onerous. Equally, a contracting party will have to observe a reasonable period of prior notice before ending open-ended contracts

No changes to arbitration will be brought by the reform.

IE: All areas of contract law will be affected--from the formation to the end stage of a contract. The notion of good faith will be applied throughout a contract's entire lifecycle.

The part on arbitration in the Civil Code has not been amended, and so we anticipate limited direct impact in this area.

There seems to be a lot of concern about contract law and the reform in particular, what are the issues?

LV: Generally, there has been concern over the competitiveness of French law in international trade and its ability to attract foreign investment. It is questionable, however, whether the new provisions would solve this issue as the diminishing of contractual freedom could have an impact on economic operators and lead to the consumerisation of contract law.

For instance, the draft reform weakens contracts by extending the principle of good faith to the formation stage of a contract and by adding new grounds for challenge, as previously discussed.

The introduction of a provision prohibiting unfair contract terms in all contracts would be redundant as there exists provisions in consumer and competition law that pursue the same objective but through different means. This could lead to the creation of three distinct legal regimes for similar clauses.

IE: There is a lack of precision in the reform with regard to the following issues:

- o the temporal applicability of the law
- o the public order character of certain provisions proposed
- o the harmonisation between the general contract regime and that of special contracts

How does this impact UK companies doing business in France or those who have contracts with French suppliers and customers?

LV: The reform would impact UK companies doing business in France or those who have contracts with French suppliers/customers if their contract is governed by French law.

If the reform is adopted in its current state, foreign co-contracting parties could, if their contract is governed by French law, run the risk of the courts:

- o reinterpreting their intentions at the time the contract was concluded
- o cancelling contracts with dependent contracting parties
- o removing any contract term considered unfair even though negotiated in good faith
- o ending contracts if they become non-profitable for the other party due to unforeseeable circumstances

It is thus highly probable that international companies (including French companies engaging in international trade) will subject their contracts to another body of law (and to foreign courts) which are more flexible and respectful of the will of the parties--such as Swiss, German or English law--for reasons of economic efficiency and legal certainty.

IE: UK companies entering into contracts governed by French law should be aware that there may be more (or less) to what is expressly set forth in the contract.

The broad legal concepts and the interpretation of these could generate uncertainty in some areas.

What is the predicted time line?

LV: The reform is at an early stage and substantial amendments will hopefully be taken into account as a result of a public consultation launched by the French Ministry of Justice and which closed at the end of April 2015.

The changes brought about by the reform will most probably only apply to contracts concluded after the reform is published or ratified (set to be around mid-2016) and not apply to ongoing contracts.

IE: The plans aim to reform the law of contracts and obligations within a period of 12 months, however, significant amendments resulting from the public consultation may result in a deferred application.

Is there anything lawyers in the UK should do to prepare for these changes?

LV: Once the reform has been adopted (if it has not been substantially modified in the upcoming months), lawyers in the UK may want to advise their clients to secure their contracts as much as possible, for instance:

- o by providing for hardship clauses
- o by ensuring that the rights and obligations of the parties are, by and large, balanced and that their conduct cannot be considered as an abuse of the economic dependence of the other contracting party
- o by observing a reasonable period of prior notice before ending open-ended contracts

Another option would be to provide for the contract to be governed by another body of law.

What are your predictions for the future?

LV: In my opinion, the current draft reform is a bad omen for the future of French contract law as it generates legal uncertainty and increases the judicialisation of contracts. This would impede the growth of the French economy and render French law less competitive compared to other jurisdictions.

We can only hope that changes suggested by practitioners from the public consultation will be taken into account in order to rectify the flaws in the draft reform.

IE: The reform project will undergo further developments as a result of the wide public consultation undertaken by the Minister of Justice and, due to certain ambiguity, it is likely that the principles in their current state will not be delivered.

Interviewed by Stephanie Boyer.

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