

THE COMPLEX
COMMERCIAL
LITIGATION LAW
REVIEW

FOURTH EDITION

Editors

Oliver Browne, Ian Felstead and Mair Williams

THE LAWREVIEWS

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PREFACE

Litigation is, on one analysis, all about telling stories to impartial decision makers. Complex commercial litigation means that those stories are more detailed, more involved and more intricate. That means that telling the best story, in the most effective fashion, requires an incredible amount of preparation, research and skill.

But telling the best story is only part of the battle: every good story requires a strong foundation.

That is the purpose of *The Complex Commercial Litigation Law Review*.

As the editor of previous editions has noted, the world is becoming increasingly small, and disputes increasingly cross national borders. That means that the stories we tell are increasingly multi-jurisdictional, and playing a proper role in litigation (which now often makes us venture into new and uncharted territory to serve our clients and other stakeholders properly) requires an understanding of the different approaches each jurisdiction takes to important issues.

Addressed in these pages are the components required to provide a strong foundation to allow us to enhance our understanding of the ways in which complex commercial litigation works in different jurisdictions. From contract formation and interpretation (contracts being at the heart of the overwhelming majority of complex commercial litigation) to explaining the dispute resolution process, the remedies that might be sought and the defences that might be presented in response, this volume details the different approaches taken around the world to the resolution of complex commercial disputes.

We are very fortunate to have had considerable assistance fulfilling the purpose of this edition of *The Complex Commercial Litigation Law Review* from colleagues around the globe who are leading practitioners in their various jurisdictions. They come from some of the most respected law firms, and we are privileged to have the benefit of their insight into the ways in which complex commercial litigation arises and is addressed, as well as recent developments, in the countries in which they practice.

Ultimately, whether you are a corporate counsel, a business executive, a private practitioner, a government official or simply an interested bystander, and whether you are facing litigation, arbitration, mediation or some other form of dispute resolution (or simply wanting to understand litigation risk), we hope this edition provides useful insight and guidance. If it makes your foundations stronger, and your stories more informed and more effective, then we will have achieved our objectives.

Finally, please remember Abraham Lincoln's wise words: 'Discourage litigation. Persuade your neighbours to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.'

Litigation is not always the answer – but where it is unavoidable, we hope this edition provides assistance.

Oliver Browne, Ian Felstead and Mair Williams

Latham & Watkins

London

November 2021

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 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 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 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 Civil Code (e.g., the rules specific to sales contracts⁵ or contracts of mandate⁶), as well as in other bodies of texts, such as the Commercial Code (e.g., 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 and trainees Soukaïna El Mekkaoui, Maevane Degras-Lion and Bérénice Nedelec.

2 Articles 1123 (Sections 3 and 4), 1158 and 1183 of the 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 Civil Code.

5 Articles 1582 et seq., Civil Code.

6 Articles 1984 et seq., Civil Code.

7 Articles L.145-1 et seq., 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

Pre-contractual negotiations may be initiated, conducted and terminated freely 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 those 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 the 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 as the parties may neither limit nor exclude this duty.

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 expiry of the period stipulated or, in the absence of such period, 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

8 Article 1101, Civil Code.

9 Article 1102, Civil Code.

10 Article 1112 (Section 1), Civil Code.

11 Article 1112 (Section 2), Civil Code.

12 Article 1112-1 (Sections 1 and 2), Civil Code.

13 Article 1112-1 (Section 6), Civil Code.

14 Article 1114, Civil Code.

15 Article 1116, Civil Code.

16 Article 1113 (Section 1), Civil Code.

17 Article 1113 (Section 2), Civil Code.

18 Article 1120, Civil Code.

Preliminary contracts

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

- a* the pre-emption agreement, whereby a party commits to offering to negotiate first 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 of which the 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:

- a* consent of all parties;
- b* parties' capacity to contract; and
- c* defined and lawful subject matter of the contract.²¹

Capacity and representation

Any natural person over 18 has the capacity to contract unless he or she is subject to a measure of legal protection, in accordance with 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 wilful misrepresentation (*dol*).²⁵ If a party's error concerned an essential component of the contract, the party cannot have understood its real implications.

Consent is also void when a party only agreed under an illegitimate moral, physical or pecuniary threat. As for *dol*, a civil law concept, it can be defined as 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 the object of the obligation arising from it must be a present or future performance that must be both possible and determined or determinable.²⁸

19 Article 1123 (Section 1), Civil Code.

20 Article 1124 (Section 1), Civil Code.

21 Article 1128, Civil Code.

22 Articles 1145 and 1146, Civil Code.

23 Article 1145 (Section 2), Civil Code.

24 Articles 1153–1161, Civil Code.

25 Article 1130, Civil Code.

26 The consequences of such invalid consent are examined in Section V of this chapter.

27 Article 1162, Civil Code.

28 Article 1163, Civil Code.

In a bilateral contract, the fact that the obligations are unbalanced is not a cause of nullity, unless otherwise specified by law;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

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 regardless of whether it was concluded orally or in writing. Nevertheless, some types of contracts must be formalised in writing and may 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 consequences that equity, customs or law may give them.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 that make it prohibitively expensive to carry out occur.³⁵

Regarding the transfer of ownership, unless the 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 provisions,³⁹ third-party performance promises,⁴⁰ mandates,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, as parties are free to determine which law will govern the substance of their contract (*lex contractus*). That law will also govern its interpretation.

29 Article 1168, Civil Code.

30 Article 1169, Civil Code.

31 Article 1172, Civil Code.

32 Article 1199, Civil Code.

33 Article 1194, Civil Code.

34 Article 1193, Civil Code.

35 Article 1195, Civil Code.

36 Article 1196, Civil Code.

37 Article 1197, Civil Code.

38 Article 1203, Civil Code.

39 Article 1205, Civil Code.

40 Article 1204, Civil Code.

41 Articles 1984 et seq., Civil Code.

42 Article L. 132-1, Commercial Code.

However, parties may not choose a foreign law solely out of convenience to escape imperative provisions of the law that would otherwise have been naturally applicable. In those cases, a court may apply those 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
- b* apply the rules set forth in Regulation (EC) No. 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 the 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 those 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, the courts may interpret the meaning of a provision in one of those contracts in light of that operation.

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, Civil Code.

45 Article 1192, Civil Code.

46 Article 1188, Civil Code.

47 *ibid.*

48 Article 1189, Civil Code.

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

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

- a* in favour of the consumer, when the contract governs the relation between a professional and a consumer;⁵⁰
- b* in favour of the obligor, 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

As parties must not only comply with the express provisions of their contract but also with all consequences that equity, customs or law may give them,⁵³ 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 to determine which texts shall prevail in case of contradiction; otherwise, the 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:

- a* the public law courts, which deal with most disputes involving administrative bodies;
- b* the criminal courts, which deal with criminal complaints and prosecutions in relation with a criminal offence; and
- c* 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 appeal when at least one of them is unsatisfied with the decision of the first instance court, provided the disputed amount exceeds €5,000.⁵⁵ Access to the highest court, the Court of 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 €5,000, provided the case only involves rights over which they have an unrestricted power of disposition.⁵⁶

49 Article 1191, Civil Code.

50 Article L. 211-1, Consumer Code.

51 Article 1190, Civil Code.

52 Article 1190, Civil Code.

53 Article 1194, Civil Code.

54 Court of Cassation, First Civil Chamber, 21 November 1911, *Compagnie Générale Transatlantique*.

55 Articles R. 211-3-24 and R. 211-3-25, Code of Judicial Organisation.

56 Article 41, Code of Civil Procedure.

On February 2018, international chambers were created within the Paris Commercial Court (first instance court) and the Paris Court of Appeal. Those chambers have jurisdiction to decide over disputes that involve international commercial interests (e.g., commercial contracts, unfair competition, transportation, operations on financial instruments and claims for compensation following anticompetitive commercial practices).⁵⁷ The chambers' main particularities are as follows:

- a they are composed of English speaking judges, meaning that 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 those 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.⁵⁸ Parties may agree, after a conflict has arisen, that their dispute will be heard by a court even if that court does not have jurisdiction because of the amount of the claim.⁵⁹

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, craftsmen,⁶⁰ credit institutions and financing companies; or
- c commercial deeds.⁶¹

Judges sitting in commercial courts are not career judges but lay magistrates, elected by delegates – themselves elected among the commercial community.⁶² 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.⁶³

Rules of territorial jurisdiction

By default, a claimant must seize the competent court of the jurisdiction where the respondent resides (*actor sequitur forum rei*).⁶⁴ 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;⁶⁵

57 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.

58 Article L. 211-3, Code of Judicial Organisation.

59 Article 41, Code of Civil Procedure.

60 Article L. 721-3, Commercial Code, has been amended to include craftsmen. Such amendment will enter into force on 1st January 2022.

61 Article L. 721-3, Commercial Code.

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

63 Article 860-1, Code of Civil Procedure.

64 Article 42, Code of Civil Procedure.

65 Article 44, 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;⁶⁶ and
- c certain claims regarding, among other things, 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.⁶⁷

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.⁶⁸ 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 traders. 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.⁶⁹

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, the 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.⁷⁰

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).⁷¹ 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 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.⁷²

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

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

68 Article 46, Code of Civil Procedure.

69 Article 48, Code of Civil Procedure.

70 Article 700, Code of Civil Procedure.

71 Articles 433 et seq., Code of Civil Procedure.

72 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

Parties' written submissions and disclosed evidence are not made available to the public; however, no legal obligation of confidentiality is attached to those 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; that said, company sued by a competitor must be careful with public declarations on the ongoing procedure as 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.⁷³ 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 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.⁷⁴

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.⁷⁵

A claimant referring the matter to a court directly will expose himself or herself to a ruling of inadmissibility of the proceedings.⁷⁶

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.⁷⁷ To encourage these alternative dispute resolution mechanisms, the limitation period on the associated claim is suspended from the day on which the parties agree to resort to mediation

and disclosure; Law No. 2018-670 of 30 July 2018 on the protection of trade secrets; Articles L. 151-1 et seq., Commercial Code.

73 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.

74 As an illustration, the first French class action was brought by UFC-Que-Choisir association against a property manager for alleged undue billing to thousands of tenants for rent receipts. UFC-Que-Choisir's claims were fully dismissed on the merits (Versailles Court of Appeal, 20 May 2021, No. 18/04462).

75 Court of Cassation, Commercial Chamber, 29 April 2014, No. 12-27.004.

76 Court of Cassation, Mixed Chamber, 14 April 2003, No. 00-19.423.

77 Article 1528, Code of Civil Procedure.

or conciliation. Where the court proceedings must be preceded by an amicable settlement attempt, the summons must also specify the steps taken by the claimant to reach an amicable settlement of the dispute.⁷⁸

V BREACH OF CONTRACT CLAIMS

i Contractual liability

Sectoral laws may specify parties' particular obligations as is, for instance, the case for sales contracts. For example, a buyer benefits from protective provisions such as a warranty against eviction,⁷⁹ a warranty against hidden defects,⁸⁰ an obligation of proper delivery⁸¹ and a product liability claim.⁸²

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 this was owing to an external cause that cannot be imputed to the party.⁸³

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 obligor is liable only for damages that were foreseen or that could be foreseen at the time of the contract, unless the obligor's failure is owing to his or her own gross negligence or fraud.⁸⁴

Causal link

A causal link must be demonstrated between the breach of contract and the damages. In other words, the damages must be the immediate and direct consequences of the non-performance of the agreement.⁸⁵

78 Article 54, Code of Civil Procedure.

79 Articles 1626 et seq., Civil Code.

80 Articles 1641 et seq., Civil Code.

81 Articles 1604 et seq., Civil Code.

82 Articles 1245 et seq., Civil Code.

83 Article 1231-1, Civil Code.

84 Article 1231-3, Civil Code.

85 Article 1231-4, Civil Code.

ii Burden of proof

Each party must prove, according to the law, the facts necessary for its claim to succeed.⁸⁶

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 2010.⁸⁷ According to this procedure, parties may agree not to seize a court, at least for the duration of their agreement, and instead work together, with their counsels, to find an amicable settlement to their dispute. In this context, parties must formalise the terms of their exchange of evidence in writing.⁸⁸

In anticipation of proceedings, 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 proof of the facts upon which the resolution of the dispute depends.⁸⁹ This is the procedure most commonly used by parties to obtain evidence.

International litigants should also pay attention to the restrictions set forth in Law No. 68-678 of 26 July 1968 (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 the mechanisms provided by international treaties or agreements (e.g., the Hague Evidence Convention of 18 March 1970).⁹⁰

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 a maximum fine of €90,000 for legal persons.⁹¹ Rarely enforced, the Blocking Statute was recently back in the spotlight when the Gauvain report suggested increasing the sanctions to a maximum two-year imprisonment or a criminal fine amounting to €2 million, or both, for natural persons and a maximum fine of €10 million for legal persons.⁹²

Rules of evidence

A claimant demanding the performance of an obligation must prove it.⁹³ Similarly, a person claiming to be released from an obligation must prove its payment or the fact that caused its extinction.⁹⁴

86 Article 9, Code of Civil Procedure.

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

88 Article 2063, Civil Code.

89 Article 145, Code of Civil Procedure.

90 Article 1 *bis*, Law No. 68-678 of 26 July 1968 (the Blocking Statute).

91 Article 3, the Blocking Statute.

92 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).

93 Article 1353 (Section 1), Civil Code.

94 Article 1353 (Section 2), Civil Code.

Unless the law states otherwise, evidence may be brought by any means.⁹⁵ Nonetheless, any contract obligation exceeding €1,500⁹⁶ must be proved by a private or authentic act in writing⁹⁷ 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*.⁹⁸

A confession, a decisive oath or prima facie evidence may be accepted as substitutions for a required written proof.⁹⁹

The law may establish presumptions related to some acts or facts. Three types of presumptions exist: simple, mixed and irrefutable.¹⁰⁰ It is possible to prove the contrary of a simple presumption by any means;¹⁰¹ however, a mixed presumption can only be rebutted by the means of proof stated by the law, and an irrefutable presumption cannot be rebutted.¹⁰²

VI DEFENCES TO ENFORCEMENT

i Extinctive limitation period

In general, personal actions or movable rights of action are extinguished 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.¹⁰³

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 the trial.¹⁰⁴ Any legal action, even summary proceedings, interrupts the prescription, even if the action was brought before a court that lacks jurisdiction or was annulled for procedural error.¹⁰⁵

Parties may decide, by mutual agreement, to shorten or extend the prescription period.¹⁰⁶

ii Legal compensation

Compensation is defined as the simultaneous extinction of mutual obligations between two persons.¹⁰⁷ For compensation to operate, the obligations must be fungible, certain, liquid and due.¹⁰⁸

95 Article 1358, Civil Code.

96 Decree No. 80-533 of 15 July 1980.

97 Article 1359, Civil Code.

98 Article 1360, Civil Code.

99 Article 1361, Civil Code.

100 Article 1354, Civil Code.

101 *ibid.*

102 *ibid.*

103 Article 2224, Civil Code.

104 Article 2239, Civil Code.

105 Article 2241, Civil Code.

106 Article 2254, Civil Code.

107 Article 1347 (Section 1), Civil Code.

108 Article 1347-1, 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 restitution for any contractual performances that have already taken place.¹⁰⁹

Defects of consent

Defects of consent (see Section II) are a cause of nullity of the contract¹¹⁰ if and only if they have been decisive. In other words, the error, dol or violence must be of such a nature that had the error, dol or violence not been committed, one of the parties would not have entered the contract or would have contracted only under substantially different conditions.¹¹¹

To be a ground for nullity, the error must not be inexcusable and must relate to the essential qualities of one of the performances or of the co-contractor;¹¹² therefore, errors on the value resulting from an erroneous economic assessment are excluded,¹¹³ whereas errors resulting from dol are always excusable and a cause of nullity even when relating to the value of the consideration.¹¹⁴ With regard to violence, it may be a ground for nullity regardless of whether it is exercised by a co-contractor or by a third party.¹¹⁵

Incapacity and defaults in representation

Capacity is a condition of validity of contracts;¹¹⁶ therefore, incapacity to contract is a ground for relative nullity.¹¹⁷

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.¹¹⁸ 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.¹¹⁹

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.¹²⁰

109 Article 1178 (Sections 1 and 2), Civil Code.

110 Article 1131, Civil Code.

111 Article 1130, Civil Code.

112 Article 1132, Civil Code.

113 Article 1136, Civil Code.

114 Article 1139, Civil Code.

115 Article 1142, Civil Code.

116 Article 1128, Civil Code.

117 Article 1147, Civil Code.

118 Article 1156 (Section 2), Civil Code.

119 Article 1157, Civil Code.

120 Article 1161, Civil Code.

Illicit contracts

Contracts are only valid insofar as they include a defined and lawful subject matter.¹²¹ Contracts cannot derogate from laws that relate to public order, either by their stipulations or by their purpose, regardless of whether the latter was known by all the parties.¹²²

The sanction of an illicit or indefinite subject matter is the nullity of the contract.¹²³

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. The nullity exception is imprescriptible (i.e., can still be raised even where the limitation period has expired) as long as it relates to a contract under which there has been no performance.¹²⁴

iv Illusory or derisory consideration in onerous contracts

An onerous contract is null and void if, at the time of its formation, the consideration provided to a party is illusory or derisory;¹²⁵ however, in a bilateral contract, the lack of equivalence between two obligations is not a ground for nullity, absent legal provisions to the contrary.¹²⁶

v Exclusion or limitation of liability clauses

Parties may validly include in their contracts exclusion or limitation of liability clauses to adapt their contractual relations or to limit their mutual obligations; however, any clause that would deprive the essential contractual obligation of its substance is deemed unwritten (i.e., null and void).¹²⁷ 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.¹²⁸

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 creating a significant imbalance between the respective rights and obligations of the parties to the contract, shall be deemed unwritten.¹²⁹

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.¹³⁰

121 Article 1128, Civil Code.

122 Article 1162, Civil Code.

123 Article 1178, Civil Code.

124 Article 1185, Civil Code.

125 Article 1169, Civil Code.

126 Article 1168, Civil Code.

127 Article 1170, Civil Code.

128 Article 1231-3, Civil Code.

129 Article 1171, Civil Code.

130 Article 1186, Civil Code.

viii Force majeure

In contractual matters, *force majeure* occurs when an event beyond the obligor's control, which could not reasonably have been foreseen at the time the contract was concluded and of which the effects cannot be avoided by appropriate measures, prevents the obligor from performing his or her obligation.¹³¹ 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 the 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.¹³²

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS**i Breach of the duty of good faith**

Contracts must be negotiated, formed and executed in good faith.¹³³ This provision is required by public order.¹³⁴

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 Court of 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.¹³⁵

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 the contract or ask the judge for its adaptation. If they fail to reach an agreement, a party may still request the revision or termination of the contract.¹³⁶ The party who requested the renegotiation of the contract must continue to execute its obligations during the course of the renegotiations.

iii Quasi-contractual claims

Quasi-contracts are purely voluntary acts resulting in an obligation by the person who benefits from them without being entitled to it, and sometimes a commitment by their author towards others.¹³⁷ The Civil Code identifies three quasi-contracts: management of affairs,¹³⁸ undue

131 Article 1218, Civil Code.

132 Article 1351, Civil Code.

133 Article 1104 (Section 1), Civil Code.

134 Article 1104 (Section 2), Civil Code.

135 Article 1195, Civil Code.

136 *ibid.*

137 Article 1300, Civil Code.

138 Articles 1301–1301-5, Civil Code.

payment¹³⁹ and unjustified enrichment.¹⁴⁰ They give rise to the obligation to compensate for the unfair advantage taken from others; therefore, the impoverished person has a legal action against the enriched person on the basis of one of those three quasi-contracts.¹⁴¹

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* (fraud corrupts everything), a judge may declare the contract void or deprive the scheme of its fraudulent effect.

A fraudulent act directed against a third party will be declared unenforceable against that third party. The Paulian action is a specific cause of action that enables a creditor to protect himself or herself from fraud by having the acts committed by the debtor in fraud of the creditor's rights declared unenforceable against the creditor inasmuch as the obligor has arranged his or her insolvency to frustrate the enforcement of the creditor's debt.¹⁴²

VIII REMEDIES

i Remedies available for breach of contract

The Civil Code sets out five remedies¹⁴³ that are available to the party or victim of non-performance or improper performance:

- 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,¹⁴⁴ or suspend the performance of his or her obligation when it is obvious that the other party will not perform;¹⁴⁵
- b* forced performance: the creditor of an obligation may obtain the forced performance of the obligation or take it upon himself or herself to have the obligation executed, after a formal notice;¹⁴⁶
- c* price reduction: the obligee may accept, after a formal notice, partial performance of the contract and demand a proportional price reduction;¹⁴⁷
- d* termination for breach: termination for breach may be obtained on three grounds: application of a termination clause, judicial resolution or unilateral termination.¹⁴⁸ Unilateral termination is a major innovation of the 2016 reform, according to which obligees can terminate contracts by notification to their obligors if they have not remedied the breach of contract despite a formal notice;¹⁴⁹ and

139 Articles 1302–1302-3, Civil Code.

140 Articles 1303–1303-4, Civil Code.

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

142 Article 1341-2, Civil Code.

143 Article 1217, Civil Code.

144 Article 1219, Civil Code.

145 Article 1220, Civil Code.

146 Articles 1221 and 1222, Civil Code.

147 Article 1223, Civil Code.

148 Articles 1224–1229, Civil Code.

149 Article 1226, Civil Code.

e damages: the obligee may obtain compensation for the damage caused.¹⁵⁰ 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 in damages.¹⁵¹

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

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, the damage must be certain, even if has not yet materialised; compensation can be obtained for the loss of an opportunity as long as its existence can be proven. Second, the damage must be direct (i.e., the immediate and direct result of the breach of contract).¹⁵² Finally, compensation is limited to the damage foreseeable at the time the contract is concluded, except in the event of gross negligence or fraud.¹⁵³

Judges may still use their sovereign power to assess the damage to moderate the quantum of damages. Additionally, both interest at the legal rate and damages may be awarded.¹⁵⁴ The breach of contract by the bad faith obligor must have caused additional damage, distinct from the delay, to the obligee for additional damages to be awarded.

iii Extra-contractual claims (torts)

Under French law, contractual liability applies between co-contracting parties for any damage resulting from the non-performance of a contractual obligation. Consequently, if those conditions are not met, the liability is necessarily extra-contractual.¹⁵⁵ Further, 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 sought by a party to the contract.

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 sudden termination of established commercial relations, even though those claims are based on the same facts.¹⁵⁶

With regard to third parties, a landmark ruling by the Plenary Assembly of the Court of Cassation¹⁵⁷ enshrined the principle whereby a third party to a contract may invoke, on the basis of extra-contractual liability, a breach of contract if the breach has caused him or her

150 Article 1231 et seq., Civil Code.

151 Article 1231-5, Civil Code.

152 Article 1231-4, Civil Code.

153 Article 1231-3, Civil Code.

154 Article 1231-6, Civil Code.

155 Article 1240, Civil Code et seq.

156 Court of Cassation, Commercial Chamber, 24 October 2018, No. 17-25.672.

157 Court of Cassation, Plenary Assembly, 6 October 2006, *Myr'ho*, No. 05-13.255.

damage. In other words, the sole breach of contract by a co-contracting party is sufficient for a third party to engage the former's extra-contractual liability. While several recent decisions of the Court of Cassation and the Civil Liability Bill of 13 March 2017¹⁵⁸ had tempered this principle, the Plenary Assembly of the Court of Cassation reaffirmed its landmark ruling.¹⁵⁹

158 Article 1234, Civil Liability Bill of 13 March 2017 (still under discussions before the French senate).

159 Court of Cassation, Plenary Assembly, 13 January 2020, No. 17-19963.

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