



We are pleased to send you the first issue of our real estate *News Flash*.

It will cover legal issues of current interest or of relevance to situations you may encounter.

However, we draw your attention to the fact that the articles in our real estate *News Flash* are not exhaustive on the issues they address and are in no event intended as a substitute for legal advice.

Please send us your comments and/or questions.

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**Real Estate department**

Construction  
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**REAL ESTATE SALES**

**Creation of a new official deed ("acte authentique")** (Act nr. 2009-323 of 25 March 2009 – articles L.290-1 and L.290-2 CCH)

Any promise of sale ("*promesse de vente*") granted by a natural person, having as its object the sale of a building or of an interest in land, whose term of validity exceeds eighteen months, or any extension of such promise bringing its term to eighteen months, shall henceforth be memorialized in an official deed ("*acte authentique*").

The promise of sale shall also specify a consideration for the promise ("*indemnité d'immobilisation*"), in an amount equal to at least 5% of the sale price, which consideration shall be placed with the notary in the form of a cash deposit or letter of guaranty.

These provisions will become mandatory starting on 1 July 2009. Failure to comply with them will render the promise null and void.

**CONSTRUCTION**

**The law of 31 December 1975 on sub-contracting ("*sous-traitance*") is a mandatory rule ("*loi de police*")** (French Supreme Court, 3<sup>rd</sup> Civil Division, 25 February 2009, nr. 07-20.096)

The French Supreme Court ("*Cour de cassation*") confirmed its decision of 30 November 2007, stating that "**with respect to the construction of a building in France, the act of 31 December 1975, relating to sub-contracting, in its provisions that are protective of the sub-contractor, is a mandatory rule ("*loi de police*") within the meaning set out in the combined provisions of article 3 of the Civil Code and of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations**".

In the case under consideration, the client, a French law company, had entrusted to a German law company the development of a building located in France.

The latter had sub-contracted part of the work out to a French company, with the entire contractual arrangement being submitted to German law.

A dispute having arisen between the parties, the sub-contractor had requested that the provisions of the act of 31 December 1975 be applied in connection with the direct claim it possessed against the French client company.

The Court granted that request and in so doing refused to apply German law.

The sub-contracting act therefore applies to all buildings located in France, without taking into account the nationality of the companies that are party to the real estate project or the choice of law stipulated in their agreement.

This solution could perhaps be called into question by the new, more restrictive definition of mandatory rules ("*lois de police*"), set out in the Rome Regulation I, which entered into force on 1 January 2009. The Regulation provides that, henceforth, mandatory rules can only override foreign contractual rules in exceptional circumstances, if compliance with those mandatory rules is deemed crucial by the country.

It will thus become necessary for the judges to confirm the mandatory rule status assigned to the act of 31 December 1975, in light of the new terms of the Regulation.

## COMMERCIAL LEASES

**Reference date for evaluating the concept of premises used exclusively as office space** (French Supreme Court, 3<sup>rd</sup> Civil Division, 1 April 2009, nr. 08-13.130)

The execution of a lease for premises to be used exclusively as office space allows for setting aside, at the time of such lease's renewal, the rule imposing a rent ceiling on commercial leases.

In the case under review, the parties had executed a commercial lease specifying that the premises were to be used exclusively as office space for the purposes of training in, production and distribution of the lessee's computer equipment.

At the renewal of the lease, the lessee attempted to show that the premises were not used as offices but rather for teaching. However, that activity was not actually being performed at the time of the lease's renewal, but would begin a few months later.

The French Supreme Court held that the character of the leased premises as a place reserved exclusively for use as office space nevertheless had to be evaluated as at the date of renewal of the lease and that, in the absence of ambiguity regarding the occupancy of the premises, the parties' intention to use the premises for purposes of operating a teaching establishment was not proven. The rent ceiling therefore had to be removed.

**Fate of the assignment clause contained in a fraudulent agreement** (French Supreme Court, 3<sup>rd</sup> Civil Division, 1 April 2009, nr. 07-21.833)

Within the framework of the renting of commercial premises, the parties to the contract can agree to waive the application of the status of commercial leases, by executing a temporary occupation agreement ("*convention d'occupation précaire*") or an overriding short-term lease ("*bail dérogatoire de courte durée*"), or by expressly renouncing to the application of the status.

The execution of this type of agreement is subject, however, to certain strict conditions, under penalty of requalification of the contract.

In this case, the parties had executed several successive temporary occupation agreements. The lessor had then sued his lessee to obtain a court judgment pronouncing the termination of the contract for violation of its terms requiring that the lessor be informed in the event of an assignment of the lessee's rights.

The French Supreme Court held that the lessor could not invoke the assignment clause contained in an agreement that was fraudulent because executed with the aim of avoiding the application of the legal status of commercial leases.

It follows that the execution of an agreement that overrides the status of commercial leases must therefore be carried out in compliance with the statutory provisions, in order for the stipulations of that agreement to be enforceable against the other party.