

PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the twelfth edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for December 2017.

The PwC IBR Network provides legal services to assist multinational organisations with their cross-border reorganisations. We focus on post-deal integration, pre-transaction separation and carve outs, single entity projects, and legal entity rationalisation and simplification as well as general business and corporate and commercial structuring.

Each month our global legal network brings you insights and updates on key legal issues and developments relevant to multinational organisations.

We hope that you will find this publication helpful, and we look forward to hearing from you.

In this issue

In our December 2017 issue:

- PwC Société d'Avocats (France) considers the impact of recent contract law reforms on corporate law; and
- PricewaterhouseCoopers Oy (Finland) reports on the comprehensive reform of the *Finnish Act on Foundations*.

Contact us

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PwC Société d'Avocats (France) – Impact of the French contract law reform on corporate law

At a glance

The order No. 2016-131 relating to the French contract law was adopted by the French Government upon the authorisation of the Parliament (**Order**). The general regime and the proof of obligations (**Reform**) were introduced into the French Civil Code and took effect on 1 October 2016.

The new amendment overturns the former controversial case law regarding unilateral promises to sell or purchase, representation and assignments of contracts, receivables and debts.

In detail

The French Government signed a reform of the French contract law regarding the general regime and the proof of obligations, which took effect on 1 October 2016.

The Reform was initiated modernising French contract law to make it more accessible, coherent, predictable and attractive. By adopting the order, the Government first intended to codify (in the Civil Code) principles which have been established by French case law, but also to introduce new concepts. Among the key modifications resulting from the Reform which may affect French corporate law, we retained three topics, namely: “Unilateral Promises” (Article 1124 French Civil Code), “Representation” (Article 1161 of the French Civil Code) and “Assignment of contracts, receivables and debts” (Articles 1216, 1321 to 1327 of the French Civil Code).

Unilateral promises to sell or purchase (Article 1124)

Before the Reform, the former case law applied to situations where a Promisor, party to an Unilateral Promise of Sale (i.e. a contract pursuant to which a given Party, the Promisor arranges with the Beneficiary selling or purchasing e.g. shares of a company), revokes its commitment on selling or purchasing, before the Beneficiary exercises the option to buy or sell. The Beneficiary could only claim damages without any possibility seeking the enforcement of the Promise to sell or purchase.

The new rule overturns this controversial case law. Article 1124 of the French Civil Code now provides that the Promisor's revocation of the Unilateral Promise, during the given time period to exercise its option by the Beneficiary, does not prevent the formation of the promised contract. Consequently, the Beneficiary is entitled to request the enforcement of the contract from the court (i.e. the sale or the purchase of the shares in our example). This new legal provision will make it possible to secure shareholders' commitments relating to the sale of their shares.

PricewaterhouseCoopers (Australia)

Proposed Australian corporate collective investment vehicle

More generally, the Reform introduces the principle according to which in the event of a debtor failing to perform a contractual obligation, the other party is entitled to claim from the court the “enforcement in kind” of such obligation (art. 1221), and not only damages covering the prejudice caused by the contract breach. This provision of the Civil Code will also allow to strengthen the binding force of the commitments stipulated in Shareholders' agreements.

Representation (Article 1161)

Pursuant to the new article 1161 of the French Civil Code “*a representative cannot act on behalf of both parties to a contract nor can he contract on his behalf with the person whom he represents*”. Where a representative does so, any act which is concluded is null and void, unless legally authorised or if the person represented has authorised or ratified it. This provision was made with a view to combating conflicts of interest. Referred to this general provision, a legal representative of a company (e.g. the President of the simplified joint stock company or “SAS”) may not personally conclude an agreement with the company represented by him, or may not conclude an agreement between two companies if he is their legal representative. In such cases, another legal representative, if any (e.g. a Managing Director, if any) will have to negotiate and sign the agreement, or another corporate body (e.g. the Board of Directors) will need to authorise or ratify the execution of the agreement.

PricewaterhouseCoopers Oy (Finland)

The Finnish Supreme Court broke the principle of limited liability

However, the application of this legal provision to company directors or to legal representatives is contested by commentators and professionals. Firstly, because there are special provisions in corporate law that address the situations entailing a conflict of interest. Secondly, because this rule makes more cumbersome the execution of agreements on behalf of companies. For this reason, the Parliament envisages to amend this rule, so that it no longer applies to legal representatives of companies. In the meantime, it is recommended to pay attention to situations where a same representative executes agreements on behalf of one or several companies.

Assignment of contracts, receivables and debts

Assignment of contracts (Articles 1216 and seq.)

The Order introduced a regime of assignment of contracts (*cession de contrat*) and by such, consecrated the case law previously existing. The article 1216 of the French Civil Code provides that a contracting party may, with the consent of its co-contracting party, assign its position as party to a contract. Consequently, the new provisions of the Civil Code clarify the legal frame and conditions of a contract assignment.

Assignment of receivables (Articles 1321 and seq.)

The assignment of receivables and its regime was also improved and simplified by the Order. To be enforceable against the debtor and third parties, the assignment of a receivable no longer requires to be served on such debtor by bailiff (“*signification par huissier de justice*”). The assignment is now automatically enforceable against third parties at the date of the conclusion of the assignments agreement, which must be in writing. The assignment is enforceable towards the debtor once a mere notification is sent to the debtor, or upon such debtor’s acknowledgement.

Assignment of debts (Articles 1327 and seq.)

The Order also introduced under French law the notion of “debt assignment” into the French Civil Code. Henceforth, pursuant to article 1327, the creditor's consent is required to transfer the debt. In addition, insofar as the creditor expressly agrees (such consent being separate from the creditor’s approval to the principle of the transfer of the debt) the original debtor will be discharged of its obligation for the future. Otherwise the original debtor remains severally liable with the assignee for the debts payment. In particular the Order specifies that security interests remain in existence when the original debtor is not discharged by the creditor. Otherwise the security interests granted by third parties can only be maintained with their consent.

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PricewaterhouseCoopers Oy (Finland) – The new Finnish Act on Foundations

At a glance

A comprehensive reform of the *Finnish Act on Foundations (FAF)* came into force on 1 December 2015. The goal of the reform has been to bring more transparency into the actions of foundations, which will enhance trust towards foundations.

A noteworthy amendment in the new FAF was adding a wide definition of the inner circle into the legislation. The FAF also imposes a requirement of a comprehensive reporting of all inner circle actions in the annual report of the Board.

The rules of all Finnish foundations shall be amended to be in accordance with the new legislation by **1 December 2018**.

In detail

A comprehensive reform of the FAF came into force on 1 December 2015. The purpose of the new legislation has been to enable an efficient, flexible and predictable ways for the foundations to function. The goal of the reform has been to bring more transparency into the actions of foundations, which will enhance trust towards foundations. Privately owned foundations are of significance to the Finnish society as they support science, art, culture and social objectives. The Finnish legislation does not recognise or stipulate the trust institution which is known in common law countries.

According to the FAF, the purpose of a foundation has to be useful. The general principles added in the legislation clarify the concept of useful purpose, for example by totally prohibiting the inner circle actions deviating from the purpose of the foundation. Also, the asset management of a foundation has to be systematic.

The foundations may conduct business operations, in case the business is related to implementing or financing the purpose of the foundation, or it has been stipulated in the rules of the foundation. In the rules it is also possible to forbid the foundation from conducting business.

A noteworthy amendment in the new FAF was adding a wide definition of the inner circle into the legislation. The definition of inner circle is worth noting, because the definition comes up in a number of provisions in the FAF. The FAF also imposes a requirement of a comprehensive reporting of all inner circle actions in the annual report of the Board, in order to add transparency and trust towards the actions of foundations.

Many Finnish foundations have renewed their rules in accordance to the new law. The rules of all Finnish foundations shall be amended to be in accordance with the new legislation by **1 December 2018**.

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PricewaterhouseCoopers Oy (Finland)

The Finnish Supreme Court broke the principle of limited liability

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