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Article 1843-4 of the French civil code (« Code civil »): the new role of the super-expert (“tiers-expert”):

After the French Court of cassation (“Cour de cassation”) case of the 11th of March 2014, the legislator’s decision, in his legislation of the 31st of July 2014, is to limit the powers of the super-expert (“tiers-expert”) and to return its substance to agreements concluded between the parties (statutory or not).

Although this legislation gives back to the super-expert his role and forces him to apply the agreements concluded between the parties, more precisely, the application of the formula defined in statutes or any other agreement, it also raises new questions concerning the meaning to give to the application of incomplete formulas or those that have become null and void with time.

In the event of the absence of formula in the statutes and/or in the agreement, it could be natural for the super-expert to research the most adapted approaches according to him.

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It must be reminded that in that case the multi-criteria approach is recommended such as the intrinsic approaches (Business Leaders of France “DCF dirigeants commerciaux de France”, reevaluated net assets) and analog approaches (price reference on the basis of listed companies and/or recent comparable transactions).

The situation has become delicate in cases where the strict result of the application of the formula leads to a negative or undetermined result. Should the formula be preserved?

In the presence of the result of a negative price, case-law has accepted the conversion of a negative price to the price of one euro as long as the price is serious (French Court of cassation case of the 7th of June 2011, n°10-17584).

In the presence of an undetermined price due to a vague formula based on absent or out of date aggregate, different interpretations can appear:

- The literal interpretation: the expert declares himself incompetent to correctly fulfill his mission and refers it to the President of the Court.
- The practical interpretation: in order to maintain the formula, the super-expert could interpret the formula and modify it by researching to preserve the spirit of the formula originally contracted.

Another interpretation would be to consider that a wrong formula is equivalent to the absence of a formula, thus, the expert would regain his freedom. However, in this situation, it could be questioned if the expert is exceeding his powers in regards to the new legislation. Only future case-law will settle this issue.

It is worth noting that the spirit of the new text is to preserve a maximum of price clauses contained in statutes or any other agreement.

In order to avoid these situations, it is recommended in the drafting of agreements to use the formulas that foresee the application of the closest principles to those agreed by the parties.

It is also important to foresee in the drafting of price formulas, a combination between a determined price and a price determinable in the circumstances of a forced sale. It is equally important to maintain aggregates concerning the activity and context of the company.

It is recommended to avoid using aggregates that would be too low in the income operating statement (“compte de résultat”) (net profit, current profits before tax), that could significantly be impacted by accounting restatements (depreciation, non-recurring items...) and that could lead to interpretation.

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Finally, in the case of reference to net debt, it is worth taking into account the existing bank debt (especially for companies under LBO) with the risk of obtaining a systematic negative price during a certain period.

Overall, the changes brought to article 1843-4 of the French civil code ("Code civil") strengthens the agreements concluded during parties' disagreements and also questions the limits of the expert's role in the application of the agreement's formula.

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