

THE PRICE IN FRENCH CONTRACT LAW AFTER THE 2016 REFORM

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ABSTRACT

The reform of contract law is contained in the February 10, 2016 order reforming contract law, the general scheme and the proof of obligations. This is to reform the civil code of 1804. The subjects covered by the order are related to: general principles of contract law, such as good faith and contractual freedom, the formation of the contract, the interpretation of the contract and the content of the contract. The new texts of the civil code relating to the price leave many questions that we will try to answer.

Keywords: Price, Fixing of the Price, Price Review, Index Substitution, the Role of the Judge, Significant Imbalance.

INTRODUCTION

The notion of price was, until the 2016 order, little present in the civil code. It was found in the definitions of certain special contracts (contract of lease, business, sale...) and especially in the commercial code. The price, which we find designated by different names (wages, rents), can be defined as a sum of money. It is sometimes claimed that the price may be something other than a sum of money, Nicolas (2000) and case law has been able to validate sales or assignments contracts for a symbolic price considering that “the sale of a thing may be made for consideration other than a sum of money” Cass (1987). Reform does not take sides on this point.

In contracts law, the main question related to price is whether it should be determined once the contract is done or whether it can be determined subsequently, either by agreement or unilaterally. Prior to the reform, the civil code did not generally resolve this problem. For a time, the price requirements were set by reference to the subject of obligation. Under the 1129 old Article of civil code, the price had to be determined or determinable during the contract formation. In addition, for certain important contracts such as sales contract, texts posed and continue to pose the requirement for price determination in the exchange of consents. Thus 1591 Article of the civil code states that “the selling price must be determined and designated by the parties”. Similar jurisprudence had developed about certain service and mandate contracts, which allowed the price to be determined after the conclusion of the contract, once the service had been performed.

Finally, the appearance of framework distribution contracts in the legal landscape at the beginning of the 1970s led to the developments in case law that we know and which found an end point in the judgments delivered in plenary assembly by the Court of Cassation December 1, Cass (1995).

Finally, the emergence of framework distribution contracts in the legal landscape at the beginning of the 1970s led to the developments in the case law that are well known and that have

found a culminating point, in the judgments delivered in plenary session by the Court of Cassation on 1 December 1995.

Since those judgments it has been held that Article 1129 does not apply to the determination of the price; the uncertainty of the price in the Framework Convention does not affect its validity and a party may fix it unilaterally, only abuse in fixing the price giving rise to termination or compensation. A framework agreement is particularly valid when it matches the supplier's tariffs and also when it is totally silent on the price. The sanction is no longer the nullity of the contract, but its termination or compensation of the distributor. Consequently, before the reform, several solutions were applied for determining the price in contracts.

Either the price should be the subject of an agreement between the parties and be determined as soon as the contract is formed. The price determination was condition for the agreement validity. The advantage of this solution for the parties was that they knew what to expect as soon as the contract was concluded.

However, this method meant that they were aware, from the moment the contract was formed, of the service provided in return for payment of the price.

When this was not the case, the price was simply determinable and this did not prevent the formation of the contract, since a clause organized the method of calculating the price and this method of calculating it did not depend on the discretionary will of one of the parties.

Either the price determination was not a condition of the contract validity and could be determined subsequently by the parties, or by agreement or unilaterally subject to the abuse control. Price determination was then a matter of contract performance and more a condition of its formation.

The challenge was to determine which contracts were subject to the requirement of prior determination and which were not, and to justify that distinction. The jurisprudence had held that the price determination was not a condition for the validity of distribution contract; Cass (1996), franchise Cass (1999) or business contracts Cass (1996). But the application of these solutions was not easy, and a break-up had been found between the various forms of contracts of the same nature, Nicholas. The jurisprudence has not always been consistent.

Therefore, the civil code reform to clarify solutions was appreciated. We know that reformers have various objectives. In one side, their ambition was to promote security, speed of transactions Philippe (2016) and economic efficiency. This explains why, alongside the principle of contractual freedom and that of the binding force of contracts, many unilateral powers were granted to the parties. The new texts of the civil code also give the impression to invite the parties to foresee all details in the contract in order to have the least possible recourse to the judge, Philippe (2016). On another side, the reform has taken into consideration the fact that the contract can no longer be considered as necessarily concluded by equal, enlightened and frees individuals. The order guarantees contractual justice, through giving the judge a role of protector of the weak contractor Gach-Pech (2016), especially in adhesion contracts. The judge is seen as "in charge of the contractual relationship" Marie-Elodie and his role is shifted from the formation of the contract to its performance Sarah (2012). The increase in unilateralism, means the increase in powers offered to only one of the parties, is offset by the extension of judicial review, Manuella (2016). To this end, the judge now has various flexible notions: "abuse", "significant imbalance", "unforeseeable circumstances", "obviously excessive advantage", "legitimate expectations" Hugo (2016) sometimes expressed by imprecise adverbs and adjectives like, such as: "illusory", "derisory", "determinative", "excessively" Sandrine (2016), in order to give it a power of appreciation.

The order of 10 February 2016 nevertheless takes a step back from the 2015 draft, which may reflect certain mistrust to the judge, Gael & Nicolas (2016).

Although some additional clarifications would have been useful Blandine (2013), the reform provided the civil code with considerable innovations in the price field, in particular the possibility of fixing it unilaterally in contracts for the services provision, and to reduce it in case of imperfect execution. It is clear that the new mechanisms are designed to avoid the disappearance of the contract, either its nullity or its resolution.

We will leave aside the revision for hardship provisions: even if it constitutes an important innovation of the reform, the mechanism particularity and the power to revise the contract which is awarded to the judge invite to exclude it from this overview.

Price control takes place mainly in the contract execution phase. The judge still does not have the possibility to appreciate its adequacy to the service when it has been agreed between the parties (2). New texts cover unilateral price fixing (3) and possible price changes (4) during the performance of the contract.

THE CONVENTIONAL FIXING OF THE PRICE

At the contract formation step, little use is made of the “term price” in the order, which instead uses the terms “value”, “equivalence” and “balance”. However, the price is directly concerned when the obligation to inform the value of the service is eliminated and the error on the value is ignored. These classic solutions are reaffirmed by the reform (2.1). There is still a question of price, albeit indirectly, when the order deals with the lack of equivalence of benefits and the significant imbalance (2.2).

Price, pre-contractual information and value error

The new Article 1112-1 of the civil code enshrines the obligation of information and declares it imperative. It states that “the parties who know information the importance of which is decisive for the consent of the other must inform the other party if the other party legitimately ignores that information or trusts its co-contracting party”. The information promotes the “right price” and market transparency. It concerns a relevant fact relevant fact, which is “any factor that could cause the creditor to react in the sense that if the creditor had known the information, he would have acted differently”, Muriel (1992).

Paragraph 2 of this article states that “this duty to provide information does not concern the estimation of the value of the service”. This exclusion seems justified by the objective “not to create legal uncertainty and to respond to corporate concerns”, according to the report submitted to the President of the Republic. It will have to yield to the special rules to certain contracts, such as those resulting from articles L. 111-1 2°, L. 112-1 and L. 113-3-1 and following of the consumer code, concerning contracts concluded between a professional and a consumer, or the obligation to disclose article L. 112-2 of the insurance code

The Baldus Cass (2000) jurisprudence and the Cass (2007) jurisprudence stating that the acquirer, even a professional one, is not obliged to inform the seller about the value of the acquired property, were apparently consecrated Grégoire (2016). Two remarks can be made. First of all, paragraph 3 of article 1112-1 of the civil code states that “information which has a direct and necessary connection with the content of the contract or the quality of the parties has critical importance”. However, the contractual content is indicated in subsection 3 and includes, among other things, the price question. So there is a drafting quirk that creates a contradiction. Secondly,

the pre-contractual obligation of information is not treated at the same time as the fraudulent reluctance. One might thus think that that a fraudulent reluctance of information could be penalised even though no obligation of information weighed on the author of the retention. A defect in the consent, in any case the fraud, could therefore be grounds for a sanction of a lack of information on the price.

Fraud could similarly be invoked to sanction an error in value, although it is not, in fact, a cause of nullity (art. 1136). The second paragraph of article 1137 of the civil code states that: “constitutes also a fraud the intentional concealment by one of the contracting parties of information of which he knows the determining character for the other party” and article 1139 states that: “the error resulting from a fraud is always excusable; it is a cause of nullity even though it concerns the value of the service or a simple reason for the contract”. Thus, the relative nullity of the contract could be pronounced in case of an error on the value caused by an intentional retention of information as was already the case before the reform Cass (2015). As a result, it is no longer so certain that the Baldus jurisprudence, related to the retention of information on behalf of the buyer, is devoted by the reform Olivier (2016).

Could the defect of economic violence provided for in the new Article 1143 of the civil code be invoked in the event of excessive prices? Defect and imbalance are linked here ; to this extent, article 1143 of the civil code resembles the first version of article L. 132-1 (former) of the consumer code which defined the abusive clause as that “imposed on non-professionals or consumers by an abuse of the economic power of the other party and [which] gave the other party an excessive advantage”. This criterion was left because it seems too difficult to be proved.

In the same vein, Article L. 442-6 12° of the commercial code, which sanctions significant imbalance, does not require proof, in advance, that the author of the practice holds a buying or selling power or a situation of dependence.

Article 1143 is also more restrictive than the jurisprudence of the Supreme Court Cass (2002) and then the reform projects in that it adds the condition of excessive advantage. The question may therefore arise due to its usefulness if its application conditions are more restrictive than those of special rights, Sophie.

Anyway, the fact that this protection mechanism was included in the category of consent defects and not in the provisions related to the contract content as suggested by the authors of Terré project shows the reform’ authors will not to allow the judge to check the adequacy of the price to the value of the service.

Balance is thus sought between the will to sanction glaring imbalances and the will to preserve contractual freedom and the security of transactions.

The price and lack of damage control

The civil code, in its section relating to the content of the contract, reaffirms in two provisions the prohibition of the control of the lesion.

This is, firstly, article 1168. This text is to be compared, then, with article 1171 which, although providing that, “in a contract of adhesion, any clause which creates a significant imbalance between the rights and obligations of the parties to the contract is deemed unwritten”, recalls that “the appreciation of the significant imbalance relates neither to the main object of the contract nor to the adequacy of the price for the service”.

The question may arise as to whether, as soon as the price is discussed, the agreement escapes the qualification of adhesion contract, Jean-Marie & Gwénaëlle (2015). It seems to us that the answer should be negative in that the price is rather part of the essential obligations of the

contract and not of the general conditions, its negotiation alone cannot lead to the contract classification of by mutual agreement.

The difficulty posed by article 1171 concerns its articulation with article L. 442-6 I 2° of the commercial code concerning restrictive practices of competition Arnaud (2016) which, in turn, would allow a control of the adequacy of the price to the service.

At first glance, the two texts do not have the same scope: contracts of adhesion in civil law, contracts concluded between commercial partners in commercial law, Manuella.

In addition, sanctions of significant imbalance are not considered in the same way. If the civil code considers the clause as unwritten, the commercial code retains mainly the responsibility of the author of the practice. In particular, article L. 442-6 I 2° of the commercial code would apply to imbalances between the service and the price Martine (2017). This is, in fact, what the case law has decided Paris Court (2013). The Court of Cassation thus considered, in a judgment of January 25, 2017, that “article L. 442-6, I, 2 ° of the commercial code authorizes a judicial control of the price, since this one does not result not free negotiation and characterizes a significant imbalance in the rights and obligations of the parties”. Similarly, the High Court recently used article L. 442-6 I 2 ° of the commercial code to control a price revision clause which did not allow a revision of the prices in a reciprocal manner Gac-Pech (2015). Some authors have expressed the fear that this provision would allow judges to carry out a general price control between distributors and suppliers, Martine.

This is, in fact, what the paragraph 2 of article 1171 of the civil code is explicit.

It should not, in fact, allow the judge to check the balance between price and performance in membership contracts. It should be noted, however, that, in consumer law, despite the same prohibition, the appreciation of the significant imbalance indirectly led to the verification of the adequacy of the price for the service.

Thus, with regard to a contract stipulating that the price would be a function of the travel time of the intervener, the supreme court affirmed that the clause “creates a real uncertainty as to the actual duration of the service” and “made it impossible for the consumer to know and control his cost, so that it would only benefit the supplier and result in a significant imbalance between the rights and obligations of the parties to the detriment of the consumer and that it was abusive” Gac-Pech (2016).

Does that mean that if a price clause confers an excessive privilege for one of the parties, the control of article 1171 could apply Mustapha (2016)? We have to be careful. This judgment is based on article L. 212-1 of the consumer code, which excludes control of the lesion “provided the clauses are clearly and comprehensibly drafted”.

The solution could therefore be justified by the obscure nature of the price clause. This limit, which is not included in the civil code, would make the specific solution in consumer law. Moreover, in two cases, the new civil code will allow a sanction in the event of an imbalance in the price of the service.

On one hand, article 1169 states that “a contract for pecuniary interest is void when, at the time of its formation, the counterparty agreed in favour of the undertaking is illusory or derisory”. This article is obviously reminiscent of the former absence of cause, as well as, in its extension, of the case law related to the sale granted with vile price Cass (1993). On the other hand, article 1170 states that “any clause which deprives of its substance the essential obligation of the debtor is deemed unwritten” and thus consecrates the famous judgments Chronopost (1996) & Faurecia (2011).

Some see it as the possibility of deeming unwritten a clause which would fix a derisory monetary counterpart, Mustapha. It is difficult to anticipate the application of this text by case law, but it would be surprising if it were to be used as a duplicate of section 1169.

The reform therefore did not allow the possibility for price judicial review when it does not correspond to the real value of the service provided Thierry (2016). The judge's intervention is only foreseen in the event of abuse in the unilateral fixing of the price by one of the parties.

UNILATERAL FIXING OF PRICES

Article 1163 takes over the content of the former article 1129 of the civil code. We remember that the jurisprudence had applied it to price before declaring, in 1995, that section 1129 was inapplicable.

The claim was made in the particular context of the price determination in the framework contracts. The reform incorporates the possibility of unilaterally fixing the price in these contracts in article 1164 so that Article 1163 reappears as a text of principle Françoise (2016) as regards price: in the contract, the price must be determined or determinable. Article 1165 is a major innovation in allowing unilateral price fixing in service contracts. Unilateralism enshrined in Articles 1164 and 1165 offers the advantage of speed since it allows the immediate conclusion of a contract whose price will be fixed later, Sarah.

The possibility of setting prices unilaterally concerns two categories of contracts, basic contracts (3.1) and contracts for services provision (3.2), which encompass a wide variety of special contracts, Françoise. The question therefore arises as to why the rule has not been extended to all contracts Christien & Sarah (2016).

Unilateral price fixing in framework contracts

Article 1164 of the civil code devoted the case law allowing unilateral price fixing in framework contracts subject to abuse, Cass (1995). The framework contract is defined in article 1111 of the same code as "an agreement by which the parties agree on the general characteristics of their future contractual relations".

If the definition given by the drafters of the order is subject to criticism Nicolas (2017), it is especially surprising that this category of contracts was devoted in order to draw a single consequence: the possibility of setting the price unilaterally.

The parties may therefore agree that one of them will unilaterally fix the price. What if no clause provides for this option? The use of the term "agree" implies that there is agreement, even tacit, between the parties. In the absence of such an agreement, the judge will thus have to declare the contract null and void on the ground that the price has not been determined. In the absence of a choice for unilateral determination, it is therefore necessary to return to the principle of conventional determination.

Once agreed, the power to unilaterally set the price is not discretionary. In case of dispute, the party having fixed it must justify its, which, according to the report, will be to "explain how the price was calculated, based on the forecasts of the parties".

This amounts to the creditor proving that there is no abuse in the exercise of this power, Philippe. If no sanction is enacted in the event of a breach of this obligation to state reasons, it may nevertheless be considered that it will justify referral to the judge, in so far as refusal to state reasons will be an indication of the presence of an abuse, from then easier to prove Alain (2016), or even operate a reversal of the burden of proof of abuse, which weighs a priori on the debtor.

In cases of abuse, it is provided that the co-contractor may take legal action to seek compensation or the termination of the contract. While there have been few judgments on abuse in unilateral price fixing since 1995 Voir (2014), it is necessary to consider what such abuse may constitute.

For an author, controlling abuse must not be tantamount to controlling the fair price in the contract, the adequacy of the price for the service, because that would amount to contradicting article 1168 of the civil code. Good faith is required in accordance with the new article 1104 of the civil code.

Since abuse is a form of disloyalty, it seems to us that it should be evaluated both objectively with regard to the analysis of the price amount (the difference should then be huge Cass.com (1992), that is to say there is an excessive difference between the price fixed by the creditor and the market price, thus the fact that the creditor does not allow his co-contracting to compete Cass.com (2014)) and subjectively taking into account the conduct of the creditor.

The debtor's dependence on his economic partner, Nicolas could thus be taken into consideration. This last criterion makes us think of violence vice and more particularly of the "abusive exploitation of a situation of economic dependence" of article 1143 of the civil code, but the latter concerns the contract formation while the abuse in fixing the price is sanctioned at the execution stage. Nevertheless, there is some closeness between the two concepts.

Article 1164 of the civil code does not provide for direct intervention by the judge in price fixing, but simply the possibility of ordering damages or the termination of the contract. If the draft order contemplates allowing the judge to review the price himself, the final text retains only an indirect revision of the price, Thierry. The drafters have also adopted this solution in service delivery contracts.

Unilateral price fixing in contract for the provision of services

Article 1165 of the civil code is written in terms similar to those of Article 1164 and applies to contracts for the provision of services. Thus, in many contracts, price determination is no longer a condition of their validity. The difficulty of applying this text will come essentially from the concept of a contract for the provision of services, a category with unclear content usually used in consumer law.

Business contracts seem to be targeted, but this category can integrate multiple varieties of contract: mandate, lease, insurance, even loan to use... The question arises as to the category of contracts transferring ownership, Françoise: some of them being business contracts, they would fall under service contracts. The possibility of fixing the price unilaterally in transferring ownership contracts makes even more uncertain the basis for excluding the sale of this option.

Article 1165 transposes the solution hitherto applied to the business contract where the parties do not always determine the price as soon as it is concluded, Marc (2016). However, a clause providing for the unilateral fixing of the price does not seem necessary, unlike the framework contract. Nor should this provision be confused with article 1166 of the civil code, which makes the price depend on the quality of the service if it does not comply with the legitimate expectations of the parties. In the latter text, it is the non-monetary benefit which is not determined or determinable.

Unilateral fixing of the price implies, as in the case of the framework contract, the obligation on the creditor to give reasons for the amount of the price fixed by him.

This obligation is only necessary in price dispute by the debtor and it takes up the requirements which the Supreme Court had laid down, in the matter of a business contract, on the price creditor, which must provide the elements enabling its amount to be fixed, Cass.com (1997).

The judge will take into consideration, for example, the “professional qualification” of the contractor Cass.com (1992), the “quality of the work provided” Cass.com (1997), the “importance of the services rendered” Cass.com (1992), and the difficulty of service performance. But here again, it is only an indirect intervention of the court, which is a notable difference from the previous jurisprudence on the business contract, in the absence of agreement between the parties on the price, allowed the court to fix it itself Cass.com (1989).

The draft order also contemplated the possibility of a judicial review of the price. In case of fixing price abuse, article 1165 only provides for compensation to be paid to the co-contractor. This choice is finally astonishing because, at the same time, the order grants a power of direct revision of the price to the judge in case of unpredictability, Thierry.

THE PRICE REVIEW

Two mechanisms are envisaged: on one hand, index substitution as regards indexation (4.1), on the other hand, price reduction in case of partial execution (4.2).

Index substitution

Article 1167 of the civil code treats the development of price on the basis of an index and codifies the case law which substituted a lawful index for an unlawful index in the name of the common intention of the parties as regards indexation. However, the article does not specify who is competent to make this substitution. Can this substitution be operated out by one of the contractors under the supervision of the judge or must it be operated directly by the judge at the request of one of the parties? Whatever the answer, the conditions of articles L. 111-1 and following of the monetary and financial code, the requirement of proximity taken in article 1167 of the civil code Thierry (2016) and the 7° of article L. 442-6 I of the commercial code must be respected.

The evolution of the price is mainly envisaged by two articles of the civil code: articles 1217 and 1223 devoted to the reduction of the price in case of imperfect performance of the service. This is a great change from the civil code of 1804.

The price reduction

Article 1217 of the civil code proposes several remedies for the total or partial non-execution of the contract: the exception of non-execution, the forced execution in nature of the obligation, the termination of the contract, the reparation of the consequences of non-execution and finally, the reduction of the price provided by article 1223, which provides that “the creditor may, after formal notice, accept an imperfect execution of the contract and request a proportionate reduction of the price. If he has not yet paid, the creditor notifies his decision to reduce the price as soon as possible”.

This latter solution applies in the case of partial (or imperfect) execution of the contract, for example in the case of receipt of an unfinished work Benoît (2017). This option already existed in certain texts, for example the estimator action of the guarantee against the hidden defects of article 1644 of the civil code or the lesion, Art (1674) in the real estate sale or movable sale.

When nothing was foreseen, it was necessary to go through the contractual liability mechanism by claiming damages, which meant respecting the terms of the action.

The interest of the new mechanism is to allow the parties to resolve disputes without recourse to the judge and to adapt what had been contractually provided for to what has actually been executed. According to the report for the President of the Republic, the price reduction in case of imperfect enforcement meets the requirement to increase the law economic efficiency.

The difficulty of application of this text stems from the imprecision of its criteria, Alain. Who gives the formal notice? This provision is distinct from article 1345 of the civil code « where the creditor refuses to receive the payment due to him or prevents him by reason of his payment, the debtor may give notice to accept or permit the payment to be made ». In our situation, if the creditor has not yet paid, it seems that it is up to him to give notice to the debtor to comply and then to notify him of his intention to obtain a reduction in the price.

The reduction in price is probably envisaged as an extrajudicial sanction, Manuella. Nevertheless, the judge could be brought a posteriori in the event of the creditor contesting the use of this mechanism, Thierry. In addition, the text provides only the hypothesis that the creditor has not yet paid but the report submitted to the President of the Republic specifies that the creditor can request a partial refund of the price if he has already paid.

Is it then up to the debtor to give notice to the creditor, who is then obliged by the latter to accept the price reduction Herve (2016) or to the creditor to make the request? Unless this hypothesis requires the intervene of the judge Denis (2016). The text specifies that the price reduction must be proportionate to the partial non-execution. Will the mechanism leave room for the exception of non-execution or a request for resolution or reparation, Herve? In view of the uncertainties surrounding this provision, some advice the parties to include a clause excluding the possibility of reducing the price, Mustapha.

CONCLUSION

In conclusion, the new texts of the civil code relating to prices leave open many questions concerning their interrelationship with each other and with special law. Inconsistencies appear: why deny the judge the possibility to revise the price set unilaterally but allow it in case of unforeseen Charles-Edouard (2016)?

Legal security sometimes seems to regress, particularly in view of the increased role of the judge, which is not very precise, in the face of the many new unilateral powers offered to one of the parties, Laurent. Behind many price rules, we also find the objective of justice. “If the judge is thus required to intervene in the contractual relationship, his intervention now consists more in the exercise of a mission of support of the contractual relationship aimed either at sanctioning the non-compliance with a condition of contract validity or the inappropriate exercise of a unilateral prerogative by a party, either to allow the continuation of the contractual relationship, or to accompany its end by allowing a party to leave it more quickly” François.

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