Information Management for the Fate of the Limitation of Liability Clauses After the Termination of the Contract in French Law

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Abstract The termination of a contract for non-performance does not preclude the application of the limitation of liability clause that was provided for in the contract. This clause therefore survives the retroactive annihilation of the contract following resolution. However, the scope of such a solution must be carefully considered. After the two rulings of the Cour de cassation (French Supreme Court) that ruled on the survival of limitation of liability clauses, the first of October 5, 2010, handed down specifically on the subject of a limitation of liability clause, and the second of May 3, 2012, which concerned all "contractual stipulations governing the conditions and consequences of its unilateral termination", the Commercial Chamber of the Cour de cassation revived the plot by restoring, in a ruling of February 7, 2018, the full effectiveness of the limitation of liability clause in the event of termination of the contract for non-performance. There is no doubt that the letter of the new article 1230 of the Civil Code, resulting from the order of February 10, 2016, will have guided the spirit of the advisers. Henceforth - says the law- "the resolution does not affect either the clauses relating to the settlement of disputes, or those intended to take effect even in the event of resolution". So in both the old and new contract law, limitation of liability clauses have a bright future ahead of them.

Keywords: *Termination of contract, reform of the civil code, Limitation of liability clause, retroactive effect, Court of Cassation*

1. Introduction

The purpose of the liability limitative clause is to limit or even exclude the effects of a contractor's liability. And more particularly, the reparation due by the debtor in the event of non-performance of his contractual obligation. In most cases, the limitative is quantitative: practically, it takes the form of a limit on damages. Thus broadly used, those limited liability clauses may be those which will be qualified as a limitative clause or a diminishing of liability, an exclusive clause or an exemption from liability, an irresponsibility clause, a limitative clause for compensation or damages [1-3].

The practice of limitative clauses or exonerations of liability really developed in the nineteenth century in response to the meteoric rise of civil liability. Since 1931, there have been two categories of clauses that reduce liability: those that define the obligation of the debtor and those that limit or exclude reparation. Theoretically, the difference between these two types of clause is clear: they result in reducing or excluding contractual liability, but the former act on the source of it: the obligation violated; seconds on its effects: the obligation to repair.

Over the past few years, the regime of limitative or exemption clauses has been disrupted. The fate of liability clauses seems extremely fragile. First, the rise of special compensation laws that prohibit them. Then, the famous Chronopost solution. Then, the case law movement that decides that these clauses are ineffective in case of gross negligence or dolosive of the debtor who avails himself of them. Finally, they are presumed irrefragably abusive when they are stipulated in a consumer contract and must be deemed unwritten pursuant to article R. 212-1, 6º, of the Consumer Code which prohibits "clauses which have the object or effect of removing or reducing the right to compensation for damage suffered by the consumer in the event of a breach by the trader of any of its obligations" [4, 5].

These clauses have both real advantages for both parties and significant disadvantages. First, these clauses have allowed to potential responsible debtors to reduce insurable damage, thereby limiting insurance premiums that could otherwise be significantly colossal. Insurance becomes both "possible and financially sustainable". Moreover, the clauses relating to reparation are an essential element in a difficult negotiation. Their inclusion in the contract makes it possible to accept other clauses in exchange. But these clauses also have disadvantages. First, these clauses could induce the debtor to be negligent. Another moral disadvantage may be raised. Indeed, irresponsibility forms incompetence and it would be incomprehensible for a person to be able to exonerate himself from the consequences of his harmful acts, by placing them at the expense of the victim.

In principle these clauses are valid, in the absence of an express prohibition . They are binding on the parties and the judge . But more and more often, the law intervenes, which shows the increasing disfavor it brings to these clauses. For example, in the matter of liability for defective products, Article 1245-14 of the Civil Code states that: «Clauses intended to exclude or limit liability for defective products are prohibited and deemed unwritten». Clauses excluding liability for the carriage of goods by land according to Article L 133-1 of the French Commercial Code and clauses excluding the liability of hoteliers are also prohibited , in the event of theft or damage to the objects of travellers according to Article 1953, par. 2 and 3 of the Civil Code.

Where these clauses are valid, they are effective if the debtor commits a slight or ordinary fault. If the creditor proves that the debtor has committed a fraudulent or gross negligence, the limitative or exemption disappears [6].

One of the objectives of the reform of contract law recently adopted by ordinance, is to «Strengthen the attractiveness of French law, politically, culturally, and economically». The report to the President of the Republic assures that the order has chosen to increase "the legal certainty conferred on our law of obligations" in order to "facilitate its application in contracts of international law". This reform directly affected the liability clauses. It enshrines the Chronopost jurisprudence in Article 1170 of the Civil Code, it extends the fight against unfair terms to adhesion contracts, and above all devotes a relatively new solution in the light of the previous but known jurisprudence of European and international law [7, 8].

2. Method

Two new levels have been acquired with respect to these clauses. The first is Article 1230 of the Civil Code resulting from the 2016 reform. The second is the recent decision of the Court of Cassation of 7 February 2018 which has again upset the regime of limitative clauses of reparation. This rather complex and perplexed regime deserves to be clarified knowing that it is evolving and it will not stop for the moment to progress towards new levels.

First, we would like to examine the principle of retroactivity of the termination of the contract and, in particular, the fate reserved for clauses limiting compensation in the event of termination of the contract under prior law (I). In a second step, we will address this issue in light of the reform of February 10, 2016 which puts an end to the jurisprudential hesitations concerning the termination of the contract and its effect on the limitative clauses of reparation (II).

I. The principle of retroactivity of the termination of the contract in prior law

We will examine successively the legal effects of the termination of the contract (A) and the effect of this termination on the limitation of liability clauses in prior law (B).

A. The effects of the termination of the contract

Various mechanisms are available to sanction the debtor when the non-performance is attributable to the latter. The creditor, according to Articles 1217 and following of the Civil Code, has a choice: he can claim, or the forced execution, or the termination, that is to say the destruction of the contract. In addition to contractual liability, which takes the form of damages in most cases, the creditor may, in particular, request the termination of the contract for non-performance .

The termination shall have the same retroactive effect as the nullity, that is to say, the effects of the contract shall be erased, and the parts of the contract shall be discharged for the future. The contract did not exist; which has consequences in the relations of the parties and towards third parties.

Between the parties, the termination and its retroactivity are subject to simple principles. If the contract has not been executed, it is destroyed. If an execution has taken place, refunds must take place, with the same settling of accounts as in the matter of nullity: refusal of indemnity for the enjoyment of the thing, indemnities in the event of deterioration or improvement of the thing. In addition, damages may be awarded, which is the application of contractual liability.

The disadvantages of retroactivity are mainly measured against third parties, who are subject to serious insecurity. The termination, in this respect, in this respect, produces the same effects as nullity: the acts of disposition made by the purchaser whose title is resolved, but not the acts of administration, are null and void. Retroactivity is excluded in successive contracts: the termination is replaced by a cancellation.

Termination can only occur in certain contracts, for certain cases, and following a judicial decision. First, the termination is based on a common sense idea: the obligation of one is no longer justified when the other does not provide the agreed consideration. So, ultimately, most contracts can be terminated [9]. Then, in order for a contracting party to complain about the non-performance of a contract in order to obtain the termination: it is necessary to justify a serious non-performance. Furthermore, the non-performance must be attributable to the debtor [10]. Finally, the termination does not automatically result from non-performance; it must be asked to the court and it is not an inevitable outcome because the creditor has according to Articles 1217 and following of the Civil Code several choices as they were stated earlier [11] .

After presenting the effects of the termination of the contract, we will study the effects of the termination on the limitative clauses of liability.

B. The effects of termination of the contract on limitative of liability clauses

In principle, the termination of the contract causes the retroactive destruction of the contract and renders things in their former state. In other words, the termination must carry with it all the clauses which make up the contract, whether they are those which provide for the main obligations which the contractors have undertaken to perform, those which specify its duration, or those which adjust, in the event of disputes, its method of settlement, the jurisdiction of attribution or territorial, the proof of the contract, its interpretation, the sanctions of its non-execution, or even those which involve post-contractual obligations. Since the support of these clauses disappears for the past, they must suffer the same fate: the accessories, the clauses, follow the main, the contract. They are therefore also fatally destroyed retroactively.

If the removal of the limitative clauses is part of a logic of retroactivity, the solution brought about by the recent decision which opts for the survival of these clauses is not completely new. This solution is already known in private international law. Article 81 of the United Nations Convention on Contracts for the International Sale of Goods states that: The termination of the contract shall release both parties from their obligations, subject to any damages that may be due. It shall not affect the terms of the contract relating to the settlement of disputes or the rights and obligations of the parties in the event of termination.

At the level of the Court of Cassation, it considered that certain contractual clauses may persist. If it has already decided that the limitative clauses do not last until the termination of the contract because of the retroactivity of the dissolution it causes, it has opted for the survival of certain clauses. The termination must be distinguished from nullity since it does not come to sanction the formation of the contract. Its objective is not to have the contract cancelled but to put an end to it by rebalancing the obligations of both parties to the contract. Following this

reasoning the Court of Cassation considered that clauses relating to disputes that can generate the contract remaining applicable despite the termination of the contract. It also decided that the penal clauses remained applicable despite the termination of the contract, in which they were inserted, and its retroactive nature. However, the resolutory clause disappears with the contract [12], as does the non-competition clause formulated to prevent any competitive activity during the term of the contract [13].

The doctrine has given several justifications for the survival of such clauses including limitative clauses of liability. According to the explanations of Thomas GENICON the termination destroys the economic operation of which the contract ended was the support and, consequently, « the realization of the economic operation carried out by the contract can no longer be envisaged as soon as the termination is decided. None of the contractors can be allowed to obtain in kind what he expected from this operation » . According to him, only clauses that are foreign to the economic operation are maintained when the contract is terminated because these clauses do not relate to the economic operation [14]. Another author explained the survival of certain clauses by distinguishing on the one hand "the binding content of the contract" and on the other its binding force, believing that at the termination of the contract only the binding content is destroyed while “the contractual standard remains [15] and while most of the effects it has created in the past are erased, it continues to serve as a reference for the the resolution of all disputes relating to the parties past’ relationship” [16].

The decision of the Court of Cassation of 5 October 2010 was the subject of strong criticism in doctrine. The Court of Cassation had decided “that the termination of the sale entailing the retroactive destruction of the contract and the restoration of things to their former state, the Court of Appeal deduced exactly that there was no need to apply the limitative clauses of liability”. Indeed, following the logic of the Court of Cassation, the limitation of liability clauseswhich is the result of negotiations between the two parties to the contract will have practically no use because the creditor can neutralize the effect of this contractual stipulation by preferring to resort to the termination for non-performance in order to seek redress for his prejudice without taking into account the limitative clause [17].

3. Results

We may wonder about the scope of this decision in relation to its non-publication. This unpublished judgment is at the bottom of the scale in the hierarchy of judgments rendered by the Court of Cassation and according to Mr. WEBER, President of the Civil Chamber of the Court of Cassation, “It is the judgments which, for the chambers, do not bring anything to the doctrine of the Court of Cassation”. Objecting to this judgment is of paramount importance because the rejection of the surviving liability clauses following the termination would have a counterproductive effect on the effectiveness of the clauses.

We hope that this is only an isolated judgment which will not be followed up in any particular way because the arguments in favor of the survival of the remedial clauses make it necessary to abandon this solution/

The question that legitimately arises is that of the reasons that led the magistrates of the Court of Cassation to adopt, henceforth, for the survival of the clauses limiting reparation. We can immediately question whether this solution comes from the influence of the reform of the law of obligations.

II. The principle of the retroactivity of the termination of the contract in the light of the provisions of the ordinance of 10 February 2016

By a decision of 7 February 2018, the Court of Cassation took a different position from its previous case law, considering that the termination of a contract did not entail the annulment of the limitative clauses of reparation.

We will first, analyze the judgment of February 7, 2018 (A). Then, we will study this decision in the light of the reform of February 10, 2018 (B).

A. Analysis of the February 7, 2018 judgment

Two companies have entered into a business contract. As a result of problems in the installation of the boiler in a power plant, the service provider company carried out repairs on the boiler, but new leaks were noted. A judicial review was carried out and it follows that the new leaks are attributable to the welding carried out by the service provider company who had intervened to repair the boiler. The client has exercised one action for termination and one action for responsibility. The termination to the exclusive wrongs of the service provider company was pronounced by the substantive judges who, moreover, retained at his expense the full compensation of the damage suffered by his co-contracting party, despite the limitative clause of reparation stipulated in the contract. And if this clause had been deactivated by the trial judges, it was because “the termination of the sale entailing retroactive cancellation of the contract and return of the goods to their former state, the limitative of liability clause should not be applied”.

The service provider company appealed against the judgment delivered on 20 April 2016 by the Court of Appeal of Nancy. The service provider company argued that the non-performance of the contract causes the judicial termination of the contract and the compensation of the damage caused by this non-performance remains subject to the limitative clause of reparation inserted in the contract. It adds that this clause aims to organize the effects of this non-performance, despite the retroactive cancellation of the contract. Thus, the court of appeal rejecting him the right to avail himself of the limitative clause of reparation (which specially capped the liability to 100% of the price HT), because of the termination of this contract violated the old articles 1134 and 1184 of the Civil Code [18-20].

The Court of Cassation has censored this decision by stating that «in ruling thus, while in the event of the termination of a contract for non-performance, the clauses limiting the reparation of the consequences of this non-performance remain applicable, the Court of Appeal has violated Articles 1134 and 1184 of the Civil Code ». The solution adopted in this Decision is new. Indeed, the Court of Cassation has traditionally ruled that the limitation of liability clausesdoes not survive the retroactive annihilation of the contract following its termination for non-performance.

It may be noted that the decision rendered on 7 February 2018 by the Court of Cassation makes no reference to the retroactivity of the termination. This absence can be explained by the fact that the Court of Cassation has surely taken into account the doctrinal criticisms that did not see

the retroactivity of the termination as a supposed basis for the disappearance of all contractual clauses.

It is clear that the position of the Court of Cassation is now established and will certainly apply to any disputes that will be subject to the law resulting from the ordinance of 10 February 2016.

B. The influence of the reform of 10 February 2016 on the position of the Court of Cassation

The new article 1230 of the Civil Code states that "the termination does not affect clauses relating to the settlement of disputes, nor those intended to be effective even in the event of a termination, such as confidentiality and non-competition clauses". This article completes the regime of the termination by expressly providing that survive the termination the clauses of settlement of the disputes and any clauses intended to produce effect even after the disappearance of the contract, such as the clauses of confidentiality or not-competition. This provision is directly inspired by business practice, and both the PDEC and the Gandolfi Code also provide for it .

Although it was issued under the aegis of the texts prior to the ordinance of 10 February 2016, this decision already informs the new article 1230 of the Civil Code to confirm its non-exhaustive nature and promise the addition of indemnity clauses to this list . The new text therefore does not explicitly address the issue of limitative of liability clauses. If it is clear that the latter are not related to the settlement of disputes, the second part of the article could, however, involve them. Indeed, confidentiality and non-competition clauses are cited as examples, so it would be possible to consider that limitative clauses are also concerned .

Certainly the reform of the Civil Code drew the attention of the judges of cassation, but we cannot guarantee that the new article 1230 had a major role in the decision taken. Moreover, it was absolutely not applicable in this case and the visa cites articles 1134 and 1184 of the Code.

If the judges had wanted to highlight the influence of the reform of 10 February 2016, they would have been allowed to insert a reference to the new texts, in addition to the old ones applicable to the case. They were open to them. If the reform ordinance had had a confirmed influence, they could have resorted to the formula, already used many times by the Court of Cassation, "the evolution of the law of obligations, resulting from Ordinance No. 2016-131 of 10 February 2016, leads to a different assessment (…)" . However, this formula presupposes two things: first, that the Court adopts a reversal of jurisprudence, which is not correct as we have seen. Secondly, that this reversal be inspired, in a decisive way, by the evolution of contract law, which is not certain in this case.

The decision of 7 February 2018 , without it being a real reversal, would put an end to the criticisms leveled against the solution adopted in 2010. The majority of the doctrine believes that this solution is justified because it is consistent with the presumed will of the parties to the contract. It must not be conceived as an exception to the retroactive effect of the termination but as a consequence of the more or less autonomous nature of the clauses concerned .

While it is not certain that the judgment of 7 February 2018 could be described as a true reversal of case law, the solution is at least a significant change from the 2010 judgment.

4. Conclusion

The regime of limitation of liability clauses seems clear at first glance. In principle, they are lawful in contract and unlawful in tort, and in the event of fraud or gross negligence on the part of the person liable, they are disregarded.

However, their legal regime has been gradually modified by special laws that treat these clauses separately. Sometimes the clauses are considered null; sometimes they remain valid, but provided that they do not set a lower repair threshold than that provided for by law. Finally, it is noted that the judges opted to survive these clauses despite the termination and its retroactivity. All of these elements have undermined the certainty of these clauses.

The judgment of 7 February 2018 is not likely to be a reversal and seems in harmony with the reform of contract law. But it does not specify the complexity of the reasoning to be followed in determining whether a clause applies despite the termination. The parties will have to first consider whether the reciprocal obligations have been useful, failing which retroactivity will preclude the effect of any clause. Then, only, in the absence of retroactivity, it will be necessary to seek whether the disputed clause was intended, in particular according to the will of the parties, to manage the conditions of the termination or its consequences. In addition, another element of the research should be added, namely whether the application of the disputed clause does not originate in the period of contractual validity. This situation can only invite the drafters of contracts to clearly characterize, in the clauses relating to cancellation and termination, the stipulations that the parties intend to apply on the occasion of the termination and subsequent to its consumption. It also calls for an effort to characterize the synchrony of the obligations that contribute to the economy of the contract, so as to make it possible to identify whether the performance has been useful to the parties or whether, on the contrary, the default affects the entire agreement.

The solution adopted calls on the drafters not to focus too much on the possible contractual indemnity granted to the creditor in the event of early termination of the contract but to concentrate more on the means of limitation of liability of the debtor, the validity of which is no longer in doubt in the light of this judgment.

We believe that the establishment of legal certainty and the protection of the parties involved must also involve the reform of the regime of limitation clauses. This regime must regain certainty and consistency, especially since, after the reform of contract law in 2016, the civil liability regime will soon see a profound reform.

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