THE COMPLEX COMMERCIAL LITIGATION LAW REVIEW

SECOND EDITION

Editor
Steven M Bierman

THE LAWREVIEWS

THE COMPLEX COMMERCIAL LITIGATION LAW REVIEW

SECOND EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Steven M Bierman

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Tommy Lawson

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Sarah Kelleher

SUBEDITOR
Robbie Kelly

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC2A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-075-2

Printed in Great Britain by+
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOCATES SMITH TAUBITZ UNSWORTH LTD

ALLEN & GLEDHILL

BAKER & MCKENZIE PARTNERSCHAFT VON RECHTSANWÄLTEN UND STEUERBERATERN MBB

GASSER PARTNER ATTORNEYS AT LAW

GOODMANS LLP

GRANDALL LAW FIRM

HERBERT SMITH FREEHILLS

JONES DAY

LATHAM & WATKINS

LIBERTY CHAMBERS

LUNDGRENS LAW FIRM P/S

MARTÍNEZ, ALGABA, DE HARO Y CURIEL, SC

MATHESON

PATRIKIOS PAVLOU & ASSOCIATES LLC

PINHEIRO NETO ADVOGADOS

SCHOENHERR ATTORNEYS AT LAW

SIDLEY AUSTIN LLP

THOUVENIN RECHTSANWÄLTE KLG

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

CONTENTS

PREFACE

I am privileged, once again, to be the editor of *The Complex Commercial Litigation Law Review*, now in its second edition. This volume is published at a time when the world grows ever smaller and commercial relationships are the common currency that links countries and cultures across the globe. And, with apologies to the poet Robert Burns, because the best laid plans of commercial counterparties go oft awry, businesses and their legal counsel in every jurisdiction must be familiar not only with the law governing commerce but also must be keenly aware of the legal issues that most frequently arise in commercial disputes.

I have had the good fortune to practise law for many years as a litigation partner of a global law firm, Sidley Austin LLP, in New York City, one of the world's great commercial and financial centers, and a crossroads where many significant and complex disputes are litigated and tried, whether in our US federal or state courts or arbitrated under the auspices of pre-eminent ADR providers. I also have had the pleasure of working alongside, or opposite, some of the most accomplished disputes practitioners anywhere, whether down the street or halfway around the world, in matters both domestic and cross-border in nature. In serving our respective clients, I would like to think that we have learned from each other, and have become better and more effective for the education. I know I have.

It is with that spirit and intention that we have assembled a truly distinguished roster of leading practitioners to contribute to this second edition, which significantly expands the range of jurisdictions from those covered in the inaugural edition. The authors of this publication are from among the most widely respected law firms in their jurisdictions. Their practices run the gamut of complex commercial litigation experience, and the home jurisdictions about which they write span the world's geography. We hope you will find their experience invaluable and enlightening when dealing with issues arising in commercial litigation in your own experience or practice.

These authors practise in disparate legal systems under dissimilar procedural regimes. One of the great strengths and, we hope, utility, of this volume is that, notwithstanding these differences, we have asked the authors to report on core principles and recent developments in the law of their country concerning the same set of fundamentally important legal issues likely to feature in complex commercial disputes, wherever they may arise. These issues include contract formation and modification; contract interpretation; breach of contract; defences to enforcement; fraud, misrepresentation, and other claims impacting contracts; dispute resolution; and remedies. The emphasis is on the law and practice of each jurisdiction, but discussion of emerging or unsettled issues is included where appropriate.

Whether you are a corporate counsel, a business executive, a private practitioner, or a government official, and whether you are facing litigation or arbitration of a commercial

dispute, negotiating a contract with an eye toward minimising litigation risk, or simply interested in learning more about this important area of law as related by seasoned and savvy practitioners, we hope you will find this volume informative, instructive, and enjoyable.

Steven M Bierman
Sidley Austin LLP
New York
November 2019

Chapter 10

FRANCE

Fabrice Fages and Myria Saarinen[1]

I OVERVIEW

Complex commercial litigation often stems from disputes arising out of the conclusion, interpretation or performance of a contract, leading the litigants to refer to the contractual provisions and to statutory law supplemented by case law.

French contract law is mostly set forth in the French Civil Code, which was substantially amended by Ordinance No. 2016-131 of 10 February 2016, ratified by Law No. 2018-287 of 20 April 2018. The purpose of this reform was to modernise French contract law and to increase its readability by codifying the landmark cases of the past two centuries. Barring minor exceptions,[2] contracts entered into force and court proceedings commenced before 1 October 2016 remain subject to the former provisions of the French Civil Code.[3] Contracts entered into force after 1 October 2016 are governed by the provisions created by the Ordinance, as clarified by Law No. 2018-287. However, certain formal amendments resulting from Law No. 2018-287 only apply to contracts entered into force after 1 October 2018.[4]

Among the provisions of the French Civil Code are a number of default provisions, leaving parties with the possibility to expressly stipulate a clause to the contrary. By way of exception, certain provisions are mandatory (i.e., cannot be derogated by agreement).

Provisions relevant for commercial litigation may be found in the French Civil Code (such as the rules specific to sales contracts[5] or contracts of mandate[6]), but also in other bodies of texts, and for instance in the French Commercial Code (such as the rules applicable to commercial loan contracts).[7]

1 Fabrice Fages and Myria Saarinen are partners at Latham & Watkins. This chapter was written with the contribution of associate Floriane Cruchet.

2 Articles 1123 (Sections 3 and 4), 1158 and 1183 of the French Civil Code are immediately applicable to all contracts.

3 Article 9, Ordinance No. 2016-131 of 10 February 2016 on the reform of contracts, the general regime and the proof of obligations.

4 It covers the modifications made to Articles 1110, 1117, 1137, 1145, 1161, 1171, 1223, 1327 and 1343-3 of the French Civil Code.

5 Articles 1582 et seq. French Civil Code.

6 Articles 1984 et seq. French Civil Code.

7 Articles L. 145-2 et seq. French Commercial Code.

II CONTRACT FORMATION

A contract is defined as 'a concurrence of wills between two or more persons to create, modify, assign or terminate obligations'.[8] French contract law is based on the freedom of contract principle, according to which parties have the freedom to contract with the person and the content they choose to the extent permitted by the law.[9]

i Contract conclusion

Negotiations

The initiative, conduct and termination of negotiations are free but must be conducted in good faith.[10]

Any misconduct carried out in the course of negotiations may trigger a claim for compensation by the alleged victim. However, the amount of damages may not include the loss of benefits expected from the aborted contract nor the loss of opportunity to get these benefits.[11] Only damages such as the costs incurred for the negotiations can be retrieved.

A duty of good faith implies a duty of information. Parties must communicate to each other the information unknown by the other that is relevant for the latter's consent unless said information concerns the value of the consideration offered.[12] Breaching this duty may result in the nullity of the contract and the allocation of damages by the breaching party.[13] It is thus crucial to respect this duty, especially for significant operations such as mergers and acquisitions.

Offer and acceptance

The offer must contain all the essential elements of the contract. It must express the will of its author to be bound in case of acceptance; otherwise, it only qualifies as an invitation to negotiate.[14] An offer may only be withdrawn after the expiration of the time period stipulated or after the expiration of a reasonable time.[15]

The reunion of both an offer and an acceptance whereby parties express their will to contract forms the contract.[16] Consent can either be drawn from parties' statements or by their unequivocal behaviours.[17] Silence is not construed as acceptance unless otherwise implied by law, customs, business relationships or specific circumstances.[18]

Preliminary contracts

The 2016 reform introduced two preliminary contracts, already vastly used in practice:

8 Article 1101, French Civil Code.
9 Article 1102, French Civil Code.
10 Article 1112 (Section 1), French Civil Code.
11 Article 1112 (Section 2), French Civil Code.
12 Article 1112-1 (Sections 1 and 2), French Civil Code.
13 Article 1112-1 (Section 6), French Civil Code.
14 Article 1114, French Civil Code.
15 Article 1116, French Civil Code.
16 Article 1113 (Section 1), French Civil Code.
17 Article 1113 (Section 2), French Civil Code.
18 Article 1120, French Civil Code.

a the pre-emption agreement, whereby a party commits to offering to negotiate firstly with the beneficiary of the preliminary contract if this party wishes to contract;[19] and

b the unilateral promise, whereby a party gives the other the right to unilaterally trigger the conclusion of a contract whose essential elements are stated in the preliminary contract.[20]

ii Conditions of validity of a contract

Three requirements must be satisfied to conclude a valid contract:[21]

a consent of all parties;

b parties' capacity to contract; and

c defined and lawful subject matter of the contract.

Capacity and representation

Any natural person over 18 has the capacity to contract unless he or she is under protection, as per Article 425 of the Civil Code.[22] As for legal persons, their capacity to contract is limited by the specific provisions that govern each of them.[23] Contracts are signed by the company's legal representative or by any person to whom such powers have been delegated.[24]

Validity of consent

Parties' consents are not valid when given only by error, obtained by violence or induced by dol.[25]

Indeed, if a party's error concerned an essential component of the contract, that party cannot have understood its real implications. Consent is also void when a party only agreed under an illegitimate moral, physical or even pecuniary threat. As per the dol, a civil law concept, it can be defined as a fraud committed to induce another party into entering into a contract.[26]

Defined and lawful subject matter of the contract

A contract's content must not breach public order[27] and must be based on a present or future obligation that must be both possible and determined or determinable.[28]

In a bilateral contract, the fact that the obligations are unbalanced is not a cause of nullity.[29] However, the onerous contract is null if the consideration provided to a party was illusory or derisory at the time of the conclusion of the contract.[30]

19 Article 1123 (Section 1), French Civil Code.
20 Article 1124 (Section 1), French Civil Code.
21 Article 1128, French Civil Code.
22 Articles 1145 and 1146, French Civil Code.
23 Article 1145 (Section 2), French Civil Code.
24 Articles 1153–1161, French Civil Code.
25 Article 1130, French Civil Code.
26 The consequences of such invalid consent are examined in Section VI 'Defences to enforcement'.
27 Article 1162, French Civil Code.
28 Article 1163, French Civil Code.
29 Article 1168, French Civil Code.
30 Article 1169, French Civil Code.

iii Form of the contract

As a principle, contracts are consensual.[31] Consensualism is a principle of French contract law according to which a contract is legally binding whether concluded orally or in writing.

Nevertheless, some types of contracts must be formalised in writing and might even require an authenticated deed (land transfers, marriage contracts, etc.) or specific handwriting mentions.

iv Enforcement of the contract

Contracts are binding for their parties.[32] Not only must they comply with their explicit provisions, but also with all other terms implied by equity, customs or the law.[33]

Contracts can only be modified or revoked if both parties consent to it, unless otherwise specified by law.[34] However, a contract may be renegotiated if some unpredictable events occur.[35]

Regarding the transfer of ownership, unless parties have decided otherwise, the transfer occurs upon conclusion of the contract.[36] After that, the seller must deliver the good as promised and preserve it until delivery.[37]

As a general rule, one may only bind oneself in one's own name and for oneself.[38] However, some contracts have third-party beneficiaries (third-party provision,[39] third-party performance promise,[40] mandate,[41] commissioning agents,[42] etc.).

III CONTRACT INTERPRETATION

i Law governing contract interpretation

Choice of law provisions willingly inserted in a contract are, in principle, upheld by French courts, for parties are free to determine which law will govern the substance of their contract (*lex contractus*). Said law will also govern its interpretation.

However, parties may not choose a foreign law solely out of convenience, in order to escape imperative provisions of the law that would otherwise have been naturally applicable. In such cases, a court may apply these imperative provisions regardless of the choice of law clause. In addition, a court may set aside the *lex contractus* when the results of its application would manifestly contradict the public order of the forum.

Where parties fail to expressly provide for a choice of law clause, courts can either:

a discover an implied choice of law in parties' behaviours; or

31 Article 1172, French Civil Code.
32 Article 1199, French Civil Code.
33 Article 1194, French Civil Code.
34 Article 1193, French Civil Code.
35 Article 1195, French Civil Code.
36 Article 1196, French Civil Code.
37 Article 1167, French Civil Code.
38 Article 1203, French Civil Code.
39 Article 1205, French Civil Code.
40 Article 1204, French Civil Code.
41 Articles 1984 et seq. French Civil Code.
42 Article L. 132-1, French Commercial Code.

b apply the rules set forth in Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I).

For instance, a contract for the sale of goods shall be governed by the law of the country where the seller has his or her habitual residence.[43]

ii Participants to contract interpretation

Agreements lawfully entered into have the force of law for those who have made them.[44] Both the parties to a contract and the courts seized of a dispute related to said contract will be bound by its terms.

Parties may anticipate disputes by inserting in their contract certain provisions circumscribing the court's margin of manoeuvre in its interpretative task. For instance, a clause of entire agreement will prevent the court from interpreting a contract off other exchanges between the parties or their behaviours. Parties may also conclude an interpretative agreement to guide further interpretations of the terms of the main contract.

When deciding a dispute, a court ruling on the merits of a case may sovereignly interpret all the obscure and ambiguous terms of a contract. However, judges cannot interpret provisions that are clear and precise.,[45] although refusing to interpret a contractual clause potentially affecting the outcome of a trial because of its ambiguous character would be tantamount to a denial of justice.

iii Rules of construction

Courts must seek the common intent of the contracting parties rather than stop at the literal meaning of the words.[46] In doing so, they may take into account the behaviours of the parties, both before and after the conclusion of the contract, as well as the context of the operation. If judges cannot detect the intention of the parties, they must interpret the clauses according to the meaning a reasonable person placed in a similar situation would give to these clauses.[47]

All the clauses of an agreement are interpreted with reference to one another by giving to each one the meaning that results from the whole act.[48] When several contracts partake in a given operation, courts may give meaning to a provision in one of these contracts in accordance with the intention of the parties as set out in the other contracts.

In addition, when a clause is susceptible of two meanings, it shall be understood to mean that which may produce some effect, rather than according to the meaning that would produce none.[49]

When none of the aforementioned rules of construction are enough to discover the meaning of a clause, said clause must be interpreted:

43 Article 4.1.(a), Regulation (EC) 593/2008 of the European parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

44 Article 1103, French Civil Code.

45 Article 1192, French Civil Code.

46 Article 1188, French Civil Code.

47 ibid.

48 Article 1189, French Civil Code.

49 Article 1191, French Civil Code.

a in favour of the consumer, when the contract governs the relation between a professional and a consumer;[50]
b in favour of the debtor, when the contract was freely negotiated;[51] and
c in favour of the party who did not draft the contract, for standard form agreements.[52]

Finally, as a general principle, parties must not only comply with the express provisions of their contract but also with all the terms implied in it by equity, customs or the law.[53] Therefore, judges may discover obligations that were not expressly incorporated in the contract, such as an obligation to ensure the security of the passengers in an agreement related to the provision of transportation services.[54]

iv Hierarchy of evidence regarding contractual meaning

Parties may insert a clause of priority organising the hierarchy within the contractual documents, so as to determine which texts shall prevail in case of contradiction. Otherwise, courts are bound only by the rules set out in Section III.iii and not by an obligation to follow a given hierarchy of evidence.

IV DISPUTE RESOLUTION

i Court litigation

Court structure

The French court structure follows a division between the public law courts, which deal with most disputes involving administrative bodies, the criminal courts, which deal with criminal complaints and prosecutions in relation with a criminal offence, and the private law courts, which deal with commercial, employment and civil matters.

Within the private law court system, a three-tier structure is observed whereby litigants can submit their dispute to a court of appeals when at least one of them is unsatisfied with the decision of the first instance court, provided the disputed amount exceeds €4,000. Access to the highest court, the Cour de Cassation, is only granted to parties claiming that the lower courts have rendered a ruling grounded on errors in law.

Once a conflict has arisen, parties may agree that their dispute will be judged without appeal even if the disputed amount exceeds €4,000, provided the case only involves rights over which they have an unrestricted power of disposition.[55]

On February 2018, international chambers were created within the Paris commercial court Paris (first instance court) and the Paris court of appeal. These chambers have jurisdiction to decide over disputes that involve international commercial interest (e.g., commercial

50 Article L. 211-1, French Consumer Code.
51 Article 1190, French Civil Code.
52 Article 1190, French Civil Code.
53 Article 1194, French Civil Code.
54 Cour de Cassation, First Civil Chamber, 21 November 1911, Compagnie Générale Transatlantique.
55 Article 41, French Code of Civil Procedure.

contracts, unfair competition, transportation, operations on financial instruments, claims for compensation following anti-competitive commercial practices).[56] These chambers' main particularities are as follows:

a they are composed of English speaking judges meaning that the English can be used both in the document production (with no French translation required) and during hearings;

b parties, witnesses and experts may be heard in English; and

c decisions from these courts are enforceable in all EU member states.

Rules of substantive jurisdiction

By default, the competent first instance courts for civil matters are the high courts, provided the disputed amount exceeds €10,000, or the district courts, when the disputed amount is inferior to that threshold.[57] Parties may agree, after a conflict has arisen, that their dispute will be heard either by a high court or a district court irrespective of the disputed amount.[58]

The law also grants exclusive jurisdiction to specialised tribunals. For instance, commercial courts have exclusive jurisdiction over disputes involving:

a commercial companies;

b obligations among traders, credit institutions and financing companies; or

c commercial deeds.[59]

Judges sitting in commercial courts are not career judges but lay magistrates, elected by delegates – themselves elected among the commercial community.[60] The procedure before commercial courts is oral, meaning that parties must present their respective claims and pleas orally at the hearing while retaining the possibility of referring to what they included in their written submissions.[61]

Rules of territorial jurisdiction

By default, a claimant must seize the competent court of the jurisdiction where the respondent resides (*actor sequitur forum rei*).[62] When the plaintiff brings an action against a legal person, the territorially competent court is that of the registered office of the defendant.

However, imperative rules may apply, giving exclusive jurisdiction to a single court or a limited number of courts. For instance:

a in matters relating to rights *in rem* in immovable property, the court of the place where the property is located has sole jurisdiction;[63]

56 Article 1 of the Protocol relating to procedural rules applicable to the International Chamber of Paris Commercial Court and Article 1 of the Protocol relating to procedural rules applicable to the International Chamber of the Court of Appeal of Paris.

57 Article R. 211-3, French Code of Judicial Organisation.

58 Article 41, French Code of Civil Procedure.

59 Article L. 721-3, French Commercial Code.

60 Articles L. 723-1 et seq. and Article L. 713-7, French Commercial Code.

61 Article 860-1, French Code of Civil Procedure.

62 Article 42, French Code of Civil Procedure.

63 Article 145, French Code of Civil Procedure.

b claims regarding the sudden termination of established commercial relations may only be brought before one of eight specialised commercial courts and appealed before the Paris Court of Appeal;[64] and

c certain claims regarding, among others, literary and artistic property, designs and models, patents and trademarks, as well as associated claims of unfair competition practices, may only be brought before a limited number of courts.[65]

Furthermore, for certain types of actions, the claimant may seize the court of his or her choice between the court of the jurisdiction where the defendant resides and another court.[66] In contractual matters, this other court is that of the place of actual delivery of the goods or of the place of performance of the service. For claims based on extra-contractual liability (tort), this other court is that of the place where the harmful event occurred or the court within whose jurisdiction the damage was suffered.

Parties may only derogate from the rules of territorial jurisdiction by convention if they all contract in their capacity as businesses. In addition, the choice of forum clause must be stated very distinctly in the undertaking of the party to whom it is opposed as, otherwise, it is deemed unwritten.[67]

ii Court proceedings

Procedural fees

Carrying legal proceedings in France is supposedly free, as justice is a public service financed by taxes.

In civil and commercial courts, each litigant initially bears his or her own costs. However, those costs that are directly linked to the proceedings, such as bailiff's fees, are eventually borne by the losing party. Other expenses such as attorneys' fees may be apportioned between the parties by the judge on the basis of equity.[68]

Confidentiality

Court proceedings are public, meaning that physical access to the courtroom is not restricted. However, the public nature of the proceedings may be adjusted in light of considerations relating to the general interest (such as national security) or the private interests of the parties (such as the protection of minors).[69] As for the ruling, it is either published online or at least made available on demand at the court clerk. A recent law transposing a European directive

64 Article D. 442-3, French Commercial Code; Annex 4-2-1, Regulatory Section of the French Commercial Code.

65 Articles D. 211-5 et seq. French Code of Judicial Organisation; Table V of the Annex, French Code of Judicial Organisation.

66 Article 46, French Code of Civil Procedure.

67 Article 48, French Code of Civil Procedure.

68 Article 700, French Code of Civil Procedure.

69 Articles 433 et seq. French Code of Civil Procedure.

on the protection of trade secrets now enables litigants and interested third parties to request the application of appropriate confidentiality measures to prevent the divulgation of trade secrets in the course of legal proceedings.[70]

Parties' written submissions and disclosed evidence are not made available to the public. However, no legal obligation of confidentiality is attached to these elements or to the proceedings themselves. Consequently, litigants may discuss the existence and content of the claim with those concerned, such as their commercial partners or insurers. Yet, a company sued by a competitor must be careful with public declarations on the ongoing procedure, for derogatory comments might trigger a liability claim for commercial disparagement.

Class actions

The mechanism of the class action was introduced in France in 2014 and progressively extended.[71] By default, proceedings may only be initiated by accredited associations or associations regularly declared for at least five years and whose statutory purpose includes the defence of those interests that have been violated by the defendant. They may seek recovery for the individual damages sustained by members of the class action or an injunction to put an end to the cause of their damages.

Class actions are only available for violations of certain sectoral regulations related to healthcare, anti-discrimination, environment protection, consumer law, anticompetitive practices and personal data protection.

iii Alternative dispute resolution

French courts generally uphold provisions whereby parties agree to submit their dispute to prior mediation or conciliation proceedings. Three conditions must be met:

a the clause must have been expressly established as a mandatory prerequisite to the referral of the dispute to a court;

b parties must have given their express consent to that effect; and

c the practical details of its implementation must have been specified in the agreement.[72]

A claimant referring the matter to a court directly will expose himself to a ruling of inadmissibly of the proceedings.[73]

The French legal system is extremely arbitration-friendly, partly owing to the presence of the International Chamber of Commerce in Paris. Arbitral awards are binding and easily enforced in France.

Parties to a dispute may also, at their initiative and under certain conditions, attempt to resolve the issue amicably with the assistance of a mediator, a conciliator or their lawyers.[74] To encourage these alternative dispute resolution mechanisms, the limitation period on the

70 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure; Law No. 2018-670 of 30 July 2018 on the protection of trade secrets.

71 Law No. 2014-344 of 17 March 2014 on consumer protection; Law No. 2016-41 of 26 January 2016 for the modernisation of our health system; Law No. 2016-1547 of 18 November 2016 on modernising justice in the 21st century.

72 Cour de Cassation, Commercial Chamber, 29 April 2014, No. 15-25.928.

73 Cour de Cassation, Mixed Chamber, 14 April 2003, No. 00-19.423.

74 Article 1528, French Code of Civil Procedure.

associated claim is suspended from the day on which the parties agree to resort to mediation or conciliation. All summons must also specify the steps taken by the claimant to reach an amicable settlement of the dispute.[75]

V BREACH OF CONTRACT CLAIMS

i Contractual liability

Sectoral laws may specify parties' particular obligations, as is for instance the case for sales contracts. Indeed, a buyer benefits from protective provisions such as a warranty against eviction,[76] a warranty against hidden defects,[77] an obligation of proper delivery[78] and a product liability claim.[79]

In any case, to incur the contractual liability of one party, a co-contractor must demonstrate a breach of contract that caused damage to him or her.

Breach of contract

A contract is deemed breached if at least one obligation was not performed or was delayed, unless it was owing to an external cause that cannot be imputed to the party.[80]

The requirements regarding the performance of a contract differ depending on whether the obligation was results-based or best-efforts-based. In the first case, the claimant only has to prove that the obligation was not achieved. In the second case, the claimant has to prove that his or her co-contractor did not perform the contract as well as possible or was negligent or not diligent enough.

Damage

The breach of contract must have harmed the co-contractor. French courts can order the compensation of different damages such as material injuries, non-pecuniary damages or bodily harms.

However, a debtor is liable only for damages that were foreseen or that could be foreseen at the time of the contract, unless the debtor's failure is owing to his or her own gross negligence or fraud.[81]

Causal link

A causal link must be demonstrated between the breach of contract and the damages, that is to say that the damages must be the immediate and direct consequences of the non-performance of the agreement.[82]

75 Article 56, French Code of Civil Procedure
76 Articles 1626 et seq. French Civil Code.
77 Articles 1641 et seq. French Civil Code.
78 Articles 1604 et seq. French Civil Code.
79 Articles 1245 et seq. French Civil Code.
80 Article 1231-1, French Civil Code.
81 Article 1231-3, French Civil Code.
82 Article 1231-4, French Civil Code.

ii Burden of proof

Each party must prove, according to the law, the facts necessary for the success of the claim.[83]

Proceedings pertaining to the production of evidence

There is no procedure of discovery under French law.

Nevertheless, a participatory procedure, partly inspired by the discovery model, was introduced in 2010.[84] Per this scheme, parties may agree not to seize a court, at least for the duration of their agreement, and instead to work together, with their counsels, in order to find an amicable settlement of their dispute. In such contexts, parties must contractually organise the terms of their exchange of evidence.[85]

In anticipation of a proceeding, a court may also order legally permissible preparatory inquiries at the request of any interested party, by way of a petition or by way of a summary procedure, if there is a legitimate reason to preserve or to establish, before any legal proceedings, the evidence of the facts upon which the resolution of the dispute depends.[86] This scheme is the most common mean to obtain evidence.

International litigants should also pay attention to the restrictions set forth in Law No. 68-678 of 26 July 1968 (known as the 'Blocking Statute'). In particular, it prohibits any person from requesting, seeking or communicating, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature with a view to gathering evidence in or in connection with foreign judicial or administrative proceedings' outside of the mechanisms provided by international treaties or agreements (e.g., the Hague Evidence Convention of 18 March 1970).[87] Failure to comply with the Blocking Statute provisions is sanctioned with a maximum six-month imprisonment or a criminal fine amounting to €18,000, or both, for natural persons and €90,000 for legal persons.[88] Rarely enforced, the Blocking Statute was recently back in the spotlight when the Gauvain report suggested increasing the sanctions with a maximum two-year imprisonment or criminal fine amounting to €2 million for natural persons and €10 million for legal persons, or both.[89]

Rules of evidence

A claimant requesting the performance of an obligation must prove it.[90] Similarly, a person claiming to be released from an obligation must prove the payment or the fact that caused the extinction of his or her obligation.[91]

83 Article 9, French Code of Civil Procedure.

84 Law No. 2010-1609 of 22 December 2010.

85 Article 2063, French Civil Code.

86 Article 145, French Code of Civil Procedure.

87 Article 1 bis of Law No. 68-678 of 26 July 1968 (the "Blocking Statute").

88 Article 3 of Law No. 68-678 of 26 July 1968 (the "Blocking Statute").

89 Report to "Restore the sovereignty of France and Europe and protect our companies from laws and measures with extraterritorial scope" submitted to the French Prime Minister on 26 June 2019 by Raphaël Gauvain (member of the French National Assembly).

90 Article 1353 (Section 1), French Civil Code.

91 Article 1353 (Section 2), French Civil Code.

Unless the law states otherwise, evidence may be brought by any means.[92] Nonetheless, any contract obligation exceeding €1,500[93] must be proved by a private or authentic act[94] unless:

a it is materially or morally impossible to obtain the written proof;
b it is common under the customs not to write the contract down; or
c the written proof was lost owing to a force majeure.[95]

A confession, a decisive oath or *prima facie* evidence may be substitutions for a required written proof.[96]

The law may establish presumptions related to some acts or facts. These presumptions are said to be simple, mixed or irrefutable.[97] It is possible to prove the contrary of a simple presumption by any means. However, a mixed presumption can only be rebutted by the means of proof stated by the law, and the irrefutable presumption cannot be rebutted.

VI DEFENCES TO ENFORCEMENT

i Extinctive limitation period

In general, personal actions or movable rights of action apply for five years from the day the holder of a right knew or should have known the facts enabling him or her to exercise the right.[98]

The time limitation may, in certain cases, be either suspended or interrupted. For instance, the time limitation period is suspended when a judge grants an investigative measure submitted prior to any trial.[99] Any legal action, even summary proceedings, interrupts the prescription.[100]

However, parties may decide, by mutual agreement, to modify the prescription by shortening or extending its time limit.[101]

ii Legal compensation

Compensation is defined as the simultaneous extinction of mutual obligations between two persons.[102] For compensation to operate, several conditions must be met: the obligations must be fungible, certain, liquid and due.[103]

92 Article 1358, French Civil Code.
93 Decree No. 80-533 of 15 July 1980.
94 Article 1359, French Civil Code.
95 Article 1360, French Civil Code.
96 Article 1361, French Civil Code.
97 Article 1354, French Civil Code.
98 Article 2224, French Civil Code.
99 Article 2239, French Civil Code.
100 Article 2241, French Civil Code.
101 Article 2254, French Civil Code.
102 Article 1347 (Section 1), French Civil Code.
103 Article 1347-1, French Civil Code.

iii Nullity of a contract

In principle, a contract that does not fulfil the conditions required for its validity is void and deemed never to have existed, which raises the question of the restitution of performances that have already taken place.[104]

Defects of consent

Defects of consent, which have already been presented in Part II 'Contract formation', are a cause of nullity of the contract[105] if and only if they have been decisive. In other words, the error, dol or violence must be of such a nature that without them one of the parties would have not entered the contract or would have but under substantially different conditions.[106] To be a ground for nullity, the error must not be inexcusable and must relate to the essential qualities of one of the performances.[107] Therefore, errors on the value resulting from an erroneous economic assessment are excluded,[108] whereas errors resulting from a dol are always excusable and a cause of nullity even if when relating to the value.[109] With regard to violence, it may be a ground for nullity whether exercised by a co-contractor or by a third party.[110]

Incapacity and defaults in representation

Capacity is a condition of validity of contracts[111] and, therefore, incapacity a ground for relative nullity.[112]

It is also possible to raise the nullity of an act for defaults in representation. The third party, having contracted with an agent, may invoke the nullity of the act if he or she was unaware that this act was accomplished by an agent without power or acting beyond his or her powers.[113] This option is also available to the principal where the agent misuses his or her powers to the detriment of the principal, and where the third party was aware of the misuse or could not have been unaware of it.[114] Finally, a contract may be declared void if the agent has acted on behalf of several parties to the contract who are natural persons with divergent interests or has contracted on his or her own behalf with the principal.[115]

Illicit contracts

Contracts are only valid insofar as they include a defined and lawful subject matter.[116] Indeed, contracts cannot derogate from laws that relate to public order, either by their stipulations or by their purpose, whether or not the latter was known by all the parties.[117]

104 Article 1178 (Sections 1 and 2), French Civil Code.
105 Article 1131, French Civil Code.
106 Article 1130, French Civil Code.
107 Article 1132, French Civil Code.
108 Article 1136, French Civil Code.
109 Article 1139, French Civil Code.
110 Article 1142, French Civil Code.
111 Article 1128, French Civil Code.
112 Article 1147, French Civil Code.
113 Article 1156 (Section 2), French Civil Code.
114 Article 1157, French Civil Code.
115 Article 1161, French Civil Code.
116 Article 1128, French Civil Code.
117 Article 1162, French Civil Code.

The sanction of an illicit or indefinite subject matter is the nullity of the contract.[118]

Nullity exception

The nullity exception is a defence to enforcement that may be raised by the party to a contract who is being asked to perform a voidable contract on grounds of nullity. The nullity exception is imprescriptible (i.e., can still be raised even where the limitation period is expired) as long as it relates to a contract that has not received any performance.[119]

iv Illusory or derisory consideration in onerous contracts

As mentioned in Section II.ii, an onerous contract is null and void if, at the time of its formation, the consideration provided to a party is illusory or derisory.[120] However, in a bilateral contract, the lack of equivalence between two obligations is not a ground for nullity.[121]

v Exclusion or limitation of liability clauses

Parties may validly include in their contracts exclusion or limitation of liability clauses in order to adapt their contractual relations, or to limit their mutual obligations. However, any clause that would deprive the essential obligation of the debtor of its substance is deemed unwritten, that is to say null and void.[122] Such provisions are also unenforceable if the damage suffered is the result of an intentional act (or omission) or gross negligence of the other party.[123]

vi Significant imbalance

In standard form agreements, where clauses and general conditions are determined in advance by one of the parties, any non-negotiable clause, unilaterally determined by one of the parties, and which creates a significant imbalance between the respective rights and obligations of the parties to the contract shall be deemed unwritten.[124]

vii Lapse of the contract

A party may use the lapse of the contract as a defence to its enforcement. A validly formed contract lapses if one of its essential elements disappears.[125]

viii Force majeure

In contractual matters, force majeure occurs when an event beyond the debtor's control, which could not reasonably have been foreseen at the time the contract was concluded and whose effects cannot be avoided by appropriate measures, prevents the debtor from

118 Article 1178, French Civil Code.
119 Article 1185, French Civil Code.
120 Article 1169, French Civil Code.
121 Article 1168, French Civil Code.
122 Article 1170, French Civil Code.
123 Article 1231-3, French Civil Code.
124 Article 1171, French Civil Code.
125 Article 1186, French Civil Code.

performing his or her obligation.[126] If the impediment is only temporary, performance of the obligation is only suspended. However, if the impediment is definitive, the contract is automatically terminated and parties are released from their obligations.

A party to a contract may use force majeure as a defence to enforcement, by claiming that force majeure makes it impossible for the party to perform his or her obligation and that this impossibility is definitive.[127]

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

i Breach of the duty of good faith

Contracts must be negotiated, formed and executed in good faith.[128] This provision is imperative.[129]

Any breach of the duty of good faith will result in contractual or extra-contractual liability on the part of its author, depending on whether the parties have entered into a contract or are still negotiating the terms of their agreement.

ii Revision of the contract for unforeseen circumstances

The 2016 reform enshrines the principle of revision for unforeseen circumstances after the Cour de Cassation had refused to do so for many years. Three cumulative conditions are required: (1) a change in circumstances unforeseeable at the time the contract was concluded, (2) which makes the performance of the contract excessively onerous for a party (3) who had not accepted the risk.[130]

When these conditions are met, a party may request the renegotiation of the contract to his or her co-contractor. Parties may also agree to terminate it or ask the judge for an adaptation of the contract. If they fail to reach an agreement, a party may still request the revision or termination of the contract.[131]

iii Quasi-contractual claims

Quasi-contracts are purely voluntary acts resulting in a commitment by the person who benefits from them without being entitled to it, and sometimes a commitment by their author towards others.[132] The Civil Code identifies three quasi-contracts: the management of affairs,[133] the undue payment[134] and the unjustified enrichment.[135] They give rise to the

126 Article 1218, French Civil Code.
127 Article 1351, French Civil Code.
128 Article 1104 (Section 1), French Civil Code.
129 Article 1104 (Section 2), French Civil Code.
130 Article 1195, French Civil Code.
131 ibid.
132 Article 1300, French Civil Code.
133 Articles 1301–1301-5, French Civil Code.
134 Articles 1302–1302-3, French Civil Code.
135 Articles 1303–1303-4, French Civil Code.

obligation to compensate for the unfair advantage received from others. Therefore, the person impoverished has a legal action against the person enriched on the basis of one of these three quasi-contracts.[136]

iv Fraud

Fraud is a case law concept characterised by a desire to circumvent a mandatory law by using artifice or machination. Under the adage *fraus omnia corrumpit*, in other words, 'fraud corrupts everything', a judge may declare the contract void or deprive the scheme of its fraudulent effect.

Moreover, a fraudulent act directed against a third party will be declared unenforceable against that third party. The specific scheme that is the Paulian action enables a creditor to protect himself or herself from fraud by having the acts committed by his or her debtor in fraud of his or her rights declared unenforceable against him or her inasmuch as the debtor arranges his or her insolvency in order to avoid performing his or her obligation.[137]

VIII REMEDIES

i Remedies available for breach of contract

The French Civil Code sets out five remedies that are available to the creditor, victim of a non-performance or an improper performance:[138]

a non-performance exception: a party may either refuse to perform his or her own obligation if the non-performance of the co-contracting party is serious enough,[139] or suspend the performance of his or her obligation when it is obvious that the other party will not execute his own obligation;[140]

b forced performance: the creditor of an obligation may obtain the forced performance of said obligation or take it upon himself or herself to have the obligation executed, after a formal notice;[141]

c price reduction: the creditor may accept, after a formal notice, a partial performance of the contract and seek for a proportional price reduction;[142]

d termination for breach: termination for breach may be obtained on three grounds: application of a termination clause, judicial resolution or unilateral termination.[143] The latter is a major innovation of the 2016 reform whereby creditors can terminate contracts by notice to their debtors, and after a formal notice;[144] and

136 Article 1301-2 Paragraph 2, French Civil Code for the management of affairs; Articles 1302, French Civil Code et seq. for the undue payment and Article 1303, French Civil Code for the unjustified enrichment.

137 Article 1341-2, French Civil Code.

138 Article 1217, French Civil Code.

139 Article 1219, French Civil Code.

140 Article 1220, French Civil Code.

141 Articles 1221 and 1222, French Civil Code.

142 Article 1223, French Civil Code.

143 Articles 1224–1229, French Civil Code.

144 Article 1226, French Civil Code.

e damages: the creditor may obtain compensation for the damage caused.[145] Damages will be awarded provided that the non-performance is final or that a formal notice has been issued.

Parties may also include a penalty clause in their contract, providing that the party who fails to fulfil his or her obligations will pay a certain amount of damages.[146]

These remedies are cumulative, provided they are not incompatible. Punitive or exemplary damages do not exist as such. Finally, the choice of remedy is at the sole discretion of the debtor.

ii Conditions for the award of damages

The cornerstone principle is that of full indemnification: damages granted to the victim shall allow the complete repair of the damage, no more and no less, in such a way as to restore the victim to the same situation in which he or she would have been had the damage not occurred.

However, in French contract law, the award of damages is subject to certain conditions. First and foremost, the damage must be certain, even if it exists in the future. Indeed, one can get compensation for the loss of a chance, as long as it really exists. Secondly, the damage must be direct; namely, the immediate and direct result of the breach of contract.[147] Finally, compensation is limited to the damage foreseeable at the time the contract is concluded, except in the event of gross negligence or fraud.[148]

Judges may still use their sovereign power to assess the damage in order to moderate the quantum of damages. Additionally, both default interests and compensatory damages may be awarded.[149] With regard to the latter, the breach of contract by the bad faith debtor must have caused an additional damage, distinct from the delay, to the creditor.

iii Extra-contractual claims (tort)

Under French law, contractual liability applies between co-contracting parties for any damage resulting from the non-performance of a contractual obligation. Consequently, if these conditions are not met, the liability is necessarily extra-contractual.[150] Also, pursuant to the principle of non-cumulation of contractual and extra-contractual liabilities, where the conditions for contractual liability are met, extra-contractual liability can no longer be enforced by a party to the contract. Nonetheless, case law acknowledges that litigants can seek compensation for the damage suffered on the basis of both a contractual claim based on non-performance of the contract and an extra-contractual claim based on a sudden termination of established commercial relations, even though these claims are grounded on the same factual background.[151]

145 Article 1231, French Civil Code et seq.
146 Article 1231-5, French Civil Code.
147 Article 1231-4, French Civil Code.
148 Article 1231-3, French Civil Code.
149 Article 1231-6, French Civil Code.
150 Article 1240, French Civil Code et seq.
151 Cour de Cassation, Commercial Chamber, 24 October 2018, No. 17-25672.

As regards third parties, a landmark ruling by the Plenary Assembly of the Cour de Cassation[152] enshrined the principle whereby a third party to a contract may invoke, on the basis of extra-contractual liability, a breach of contract if such breach has caused him or her damage. In other words, the sole breach of contract by a co-contracting party is sufficient for a third party to engage the latter's extra-contractual liability. Nevertheless, several recent decisions of the Cour de Cassation as well as the Civil Liability Bill of 13 March 2017[153] have tempered this principle.

152 Cour de Cassation, Plenary Assembly, 6 October 2006, Myr'ho, No. 05-13.255.

153 Article 1234, Civil Liability Bill of 13 March 2017.

Appendix 1

ABOUT THE AUTHORS

FABRICE FAGES

Latham & Watkins

Fabrice Fages is a partner in the Paris office of Latham & Watkins and chair of the Paris office litigation and trial department.

Mr Fages's practice focuses on resolving a broad range of complex disputes through litigation and arbitration proceedings, mostly in an international context, with particular experience in mass litigation, as well as investigations, compliance and crisis management.

Mr Fages teaches arbitration law and litigation at University of Paris 1 Pantheon-Sorbonne. Moreover, he also teaches at CentraleSupélec de Paris, and was a featured speaker at the University of Cairo for several years.

MYRIA SAARINEN

Latham & Watkins

Myria Saarinen is a partner in the litigation and trial department of Latham & Watkins' Paris office. Her practice focuses on complex commercial litigation, data privacy, and compliance. She is the global co-chair of the technology industry group.

Ms Saarinen's practice focuses on resolving a broad range of complex disputes through litigation proceedings, mostly in an international context and in various areas of business (healthcare, aeronautics, information technology, construction works, insurance, etc.). She is very active in litigation relating to major industrial operations and is involved in a broad range of general commercial disputes (contract and liability) and corporate litigation.

Ms Saarinen has expertise on cross-border issues raised in connection with discovery and similar requests in France. In addition, she has developed specific expertise, for 20 years now, in the privacy/personal data area, advising international clients. She supports her clients in their compliance programs regarding GDPR. She is also active in corporate governance and compliance and assists clients in drafting and implementing grant of powers, delegation of liability, and other compliance schemes.

LATHAM & WATKINS

45, rue Saint-Dominique
Paris 75007
France
Tel: +33 1 4062 2000
Fax: +33 1 4062 2062
myria.saarinen@lw.com
fabrice.fages@lw.com

www.lw.com

an LBR business

ISBN 978-1-83862-075-2