

# Highlights of the reform of the French law of contracts and obligations by Ordinance no. 2016-131 of 10 February 2016

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*Most of the amendments made by Ordinance no. 2016-131 (the 'Ordinance') to the Civil Code in respect of Contracts and Obligations are superfluous, codifying well-known judicial developments or illustrating concepts that either have no significance or have already been adopted in Spanish law developments. I will thus confine myself to what is truly singular or rare, even if seemingly unimportant, in order to be clear about the consequences of submitting a contract to French law.*

## **Negotiating process**

When pre-contractual negotiations are broken off by reason of *culpa in contrahendo* (fault consistent in not acting in good faith during negotiations), compensatory redress equivalent to the loss of benefits which were expected from the contract that was not concluded cannot be obtained (art. 1112).

The party who has information which is of decisive importance for the counterparty's consent – i.e., information that directly and necessarily bears on the content of the contract or the status of the parties – must share with the latter such information if the latter ignores it or relies on the former. A breach of this duty to inform – a duty that does not apply to the appraised value of consideration – entails *culpa in contrahendo* liability and may lead to the contract being rendered void for vitiated consent (art. 1112(1)).

An offer may not be withdrawn before any time limit fixed by the offeror has elapsed or, if no such time limit has been fixed, the end of a reasonable period. The withdrawal of an offer in contravention of this prohibition prevents the contract from being concluded (art. 1116).

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In the event of inconsistency between standard terms and conditions relied on by each of the parties, incompatible clauses have no effect (art. 1119).

If there is a right of first refusal agreement and the third party with whom such agreement is breached knew of it, the beneficiary of the agreement has cause of action to void the contract with the third party (art. 1123); same thing in the event of a unilateral promise (art. 1124).

A person issuing an offer remains bound by it as long as it is made accessible by him by electronic means (art. 1127(1)). A contract in such cases is validly concluded only if the party to whom the offer is addressed had the possibility of verifying the detail of his order and its total price and of correcting any possible errors before confirming his order (art. 1127(2)).

### **Content of the contract**

*Causa* (a reason for the contract) is abolished as a condition for the validity of a contract, requiring instead content which is lawful and determined or determinable (art. 1128).

As grounds for voidability, there is duress where one contracting party exploits the other's dependency, obtaining an undertaking to which the latter would not have agreed in the absence of such constraint and gaining from it a manifestly excessive advantage (art. 1143).

An act performed by a representative without authority (*falsus procurator*) or beyond a representative's authority (*ultra vires*) does not bind the person whom he represents, unless the third party with whom the former contracts had reasonable grounds for believing in such authority, notably by reason of said representative's behaviour or statements (art. 1156).

Any clause that leaves a debtor's essential obligation without substance shall be deemed deleted (art. 1170).

Any clause of a standard form contract which creates a significant imbalance in the rights and obligations of the parties to the contract shall be deemed deleted (art. 1171).

Where a person undertaking an obligation is required to add something in his own hand, he may do so in electronic form if the circumstances of this are such as to guarantee that it could have been done only by him (art. 1174); this exception, however, does not apply to signed acts relating to guarantees or security if the party in question is a consumer (art. 1175).

A contract is absolutely void where an infringed rule's purpose is to protect a public interest. It is relatively void where an infringed rule's exclusive purpose is to protect a private interest (art. 1179).

Linked contracts lapse when one of them lapses (art. 1186).

Express formulation of the *rebus sic stantibus* (changed circumstances) clause (unforeseeability and excessive hardship) is made (art. 1195).

An agreement disguised under a sham contract takes effect between the parties to the same and third parties may invoke it (art. 1201).

Where, on the expiry of the fixed term of a contract, the contracting parties continue to perform their obligations, there is an automatic extension of such term. The aforementioned produces the same effects as a contract renewal (art. 1215).

The assignor is jointly and severally liable for the future performance of the contract unless the debtor whose debt has been assigned has expressly consented to such assignment (art. 1216(1)). If the assignor is discharged, any joint and several co-debtors remain liable to the extent which remains after deduction of the former's share (art. 1216(3)).

### ***Performance and non-performance***

A creditor may accept defective performance of a contract and request a price reduction (art. 1223).

Unless otherwise agreed, fulfilment of a condition precedent will not have retroactive effects and the risks will still be borne by the debtor who retains the management and proceeds of the thing (*res*) (art. 1304(6)).

### ***Obligations***

A joint and several debtor may not raise defences which are exclusive to other debtors ('personal defences'), such as the grant of a payment deferral. However, where a defence which is exclusive to another debtor extinguishes a separate part of the debt owed by said debtor, such as a set-off or debt remission, the joint and several debtor may invoke it to reduce the total debt (art. 1315).

Any debtor of an indivisible obligation is jointly and severally liable for the same (art. 1320).

The debtor whose debt has been assigned, even if notified of such assignment, may further assert against the assignee the set-off of related debts (art. 1324).

In the event of competing successive assignments of the same debt, priority is given to the first in time (art. 1325).

A debt assumption requires the creditor's consent, even if such assumption is cumulative because the creditor has not expressly consented to discharge the assignor (arts. 1327 and 1327(2)).

Whilst an assignment of claims does not require the debtor's consent (art. 1321), a novation for the purpose of a change of creditor does (art. 1333).

In the case of joint and several debtors, set-offs, debt remissions and mergers (confusions) exclusive to a co-debtor can only be invoked to the extent of the latter's share by another co-debtor (arts. 1347(6), 1349(1) and 1350(1)).

Related debts may be offset even if one of such debts is not a liquidated sum that is payable; the set-off is deemed effected on the day when the first of related debts becomes payable (art. 1348(1)).

Any payment received by a creditor from a surety in the latter's discharge must be deducted from the debt, discharging co-sureties *pro parte* (art. 1350(2)).

By operation of law, guarantees given in respect of the satisfaction of an obligation are attached to the obligation to repay (art. 1352(9)).

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