

Judicial Review of Commercial Contracts

A Comparative Handbook

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I. Introduction

- 1 French contract law is based on party autonomy. Art. 1102 of the French *Code civil* ('Ccivil')¹ provides:

Everybody is free to contract or not to contract, to choose its contract partner and to determine the content and the form of the contract within the limits of the law.

¹ The French Civil code is quoted in the version of the reform of its 3rd book '*Des sources des obligations*' (The sources of the obligations) by ordonnance 2016-131 of 10.2.2016, JORF 0035 of 11.2.2016, and its ratification law of 20.4.2018, Journal Officiel de la République Française ('JORF') No. 0093 of 21.4.2018, Texte 1.

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Whilst our review of commercial contracts under French law will focus on the limits of 2 party autonomy, it must not be forgotten that limitations to the freedom to contract are the exception to the rule. It may be true that French law is not as liberal as the laws of some other countries.² A number of commercial and other contracts are regulated by mandatory provisions. More generally speaking, the French legislator has a tendency to protect the weaker party against the more powerful one; this is even one of the principles of the *Code civil's* contract law reform in 2016³. Commercial contracts were as a whole not subject to a general judicial review. It was obvious though that in many cases there is no equal bargaining power even between professionals. The problem was dealt with sector wise: specific legislation was passed to regulate the relations between big retailers and their suppliers⁴, for sub-contractor relations⁵ and in the transport business⁶, to give some examples. The general issue of unfair contract terms in commercial transactions was left open. A first attempt was made in 2008⁷ by enacting Art. L 442-6 I No. 2 *Code de commerce* ('Ccom') incriminating significantly imbalanced provisions in commercial contracts. For reasons, analysed below,⁸ this provision addressed only a small part of the problem and was limited in its purpose. At the occasion of the reform of the *Code civil's* general contract law in 2016 Art. 1171 Cciv was adopted, which provides that significantly imbalanced contract terms in pre-established general contract terms ('GCT') are deemed not written. This will be our main subject, but we will reach beyond and present other key matters, which are regulated by mandatory provisions and where contractual freedom is limited.

The first chapter contains the main regulatory framework (II.). Subsequently, we will 3 examine the details and application of provisions about significantly imbalanced contract terms (III.1.), followed by other mandatory provisions of relevance to our subject, in particular limitation of liability clauses (III.2.). We will then shift the focus to the international level and the application of French law in international contracts (IV.) before making some concluding remarks (V.).

II. Regulatory framework

1. Civil code⁹

One of the main subjects of our contribution has been introduced into French law by the 4 recent reform of the contract law of the French *Code civil* in 2016¹⁰. Following minor modifications in the ratification law of 20.4.2018¹¹ the relevant provisions are the following:

Art. 1171. Cciv provides

In a standard form contract any terms, which is non-negotiable and determined in advance by one of the parties and which creates a significant imbalance (*'déséquilibre significatif'*) in

² Gouëzel, *JurisClasseur Code civil* Art. 6 (fasc. Unique), mn. 10–11 emphasises that the principle of *égalité* in the sense of protection of the weaker party has often been opposed to party autonomy. There are other less philosophical but more economical and political considerations which lead the French legislator and the French *Cour de cassation* to limit party autonomy in certain situations, *ibid.*

³ Rapport au Président relatif à l'ordonnance No. 2016-131, JORF No. 0035, 11.2.2016, Texte 25.

⁴ Mouial-Bassilana, *JurisClasseur Concurrence-Consommation* (fasc. 730) mn. 1–7.

⁵ Loi 75-1351 of 31.12.1975.

⁶ Art. L 132-8 Ccom, law No. 98-69 ('loi Gayssot') of 6.2.1998, JORF 7.2.1998, p. 1975.

⁷ Law of 4.8.2008, No. 2008-776, JORF 0181, Texte 1.

⁸ See below mn. 36-38

⁹ The English translations are taken from Cartwright/Whittaker.

¹⁰ See fn. 1

¹¹ Chantepie/Latina, 200 at mn. 230. Cf. Niggemann (2018) 659 (in German) in particular in fn. 32–35.

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the rights and obligations of the parties, is deemed not written. The assessment of a significant imbalance must not relate either to the main subject matter of the contract nor to the adequacy of the price in relation to the act of performance.

- 5 The notion of ‘standard form contract’ (*‘contrat d’adhésion’*) is defined in Art. 1110 (2) Cciv:

A standard form contract is one which comprises a set of non-negotiable clauses, which are determined in advance by one of the parties.

- 6 Art. 1119 Cciv sets the requirements for GCT to be part of the contract:

General conditions put forward by one party have no effect on the other, unless they have been brought to the latter’s attention and the party has accepted them.

- 7 Art. 1119 Cciv corresponds to the legal situation before the reform.¹² In case the GCT are contained in another document, to which reference is made, that reference has to be made clearly and the GCT must be easily accessible.¹³ The other party must have had knowledge of the GCT before or at the occasion of conclusion of the contract or have been able to obtain this knowledge without difficulties. Art. 1120 Cciv further provides that silence alone is not an acceptance, unless the law, trade usages, contract relations or particular circumstances lead to another result. This concept corresponds as well to the traditional legal situation under French law: *‘silence circonstancié’*¹⁴. The sending of an order confirmation including the GCT for the first time after the contract has been concluded, or even the printing of the GCT on the reverse side of the invoice cannot lead to the inclusion of the GCT into the contract.¹⁵ Previous business relations which prove that the GCT had been accepted in the past may lead to another result, provided a reference to the GCT has been made in the new contract.¹⁶

- 8 In circumstances of differing standard terms (‘battle of the forms’) Art. 1119(2) Cciv provides:

In case of inconsistency between general conditions relied upon by each of the parties, incompatible clauses have no effect.

- 9 Where one or several clauses are declared not written or null and void, Art. 1184 Cciv distinguishes between not written and invalid clauses. In case the stipulation is null and void (*‘nulle’*), the contract is nullified if the invalid clause is an essential element (*‘un élément déterminant’*). Clauses deemed not written do not lead to invalidity of the contract.

- 10 Art. 1170 Cciv contains a further fundamental provision:

Any contract term which deprives a debtor’s essential obligation of its substance is deemed not written.

- 11 The *Code civil* further contains interpretation rules (Art. 1188–1192 Cciv¹⁷). Contracts are construed according to the common intention of the parties rather than stopping at the literal meaning of its terms (Art. 1188 Cciv). The contract clauses are to

¹² Chantepie/Latina, *ibid.*

¹³ Mercadal, *Memento Lefebvre Droit commercial*, 2019, mn. 12139.

¹⁴ Cass.civ. 1^{ère}, 24.5.2005, No. 02-15.188; Cass.com., 15.3.2011, No. 10-16.422. See also Chantepie/Latina, 205 at mn. 238–240. All decisions of the *Cour de cassation* are available on its website https://www.courdecassation.fr/jurisprudence_2/ and under www.legifrance.gouv.fr under *jurisprudence judiciaire* by searching with the date of the decision and the docket number.

¹⁵ Cass.civ. 1^{ère}, 18.10.2005, No. 03-18467; 11.3.2014, No. 12-28.304.

¹⁶ Cass.civ. 1^{ère}, 30.6.1992, No. 90-21.491; 18.10.2005, No. 03-18.467; Chantepie/Latina, 201 at mn. 230.

¹⁷ These articles are in line with the traditional interpretation rules of French law, Chantepie/Latina, 447–453 at mn. 501 et seq.

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be construed as a whole; several contracts concluded for the same operation are to be interpreted as a whole (Art. 1189).

Art. 1190 Cciv contains the *contra proferentem* rule: 12

In case of ambiguity, a bespoke contract is interpreted against the creditor and in favour of the debtor and a standard form contract is interpreted against the person who put it forward.

Clauses capable of two meanings are to be construed in a sense which makes them produce effect. (Art. 1191 Cciv). 13

Art. 1105 Cciv deals with the relation between general and special rules:¹⁸ 14

Whether or not they have their own denomination, contracts are subject to general rules, which are the subject of this sub-title.

Rules particular to certain contracts are laid down in the provisions special to each of these contracts.

The general rules are applied subject to these particular rules.

Party autonomy is limited by Art. 6 and 1102 Cciv in so far as the parties may not derogate from rules which are an expression of public order. Art. 1162 Cciv repeats this principle by stating that a contract may not derogate from public order neither by its terms nor by its purpose, irrespective of whether the latter (i.e. the content of public order) was known to all the parties. 15

The French wording of Art. 1102 and Art. 6 Cciv is peculiar and its meaning probably not fully expressed in the English translation. A derogation from rules '*qui intéressent l'ordre public*' is not permitted. This text, unchanged since 1804, expresses a concept which adapts itself to changes of common societal convictions and morals.¹⁹ It has been used to allow the courts to extend public order to matters which were not taken into consideration before; in recent decades this has particularly concerned fundamental rights.²⁰ 16

Within the contract law book of the *Code civil*, the following articles provide that they are mandatory and cannot be set aside by contractual stipulations: 17

- Art. 1104: good faith in negotiation, conclusion and execution of contracts;
- Art. 1112-1(5): Precontractual duty to inform; stipulations excluding or limiting this duty are not valid;
- Art. 1169: remunerated contracts ('*contrat à titre onéreux*') are invalid if, at the time of conclusion, the counterpart is derisory or illusory;
- Art. 1210: permanent obligations are invalid and can be terminated according to the rules on termination of contracts with undetermined duration;
- Art. 1231-5: moderating power of the courts in case of excessive contract penalties;
- Art. 1356-2: clauses about the burden of proof cannot be relied upon against irrefutable legal presumptions.

This list is exhaustive only in so far as it contains the legislative provisions which explicitly state that they cannot be modified; there are others, which may by their substance be considered as '*loi de police*' and where the French courts may decide that they fall into that category.²¹ These provisions are mandatory in a national context and are part of '*public order*' (Art. 1102 and 1162). In chapter IV. we will discuss their application in an international context.²² 18

¹⁸ On the relevance of this article see below mn. 63–69.

¹⁹ Gouëzel, *JurisClasseur Code civil* Art. 6 (fasc. Unique) mn. 17, 20, 36 et seq.

²⁰ *ibid.* mn. 17–21, 36.

²¹ See mn. 16 and Gouëzel, *fn*s 19 and 20

²² See below mn. 94–102 for the discussion of these provisions in an international context.

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2. Commercial code²³

19 In 2008²⁴ the following provision concerning unfair contract terms was introduced into Art. L 442-6 of the French *Code de commerce* ('Ccom'), replacing the rule whereby the abuse of economic dependence and of purchasing power constituted an offence in tort giving rise to a claim for damages:²⁵

I. – Any producer, trader, manufacturer or person recorded in the trade register who commits the following offences shall be held liable and obliged to make good the damage caused:

(...)

2° subjecting or seeking to subject a trading partner to obligations that create a significant imbalance ('déséquilibre significat') in the rights and obligations of the parties;²⁶

(...)

20 This provision is part of the section entitled 'restrictive competition practices' (*pratiques restrictives de concurrence*), which concerns situations common in relations between the big retail companies in France and their suppliers, who suffer from the strong market power of these companies. This sector has been a centrepiece of French legislation in matters of unfair dealings and fair competition to balance the unequal bargaining power between the big retailers and their suppliers.²⁷

21 In order to fully understand the legal mechanism of this provision it is important to know that court actions can be initiated by competitors and contract partners ('any person having a legitimate interest') (Art. L 442-4 I Ccom), and the French Ministry for the Economy and Finance, which acts through its General Directorate for Competition Policy, Consumer Affairs and Fraud Control ('DGCCRF'²⁸). This institution leads, inter alia, enquiries into restrictive competition practices, which may result in court actions, in which the authority may claim nullity of the incriminated clauses, cessation of the incriminated practices and significant fines in relation to the profits earned through these practices (until 2019, Art. L 442-6 III Ccom).

22 The section on restrictions of competition was redrafted in 2019 and a new numbering system applied.²⁹ The modified content of Art. L 442-6 is now found in Art. L 442-1 I No. 2 Ccom:

Anyone in the field of production, distribution or services who commits, in the frame of commercial negotiations, conclusion or execution of contracts, any of the following offences, shall be held liable and be obliged to make good the damages caused:

1. (...)

2. subjecting or seeking to subject the other party to obligations that create a significant imbalance in the rights and obligations of the parties.

23 Any party having a legitimate interest may forthwith not only claim for damages but also cessation of the incriminated practices and request to have the incriminated clauses declared null and void (Art. L 442-4 I(2) Ccom). The claims of competitors and contract partners are thus significantly extended.

²³ The official translation of the French commercial code has been updated until 2013 only. The translations of later texts are our own.

²⁴ Loi No. 2008-776, 4.8.2008 (loi 'LME'), JORF 5.8.2008, Texte 1.

²⁵ Mouial-Bassilana, *JurisClasseur Concurrence-Consommation* (fasc. 730) mn. 1–7.

²⁶ Translation from <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>.

²⁷ Mouial-Bassilana, *JurisClasseur Concurrence-Consommation* (fasc. 730) mn. 1.

²⁸ *Direction Générale de la concurrence, de la consommation et de la répression des fraudes*.

²⁹ Ordonnance No. 2019-359, 24.4.2019, JORF 25.4.2019.

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Failing a specific provision, the law enters into force upon its publication. However, it does not apply retroactively for contracts concluded prior to its publication.³⁰ At present the former and the latter texts apply depending on when the contract was concluded. 24

3. Consumer code

Consumer law exerts an important influence beyond its direct application. Although it is not part of the in-depth analysis, the legal framework would be incomplete without reference to consumer law. 25

Art. L 212-1 *Code de la consommation* (Cconso) reads as follows:³¹ 26

Clauses in contracts concluded between professionals and consumers are considered abusive, the object or the effect of which is to create a significant imbalance between the rights and the obligations of the parties to the disadvantage of the consumer.

Without prejudice to the interpretation rules in Art. 1188, 1191 and 1192 of the civil code the abusive character of a clause has to be determined by taking into account all circumstances prevailing at the time of conclusion of the contract as well as to all other clauses of the contract. Additionally, the appreciation has to take into account contract stipulations in another contract, provided these contracts are legally connected by their conclusion or their execution.

The appreciation of the abusive character in the sense of the first paragraph does not bear either on the definition of the principal object of the contract or on the adequacy of the price or the remuneration for the sold object or the offered service, provided that the clauses are clearly and understandably drafted.

A decree taken by the Council of State, after having obtained the opinion of the commission for abusive clauses, determines the type of stipulations, which according to the seriousness of infringing on the balance of the contract must irrefutably be considered as abusive in the sense of the first paragraph.

A decree taken under the same conditions determines a list of presumably abusive stipulations; in case of a lawsuit concerning a contract with such a clause, the professional has to prove the non-abusive character of the litigious stipulation.

In application of this text, two decrees were published in 2008,³² the first of which lists 12 clauses, which are irrefutably abusive (R 212-1 Cconso, the 'Black list') and a second list of 10 clauses, which are abusive, unless the professional proves that they are not (R 212-2 Cconso, the 'Grey list').³³ Both lists are based on the Annex to the EU Unfair Terms Directive, but contain some additional clauses.³⁴ They were last amended in 2016.³⁵ 27

A direct application of these texts to commercial relations is not possible, since their application is limited to contracts between consumers and '*professionnels*'.³⁶ However, as shall be seen,³⁷ examples of significantly imbalanced clauses figuring in these two lists 28

³⁰ Mouly-Guillemaud, 17.

³¹ There is no official translation of the current French consumer code. Unless indicated otherwise, the translations are our own.

³² When in 1995 France brought its legislation in compliance with the EU Unfair Terms Directive the list of abusive clauses had merely an indicative character in the sense that in spite of a clause featuring in the list it was not automatically or presumably abusive. This was changed only in 2008, when the legal consequences of the black and grey lists were fixed by law. Furthermore, the French government did not wish to have only the courts decide on these matters and instituted a commission on abusive clauses ('*Commisson des clauses abusives*', CCA), the function of which was (and still is) to issue opinions and recommendations for the courts and the public about specific sets of general contract terms. The role of the courts was thus reduced. Cf. Raymond/Pimbert, *JurisClasseur Concurrence-Consommation* (fasc. 820) mn. 17–18; Calais-Auloy/Temple, 164, 177–179.

³³ Décret No. 2009-302, 18.3.2009, JORF 0667 of 20.3.2009, 5030.

³⁴ Cf. Calais-Auloy/Temple, 172–177.

³⁵ Décret No. 2016-884, 29.6.2016, JORF 0151, 30.6.2016.

³⁶ Article liminaire Cconso.

³⁷ See mns 45, 58–62.

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may exert an influence on the interpretation of Art. L 442-6 I No. 2 Ccom and Art. 1171 Cciv.

III. Requirements and legal consequences

1. General provisions

- 29 French law contains three sets of rules dealing with unfair contract terms: commercial law (Art. L 442-1 No. 2 Ccom), civil law (Art. 1171 Cciv), and consumer law (Art. L 212-1 Cconso). All three revolve around the central notion of *'déséquilibre significatif'*: 'significant imbalance'.
- 30 The different legal frameworks present various questions concerning their relationship to one another, their respective scope of application and relevance in commercial contracts. Each of these aspects will be discussed in more detail below.
- 31 **a) Differences.** In contrast to the new Art. 1171 Cciv, neither the Commercial nor the Consumer code require the use of preformulated general contract conditions. Whereas Art. L 442-1 I No. 2 Ccom concerns 'significantly imbalanced obligations', the Consumer code targets only 'clauses'.
- 32 The Commercial code further requires that the unfair obligations must be a result of subjecting or seeking to subject the other party to such obligations. This is an essential condition of its application.
- 33 Both the Civil and the Consumer code exclude the adequacy between the price and the principal object of the contract from the issue of unfair terms. However, under the Consumer code this exclusion depends on the condition that the contract clauses in this respect (price and object) are themselves clearly written (Art. L 212-1(3) Cconso). The Commercial code contains no such qualification.
- 34 According to the Civil and Consumer codes, unfair clauses are deemed not written (Art. 1171(2) Code civil; Art. L 241-1 Cconso); the rest of the contract is thus maintained (Art. 1184 Cciv; Art. L 241-1(2) Cconso). With respect to Art. L 442-1 Ccom the clause is null and void (*'nulle'*), which means that the whole contract may become invalid if the clause is an essential element (Art. 1184 Cciv). There are two procedural differences between 'not written' and 'null and void'. In cases where the application of Art. L 442-1 Ccom is sought, a specific request to declare the clause null and void has to be made; such a request is subject to a time bar of five years.³⁸ In consumer and civil matters, no such explicit request is required and the action is not limited by a prescription period.³⁹ In consumer matters, the tribunal has to apply the consumer protection provisions *ex officio*,⁴⁰ which is not the case in either civil or in commercial matters.
- 35 Under the commercial code, there is an additional claimant, namely the Ministry for the Economy and Finance. Through its General Directorate for Competition Policy, Consumer Affairs and Fraud Control, the Ministry may lead investigations, which enable the Ministry to obtain much better factual and market knowledge than a private claimant may have. Its actions are thus the mightier weapon under Art. L 442-1 Ccom.
- 36 **b) Scope of application.** The scope of Art. L 442-1 Ccom increased in 2019 as a result of the legislative changes. Between 2008 and 2019 the provision applied to producers, traders, manufacturers, and persons recorded in the *'répertoire des métiers'*

³⁸ Cass.civ. 13.5.2019, No. 017-23.169; cf. Mouly-Guillemaud, 13.

³⁹ Cass.civ. *ibid.*

⁴⁰ Art. R 632-1 Cconso; cf. Calais-Auloy/Temple, 178.

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(trade register). The law of April 2019 has widened the application to all activities of production, distribution and services.⁴¹

Since the provisions of the Consumer code apply to contracts between consumers 37 and ‘*professionnels*’⁴² they do not directly apply to commercial contracts, but may exercise an influence on the interpretation of the two other provisions.

The application of Art. 1171 Cciv and the other articles of the Civil code are not 38 limited to any category of persons. The Civil code is and – since its creation in 1804 – has been a law for everybody. Commercial law is *lex specialis* to the Civil code.⁴³ However, the relationship between commercial and civil law is not so simple to grasp, since civil law is in many aspects the basis of commercial law, whereas other provisions modify the civil law provisions.⁴⁴ The respective scopes of application of Art. 1171 Cciv and Art. 442-1 No. 2 Ccom are part of this issue.⁴⁵ With respect to our topic, the application of Art. L 442-1 Ccom to commercial contracts is a certainty, whereas the application of Art. 1171 Cciv is a – serious – possibility.

c) **Art. L 442-1 Ccom.** Upon its introduction in 2008, Art. L 442-6 I No. 2 Ccom – 39 the predecessor of Art. L 442-1 No. 2 Ccom – was much feared to become the basis for judicial review of unfair contract terms in commercial contracts.⁴⁶ Since then, a large number of court decisions applied this provision and have given it clear structures and limits. The extensive case law is best summarised and analysed in the annual reports of the Faculty of Law at the University of Montpellier. In addition, we rely on the annual summary of the court decisions by the DGCCRF.⁴⁷

aa) Concepts. 40

i) *Commercial partner.* The courts have construed the notion of ‘commercial partner’ literally, requiring not only one contractual relationship but indeed a series of contracts with an established relationship.⁴⁸ This has proven an obstacle for parties objecting against specific clauses in an isolated contract; the potential claimant had to wait until the use of the imbalanced clauses had become a repeated feature.

ii) *Subjection.* The expressions used by the courts to describe the acts which may 41 qualify as ‘subjection’ are very strong, including ‘intimidating’, or ‘threat’ or ‘leaving no alternative’.⁴⁹ The courts take the market position of the parties into consideration,

⁴¹ Mouly-Guillemaud, 17. Case law had already extended the application of Art. L 442-6 I Ccom to these three sectors and even beyond, cf. Le Bescond de Coatpont, *JurisClasseur Contrats-Distribution* (fasc. 262) mn. 7.

⁴² Article liminaire Cconso, see above mn. 28.

⁴³ See Art. 1105(3) Cciv, which provides for the principle of *lex specialis derogat legi generali*.

⁴⁴ The major examples are joint and several liability for which there is no presumption in civil law, Art. 1310 Cciv, contrary to commercial law, see Dondero, and the means of evidence: Commercial acts can be proven with all means, Art. 110-3 Ccom, whereas civil law requires written evidence for all judicial acts with a value above 1500 €, Art. 1359 Cciv and décret 2004-836, 20.8.2004. Cf. for a general view Goldi-Genicon.

⁴⁵ See below mn. 63–68.

⁴⁶ Mouial-Bassilana, *JurisClasseur Concurrence-Consommation* (fasc. 730) mn. 6.

⁴⁷ *Bilan des décisions judiciaires* (Faculté de droit de Montpellier) and *Bilan des décisions administratives et judiciaires* by the DGCCRF, both issued annually, available on the website of the French Ministry for the Economy and Finance, under <https://www.economie.gouv.fr/cepc/etudes-commission>. The annual summary and analysis of the Faculty of Law at the University of Montpellier will be referred to as ‘*Bilan Montpellier*’ followed by the year, the summary of the court decisions rendered subsequent to claims of the DGCCRF will be referred to as ‘*Bilan DGRCCRF*’ and the year. We indicate that we refer to the DGCCRF’s report on its judicial activity, but not to its annual report.

⁴⁸ *Bilan Montpellier* (2018) 70. This interpretation has remained the same since 2008; cf. the *Bilan Montpellier* of the previous years under Art. L 442-6 I No. 2.

⁴⁹ *ibid.* 71.

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namely whether one party had a market position allowing it to impose its conditions on the other.⁵⁰ An important element in establishing subjection is whether the contract terms have been imposed a such without the possibility to negotiate.⁵¹

- 42 The element of subjection has proven to be a high obstacle for individual claimants. In cases where the court procedure followed an investigation by the DGCCRF, the rate of success is much higher.⁵² The individual claimant may have indications and some evidence about the superior market position of the other party, but it fails to have access to the same data and information which the DGCCRF may dispose of via a thorough market analysis. Additionally, the claimants often fail to establish that they do not have a viable alternative to contract with another party.
- 43 *iii) Imbalance.* The imbalance may be contractual, economical or financial.⁵³ The courts do not limit their analysis to contractual matters and clauses, but include price and remuneration elements into their judgment.⁵⁴ From an economic angle, the imbalance may result from the absence of a counterpart or a disproportion between the obligations of the parties.⁵⁵ The economic consequences of termination of contract or a suspension of the contractual relationship are taken into consideration⁵⁶. Price clauses or price variations in annual contracts have been held to be invalid⁵⁷.
- 44 Another indication for an imbalance may be that there is no legitimate reason for differing contractual rights for the two parties.⁵⁸
- 45 **bb) Application.** Art. L 442-6 I No. 2 Ccom has also been applied to contract clauses which would be held unfair in consumer matters. There are cases where undefined delivery periods, exclusion or excessive limitations of liability, unjustifiably different grounds for termination and difficulties of access to the courts have been held to be significantly imbalanced.⁵⁹ The following two cases, concerning the application of Art. L 442-6 I No. 2 Ccom, give an insight into the methodology of argument and application of this legal provision.
- 46 In *Amazon* – decided by the Regional court of Paris in September 2019⁶⁰ – the DGCCRF had investigated Amazon Marketplace, namely the Amazon platform, on which manufacturers and suppliers sell their products via Amazon. The case did not concern the consumer side of Amazon’s operations. The DGCCRF investigations began in 2015 and lasted for two years, during which period the competition authority interviewed a number of Amazon’s partners about the application of Amazon’s contract patterns. The action was brought against three companies of the Amazon group, two of

⁵⁰ See *Bilan DGCCRF* (2014) 7–8; (2015) 8–9; (2016) 8–10; (2017) 5–7; (2018) 7–8, all under <https://www.economie.gouv.fr/cepc/etudes-commission>. See also the *Amazon* and *Expedia* cases below mns. 46 and 50.

⁵¹ *Bilan Montpellier* (2018) 71.

⁵² *ibid.* 70–71.

⁵³ *Bilan Montpellier* (2014) 31; Cass.com., 2.3.2015, No. 13-27.525 and No. 14-10.907 (*Eurauchan*), CCC, May 2015, 50 (no real negotiation margin at the occasion of annual negotiation of the contract; threat of contract termination, pressure on the price for a new contract period).

⁵⁴ *Bilan Montpellier* (2018) 71 and *Bilan DGCCRF* (2018) 7–8. See as well the *Amazon* and *Expedia* cases mns 46 and 50.

⁵⁵ TC Paris, 2.9.2019, No. 2017050625 (*Amazon*) 13–14; Mouial-Bassilana, *JurisClasseur Concurrence-Consommation* (fasc. 730) mns 64 et seq.

⁵⁶ TC Paris, 2.9.2019, No. 2017050625 (*Amazon*); Gayard. Even though the decision is one of a lower court, it has not been challenged by Amazon, since part of the litigation had been settled.

⁵⁷ Cass.com., 2.3.2015, No. 13-27.525 (*Eurauchan*), see fn. 53.

⁵⁸ For instance, CA Paris, 24.6.2016, No. 13/20422, *Bilan Montpellier* (2016), 54.

⁵⁹ *Bilan Montpellier* (2018) 70–71, with further references; CA Paris, 21.6.2017, No. 15/18784 (*Expedia*); Chagny, 598.

⁶⁰ TC Paris, 2.9.2019, No. 2017050625 (*Amazon*).

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which were based in France, and one in Luxembourg, whereby the latter for the most part rendered only financial services. The pursuit against this latter company was not upheld by the court. The first part of the decision examines the notion of 'subjection'. The court relies on circumstantial evidence, including imbalanced economic power, one party being market leader and indispensable for the others, no real negotiation power and the same clauses in all contracts. Amazon had admitted that the non-negotiability of the contracts was an essential feature of its marketplace business and justified this argument by the fact that it deals with 170,000 partners thus rendering negotiation impossible. The court came to the result that Amazon's contract partners were subjected to accept the contracts, as Amazon's market position was so overwhelming they had no choice but to work with it.

With respect to the content of the contract, the DGCCRF was concerned by eleven 47 clauses, of which the court accepted a significant imbalance in seven cases. The criteria used to determine the significant imbalance were of contractual and economical nature, namely the absence or the serious disparity of a fair equivalent, the potestative character of a condition depending solely on one party's (Amazon's) discretion and clauses favouring exclusively one party's interests.

Certain criteria which are present in consumer protection cases were also applied. 48 Thus, the unclear clauses about the content of the contract was declared invalid. Furthermore, the possibility to unilaterally modify some contract provisions (in particular about the level of Amazon's commission), the unilateral termination and suspension rights, the performance criteria applied by Amazon, the vague wording of the accounting system and the stipulation about merchandise returned by the customer were considered significantly imbalanced. The court considers the possibility to discuss unilateral decisions *ex post* as insufficient to protect the rights of Amazon's partners, since the unilateral decisions were applied immediately, which placed the partner in an unfavourable and difficult position.⁶¹ It is further immaterial whether a clause has effectively been applied or not.

The choice of law and choice of jurisdiction clauses both opting for the courts and the 49 law of Luxembourg were disregarded. The action based on Art. L 442-6 I No. 2 Ccom is in tort. The applicable law is determined according to Art. 4(1) Rome II. Since the damages occurred to a great extent in France, French law is applicable. Furthermore, Art. L 442 is a mandatory (*'loi de police'*) provision. The choice of forum clause was disregarded, since it cannot be opposed against an action brought by the DGCCRF.

In earlier litigation concerning the DGCCRF's opposition to the travel platform 50 *Expedia*, the Paris Court of Appeal and recently the *Cour de cassation*⁶² had to decide on two standard stipulations of Expedia's hotel booking system, which the DGCCRF considered to be significantly imbalanced, namely the guarantee of granting the best price to Expedia and its right to dispose of all vacant rooms. The Appeal Court held the two clauses to be significantly imbalanced. The first one violates as well Art. L 442-6 II d) Ccom, according to which "most favoured" clauses are invalid. The reasoning and the method are exactly the same as in the Amazon case: subjection resulting from circumstantial evidence, in particular Expedia's important market position, and significant imbalance of the clauses due to absence of an equivalent counterpart. The *Cour de cassation* considers though that the last available chamber clause has to be construed in a narrower sense, namely that it does not oblige the hotel operators to rent their last room via Expedia, but merely contains an opportunity for them to use the Expedia

⁶¹ The DGCCRF is entitled to impose a fine (Art. L 442-6 III Ccom, since 2019 Art. L 442-1 III Ccom). The court reduced the fine of 9.5 million euros fixed by the DGCCRF to 4 million euros.

⁶² CA Paris, 21.6.2017, No. 15/18784, notes Delpech and Chagny, Cass.com., 8.07.2020, No. 17-31536.

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platform. Due to this narrower interpretation the clause is not significantly imbalanced. With respect to the applicable law and jurisdiction, Expedia, being an English company, stipulated English law and the jurisdiction of the English courts. The same arguments as in the Amazon case lead to the competence of the French courts and the application of French law.

- 51 The above decisions are by no means isolated; they are in line with previous decisions of the *Cour de cassation*.⁶³
- 52 **cc) Effects.** Although the cases referred to above were decided under the former Art. L 442-6 I No. 2 Ccom, they are still relevant under the new Art. 442-1 No. 2 Ccom. The modifications brought about by the new provision have enlarged the circle of those who may be liable for the use of unfair contract terms.⁶⁴ The requirement that the subjected party had to be a 'commercial partner' (*'un partenaire commercial'*) has been dropped.⁶⁵
- 53 Furthermore, the commercial parties may claim nullity of the unfair provision; the previous text gave them the right to claim for damages only. This limitation was a serious obstacle, since the parties were often unable to quantify a loss suffered by an unfair clause. This led some courts to extend the sanctions provided for in Art. L 442-6 II No. 2 Ccom to the nullity of the incriminated clauses. These decisions were *contra legem*, but showed the need for an enlargement.⁶⁶ The extension to nullity may well lead to a wider and, from the claimants' side, more efficient application of Art. L 442-1 No. 2 Ccom, but they still have to overcome the hurdle of 'subjection'.
- 54 Only 4.6 % of the claims raised by private parties were successful, the rate of success of the actions brought by the DGCCRF being much higher.⁶⁷ This is a steady feature over the years. The reasons mainly lie in the quite high thresholds required by the courts, in particular for the notions of 'commercial partner' and 'subjection'.
- 55 Art. L 442-6 No. 2 Ccom was rather a provision protecting fair dealing and competition than a barrier against significantly imbalanced clauses. The low success rate of individual claims shows that it was used by the courts in this sense. The high requirements for the notion of commercial partner and for subjection together with the limitation to obtain just damages were not only obstacles against the use of this provision against unfair contract terms but clear indications that this was not the purpose of this article. The reform of 2019 has removed two of these barriers and has widened its application to larger groups of commercial parties.
- 56 The interpretation of the term "*significantly imbalanced*" is flexible and allows the use of Art. L 442-1 No. 2 for the control of unfair contract terms. We have seen that the elements of consumer protection have been integrated into the notion of significant imbalance. They are not applied as such, but as guideline or concept of what is significantly imbalanced. We have also seen that economic considerations are an important element in the application of Art. L 442-6 I No. 2 Ccom, since the market position, adequacy of the price and of the object are included in the assessment of the significant imbalance. With respect to the requirement of subjection or the attempt to subject the courts have regularly considered that imposing

⁶³ Cass.com, 21.10.2008, No. 07-12336.

⁶⁴ Cf. above mn. 19.

⁶⁵ Rapport au Président de la République relatif à l'ordonnance No. 2019-359, sub Art. L 442-1, PRF 0097 of 25.4.2019, Texte 15.

⁶⁶ *Bilan Montpellier* (2018) 73. However, this tendency slowed down and the courts respect the sanction provided in law, *Bilan Montpellier* (2015) 42; (2016) 47; (2018) 72.

⁶⁷ *Bilan Montpellier* (2018) 70–71. This is a steady feature over the years, see the *Bilan Montpellier* of the earlier years under Art. L 442-6 I No. 2.

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standard terms on a commercial partner is an important element in constituting subjection, but does not suffice by itself. It would be only a rather small step to consider that imposing standard terms is a decisive element of subjection. This notion has been developed in a remarkable contribution by *Chaudouet*⁶⁸ and is worth serious consideration.

d) Art. 1171 Cciv. aa) Background. French civil law never contained provisions 57 about unfair stipulations or about general contract terms ('GCT').⁶⁹ The EU Unfair Terms Directive was integrated into French law in 1995 as part of the Consumer code⁷⁰ and has remained limited to that sector, unlike in Germany⁷¹. The reform of the Civil code's contract law was the occasion to legislate on unfair terms and general contract terms. Due to the fact that the initial reform of February 2016 was implemented by an *ordonnance*, which is promulgated by the government and not discussed in parliament,⁷² there is very little legislative material about the text. The only available and authoritative document is the report of the government to the President of the French Republic.⁷³ According to this report, the new provisions are destined to fill the gap in civil law between consumer (Art. L 212-1 Cconso) and commercial law (Art. L 442-6 I No. 2 Ccom) and to strengthen coherence in the battle against imbalanced clauses.⁷⁴ With respect to the interpretation of the notion '*déséquilibre significatif*', the report to the President makes specific reference to the two lists in the French Consumer code (Art. 212-1 and R 212-2 Cconso) and the list annexed to the Unfair Terms Directive; these lists are considered to contain the essence of significantly imbalanced clauses.⁷⁵ The ratifying legislation made some modifications to the wording.⁷⁶ Only clauses in non-negotiable GCT can be challenged on the basis of Art. 1171, excluding negotiated clauses in contracts which use GCT.⁷⁷ Its application is not limited to mass contracts,⁷⁸ which is an important indication, since most of the contracts which were successfully challenged under Art. L 442-6 II No. 2 Ccom were mass contracts. The general contract terms must be a set of rules and not only one stipulation (Art. 1110(2) Cciv).⁷⁹ It is

⁶⁸ Chaudouet, 412 at mn. 533.

⁶⁹ Chantepie/Latina, 386 at mn. 440.

⁷⁰ Cf. fn. 27.

⁷¹ § 310(1) 2nd sentence German BGB. See for a comparison Niggemann (2018) 2. See also the contribution by Wais, in this volume.

⁷² According to the French Constitution of 1958, Art. 34(5) 5th hyphen, civil law is a matter which has to be regulated by law, which has to be discussed in parliament. Art. 38 of the Constitution provides, however, the possibility to pass a law of authorisation, on the basis of which the matter can be dealt with by an *ordonnance* without discussion in parliament. This *ordonnance* must be ratified within two years after the date of the *ordonnance* by formal legislation (Art. 38(3) 1958 Constitution).

⁷³ Rapport au Président relatif à l'ordonnance No. 2016-131, JORF No. 0035, 11.2.2016, Texte 25.

⁷⁴ In the draft of the 2016 *ordonnance* the consequences of significantly imbalanced clauses were not tied to the use or their featuring in standard terms. The text of the *ordonnance* finally provided that clauses in contracts using preformulated terms ('*contrats d'adhésion*', Art. 1110(2) Cciv) are deemed not written. This extended the control to the negotiated part of the contract. The ratification law limited the scope to clauses figuring in the GCT; see Rapport au Président (fn. 73) and Chantepie/Latina, 393 at mn. 446.

⁷⁵ Rapport au Président and Chantepie/Latina, *ibid*.

⁷⁶ The official parliamentary documentation contains a survey of and the text of all documents, discussions and proposals. It is available under https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE_000032851308&type=general&typeLoi=proj&legislature=14. See for details Niggemann (2018) 659, references in fn. 20–21; Chantepie/Latina, 17–18 at mn. 23–24.

⁷⁷ Chantepie/Latina, 393 at mn. 446.

⁷⁸ This has been stressed in the parliamentary discussions. This concern has to be seen on the background of the situation under Art. L 442-2 No. 1 Ccom, where the investigations of the DGCCRF concern mass contracts only.

⁷⁹ A standard form arbitration clause for instance is in itself not a '*contrat d'adhésion*'.

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essential that they are not negotiable; it is irrelevant how often they have been used or will be used and who drafted them.⁸⁰

- 58 bb) Role of consumer law.** With respect to the interpretation of the notion '*déséquilibré significatif*' we have already indicated the opinion formulated in the report to the President⁸¹ that the consumer law provisions are the essence of this notion. However, not all share this opinion. Renowned authors diverge and opine that criteria, which have been developed in application of Art. L 442-6 I No. 2 Ccom should also apply.⁸² Others argue that Art. R 212-1 and R 212-2 Cconso should not be applied by the letter but should consider the particularities of commercial contracts.⁸³ Both publications support such an interpretation, the central notion not being an 'abusive clause' but a significant imbalance, which can only be analysed by considering all circumstances of the case. There is no case law yet.
- 59** Gaining a complete picture of Art. 1171 Cciv requires examination of the use and interpretation of Art. L 221-1 Cconso and the black and grey lists in Art. R 212-1 and R 212-2 Cconso.
- 60** It is extremely difficult to analyse the court decisions for our purpose, not only because they concern types of contracts that are not commercial in nature (gambling, retirement homes, telephone and internet services) but also because they limit their decision to the statement of a significant imbalance without necessarily tying it to a specific legal provision or element of the black or grey list.⁸⁴ Accordingly, we have instead analysed for this purpose the reports and recommendations published by the *Commission des clauses abusives* (CCA) since 2014.⁸⁵ The CCA is a particular feature of French consumer law. Even though particular provisions for consumer protection date back until 1978⁸⁶, the consumer protection policy of the French governments has long been to limit the role of the judiciary in favour of public bodies such as the CCA⁸⁷. The CCA issues opinions ('*avis*') upon request by the courts and recommendations upon other requests. Neither its opinions nor recommendations are binding.⁸⁸ Its reputation has gained over the years through the quality of its work. We have in particular focused on two recommendations of 2014 and 2017 on GCT in social media contracts and of furniture movers with storage.⁸⁹ These two recommendations are excellent examples of the method used; additionally, they gave rise to a great number of critical observations (46 and 29, respectively).

⁸⁰ Cf. for details Niggemann (2018) 659–660. Art. 1171 Cciv is to apply to all kinds of contracts; even notarial deeds may not be excluded; see Chantepie/Latina, 140 at mn. 149 and 392 at mn. 445. There are of course opinions which are against such an application, see Revet; Schiller.

⁸¹ See fn. 78.

⁸² Chantepie/Latina, 396 at mn. 447.

⁸³ Deshayes/Genicon/Laithier, 306.

⁸⁴ The analysis in Raymond/Pimbert, *JurisClasseur Concurrence-Consommation* (fasc. 820) mn. 66–88, is of this kind. It lacks a more analytical view of the criteria used by the courts.

⁸⁵ <http://www.clauses-abusives.fr/>.

⁸⁶ Loi 78-23 of 10.1.1978 ('*loi Scrivener*'), see Calais-Auloy/Temple, 164.

⁸⁷ Calais-Auloy/Temple, 165 et seq. The reasons for such an approach are not easy to grasp. They have their origin in a more sceptical position of the executive power in France against the judiciary, a very limited public budget, poor funding of consumer associations and the issue/difficulty of extending the *res judicata* effects of a decision to similar clauses in other contracts.

⁸⁸ See for further background Calais-Auloy/Temple, 179.

⁸⁹ Recommendation 14/2, *contrats de fourniture de services de réseaux sociaux*; Recommendation 16/1, *Contrats de déménagement, garde meuble et stockage en libre-service*, both available on the CCA's website (fn. 85). Contracts for mobile phone services are as well a perfect example for the unbound imagination of drafting to the detriment of the consumer. See CA Versailles, 4.2.2004, No. 03/07368, note Avena-Robardet, D 2004, AJ 635.

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Most of the observed violations concern the black list or Art. R 212-1 Cconso. For those which may conflict with Art. R 212-2 Ccom, namely where the user/professional has to prove that they are not significantly imbalanced, the observations are formulated with greater caution since the other side could not be heard. Other violations result from legal provisions outside of consumer protection such as data protection and privacy rights. Other admonitions result from a lack of clear drafting (Art. L 212-1 Cconso) and the lacking integration into the contract (R 212-1 No. 1). Other complaints concern deviations from provisions of civil law. Art. L 212-1 Cconso is also directly applied without relying on an additional source of law, for example when clauses provide for too short or unequal time periods or for discriminating preconditions of the parties' rights. Some complaints arise from violations of other norms of consumer law.

Case law yields telling examples. GCT have been disregarded because they infringed legal provisions,⁹⁰ when they contain a unilateral right for the user to modify the contract,⁹¹ with respect to unclear stipulations, where the consumer could not clearly determine or understand its rights,⁹² and where the burden of proof had been shifted to the detriment of the consumer⁹³.

cc) Application to commercial contracts. Whereas one may question whether Art. 1171 Cc can be applied in commercial matters in addition to Art. L 442-1 Ccom, the further question also arises whether there is still room or a necessity for its application after the reform of Art. L 442-1 Ccom in 2019.

The report to the President accompanying the reform bill of the Civil code in 2016 addresses the relationship between Art. 1171 and its corollary in Art. L 442-6 I No. 2 Ccom.⁹⁴ It is said that the civil law provisions should be excluded by those in the Commercial code, if and to the extent that it is impossible to apply them simultaneously without a contradictory result. This statement refers to Art. 1105 (3) Cciv.

This discussion was reignited during the deliberations of the ratifying legislation. Once again, it was said that Art. 1171 Cciv is excluded where Art. L 442-6 I No. 2 (now Art. L 442-1 No. 2) Ccom applies.⁹⁵ However, the expression used by the members of parliament (and on one occasion by a member of the ministry of justice) lack specificity; it remains unclear whether Art. L 442-6 I No. 2 Ccom prevents Art. 1171 Cciv from applying altogether in commercial matters or whether it remains applicable outside the realm of Art. L 442-6 I No. 2 Ccom.

It is not surprising that the opinions in legal doctrine diverge. A minority favours the exclusion of Art. 1171 Cciv from B2B-contracts,⁹⁶ a majority favours application⁹⁷. The main argument for an exclusion is Art. 1105(3) Cciv and Art. L 442-1 No. 2 Ccom as *lex specialis*. These authors also refer to the special competence of some commercial courts for competition matters.⁹⁸ Authors, who share the latter opinion, are not quite clear how far Art. 1171 Cciv should apply in commercial matters. Some attribute a *lex*

⁹⁰ Cass.civ. 1^{ère}, 13.12.2005, No. 04-13772, Mestre.

⁹¹ CA Versailles, 4.2.2004, D. 2004 AJ 635 note Avena-Robardet.

⁹² Cass.civ. 1^{ère}, 20.3.2013, No. 12-14432, Bull. I No. 53.

⁹³ Cass.civ. 1^{ère}, 20.3.2013, No. 14-24698, Dalloz Actu, 8.6.2016 note Ravel d'Esclapon.

⁹⁴ Rapport au Président (fn. 73).

⁹⁵ Rapport No. 22 (Senat); Rapport No. 247, 61; Rapport No. 639, 23 all to be found within the documents indicated in fn. 76.

⁹⁶ Behar-Touchais; Hontebeyrie; Chaudouet, 734 at mn. 949.

⁹⁷ Deshayes/Genicon/Laithier, 301 et seq.; Lagarde 2176; Grimaldi 6.

⁹⁸ Behar-Touchais.

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specialis function to Art. L 442-1 No. 2 Ccom only within the realms of its reach⁹⁹ – it would be excluded in the sectors of production, distribution and services;¹⁰⁰ Art. 1171 Cciv can be applied in the other fields. Those who advocate a cumulative application of both articles, stress the differences between the two norms and argue that, in case of cumulative application, there would not be contradictory results. They do not perceive the special competence of some courts to be problematic since Art. 1171 Cciv may be pleaded before the specialised courts, too.

- 67 From our point of view, the substantive conditions of both articles largely overlap.¹⁰¹ Art. 1171 Cciv is more restrictive with respect to the use of preformulated GCT; it excludes the object of the contract and the price. Art. L 442-1 Ccom contains the requirement of ‘subjection’. With respect to the central notion of ‘significant imbalance’, Art. L 442-1 Ccom is more influenced by economic considerations, whereas – presumably – Art. 1171 Cciv will be more limited to legal arguments. As Chaudouet rightly points out there is a wide congruence¹⁰² and a small area of difference. We fail to see a danger of contradiction. A claim may be based on both articles. It may succeed on the basis of Art. 1171 Cciv and the incriminated clauses will be rendered void. It may be based additionally on Art. L 442-1 Ccom and the result may be both invalidity and damages. The results may be different, but they are not contradictory. French procedural law provides for a limited number of commercial courts having exclusive jurisdiction over competition matters, which include claims based on Art. L 442-1 Ccom.¹⁰³ Consequently, a claim based on Art. L 442-1 Ccom may only be raised before such specialised courts. There is no such special competence for suing on the basis of Art. 1171 Cciv. A claimant may therefore sue based on both articles in front of the specialised courts¹⁰⁴ or on Art. 1171 Cciv before every commercial court having general jurisdiction. We fail to see any serious problems.¹⁰⁵ Even if jurisdictional problems may arise, they do not fall under of Art. 1105(3) Cciv, but are part of procedural law.
- 68 The present state of the law is, however, far from satisfactory since two norms apply to essentially the same situation. This is likely to create some confusion and is an obstacle to legal predictability and certainty. It would be preferable to disentangle Art. L 442-1 Ccom and to apply it only in instances of unfair competition. Judicial control of significantly imbalanced clauses in commercial contracts should be based on Art. 1171 Cciv, but it should be modified to require consideration of the particularities of commercial contracts. Additionally, some areas of commercial law might be exempted from the general conditions of control or specific conditions should be prepared. Leaving this important task to the courts alone would mean a high degree of uncertainty for a long period of time.

2. Specific provisions

- 69 a) **Limitation of liability clauses.** The reform of contract law in the Civil code deliberately excludes (with one exception, Art. 1170 Cciv) provisions about legality and limitation of liability clauses. This issue is to be dealt with in the reform of contractual

⁹⁹ Chantepie/Latina, 389 at mn. 444.

¹⁰⁰ Le Bescond de Coatpont, *JurisClasseur Contrats-Distribution* (fasc. 262) mn. 7.

¹⁰¹ Chaudouet, 285 et seq.; mn. 368 et seq. Her work yields to bring together the different angles of interpretation under consumer law and commercial law. One of her most considerable thoughts is to measure the imbalance against the balance of interests found in civil law in general.

¹⁰² Chaudouet, 734 at mn. 949.

¹⁰³ Art. 442-4 III, R 442-3 and Annex 4-2-1 Ccom.

¹⁰⁴ Chaudouet, 707 at mn. 925.

¹⁰⁵ Contra *ibid.* 734 at mn. 949.

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and extra contractual liability initiated in 2017, which should follow the contract law reform. A first draft of the text was made available by the Ministry of Justice in April 2017.¹⁰⁶ With respect to the issues of interest here, the reform does not aim to innovate but rather to codify over 200 years of development via case law.¹⁰⁷ The reform process has, however, stalled and has not been pursued further. Since the contract law reform contains only one provision on this topic (and which confirms the previous case law), the legal situation as it was before the reform still prevails.¹⁰⁸

Limitation of liability clauses are valid under French law,¹⁰⁹ albeit with specific limits. 70
A limitation of liability clause cannot be relied upon in case of deliberate and grossly negligent breach of contract.¹¹⁰ Art. 1170 Cciv further provides that a clause depriving the essential contractual obligation of its substance is deemed not written; it

is essentially the result of case law which developed over 15 years mainly in a series of 71
decisions in the *Chronopost* and the *Faurecia* cases.

In the *Chronopost* cases¹¹¹, the courier service 'Chronopost' had belatedly delivered 72
documents drawn up by architects for public tenders, with the result that the tender offers arrived after the tender procedure was closed. Chronopost relied on its general business terms, which limited the amount of damages to the price of the courier service. The French *Cour de cassation* formulated two principles in respect of two separate but similar limitation clauses in the contract: a limitation of liability clause is invalid if it contradicts the contractual commitment and deprives it of its substance. In case gross negligence is proven, the author of the breach cannot rely on the clause either.¹¹²

In *Faurecia*, the claimant, a supplier of automotive parts, had contracted with Oracle 73
the elaboration of a computer system for some of its production sites. The parties had negotiated the contract and in particular a limitation of liability clause. The clause limited damages to a low amount, but Oracle had made other significant concessions. The project failed and Faurecia claimed damages in the amount of 60 million euro. After a series of decisions¹¹³, the French *Cour de cassation* held in 2010¹¹⁴ that the limitation of liability clause did not contradict Oracle's essential obligations. It had been freely negotiated and took the price and the sharing of risks into consideration. The financial limitation was not insignificant either. The violation of an essential obligation is distinct from gross negligence; the first is not tantamount to the second.

Art. 1171 Cciv may have an impact on the validity of such clauses, provided they are 74
part of GCT. If the opinion prevails that consumer law principles influence the application of Art. 1171 Cciv, it may be argued that Art. R 212-1 No. 6 Cconso (black clause) might apply. It provides indeed that an exclusion or limitation of liability of the

¹⁰⁶ Available on the website of the French ministry of Justice, http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf.

¹⁰⁷ Cf Mekki.

¹⁰⁸ Chantepie/Latina, 380 et seq. at mn. 436 et seq.; Poumarède, mn. 3225.13.

¹⁰⁹ Poumarède, mn. 3225.11 with numerous references to court decisions.

¹¹⁰ Cass.com., 12.3.2013, 11-25183; civ. 1^{ère}, 29.10.2014, 13-21980; civ. 3^{ème}, 13.11.2014, 13-20530; com. 7.2.2018, 16-18140; 16-368; com. 7.2.2018, 16-20352. See for further examples Poumarède, mn. 3225.12. Gross negligence is defined as extremely serious negligence close to deliberate action showing the debtor's incapability to accomplish its contractual obligations, see Cass.ch.mixte, 22.4.2005, No. 03-14112; Cass.com., 12.3.2013, 11-25183; Poumarède, mn. 3225.12.

¹¹¹ Cass.com., 22.10.1996, 93-18632, Bull. IV No. 261; Cass.com. 9.7.2002, No. 99-12554, D 2002, 2329 note Chevrier; Cass.ch.mixte, 22.4.2005 (two decisions), No. 03-14112 and 02-18326. Cf. for a summary Poumarède, mn. 3225.13.

¹¹² In a subsequent decision the formulations used in the *Chronopost* case has been confirmed, Cass.com. 21.2.2006, No. 04-20139, Bull. IV No. 48.

¹¹³ Cass.com., 13.2.2007, No. 05-17407, Bull. IV No. 43; CA Paris, 26.11.2008, 07/07221.

¹¹⁴ Cass.com., 29.6.2010, No. 09-11841, notes Mazeaud, Houcief, Stoffel-Munck.

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professional in case of breach is not valid. There is an established case law for commercial contracts which the legislator did not intend to change. Even if consumer protection principles will play a role in the application of Art. 1171 Cciv, they cannot apply as such without being adapted to the commercial context and reality.¹¹⁵

- 75 **b) Seller's warranty – hidden defects.** An exclusion of party autonomy of great practical relevance results from case law in the matter of the seller's warranty.
- 76 According to Art. 1641 Cciv, the seller warrants ('*garantie*') that the object ('*la chose*') is free from hidden defects¹¹⁶ ('*vices cachés*'), which render it unfit for its intended use or which impairs the use to an extent that the buyer would not have bought the object or would have only paid a lesser price, if he had known of the defects.
- 77 The seller is liable for the reduction of the purchase price, reimbursement of the purchase price, and damages (Art. 1644 and 1645 Cciv).
- 78 Art. 1645 Code civil provides that a seller, who was aware of a defect and who acted in bad faith, has to pay full damages to the buyer, in addition to reimbursement of the purchase price. Since the 1960s the *Cour de cassation* has interpreted Art. 1645 Cciv in a sense that any *professional* seller is irrefutably deemed to have known and been aware of the defects of its products¹¹⁷; this also applies where the seller is not the producer but only the reseller.¹¹⁸ This interpretation is a legal and irrefutable presumption and cannot be countered by evidence that the seller in fact did not know about the defect. It is a pure fiction of bad faith.¹¹⁹ Due to this considerable risk, importers into France seek to avoid the application of French law.¹²⁰
- 79 Clauses containing a limitation of liability for hidden defects are therefore invalid.¹²¹ The only exception to this rule is a sale between professionals of the same specialisation, i.e. where both are active in the same field of business and have the same level of knowledge.¹²²
- 80 **c) Other limitations of party freedom in commercial contracts; construction law.** There are numerous other examples of compulsory legal provisions in B2B-contracts, however the detailed discussion would exceed the scope of this chapter. We merely hint at freight contracts by road, rail, sea, and air, which all contain limitations of liability of the carrier in case of loss or damage to the cargo.¹²³ Although these are not particular to French law, construction Law does require particular attention because it is quite singular on the international level and plays a role in the international application of mandatory French law.¹²⁴
- 81 Warranties under French construction law are dealt with in Art. 1792 et seq. Cciv. The law provides for three types, which only apply in contracts for the construction of

¹¹⁵ Chantepie/Latina, 396 at mn. 447.

¹¹⁶ A defect is 'hidden' if the purchaser could not discover it by applying usual diligence upon receiving it, Huet, *JurisClasseur Code civil*, Art. 1641–1649 (fasc. 30) mn. 66 et seq.

¹¹⁷ *Cass.civ.*, 3.1.1984, No. 81-14326, Bull. III No. 4; Poumarède, mn. 3225.31.

¹¹⁸ Huet, *JurisClasseur Code civil*, Art. 1641–1649 (fasc. 60), mn. 22.

¹¹⁹ This jurisprudence is not uncontested and for valid grounds; cf. Poumarède, mn. 3225.32, but the critics had no influence on the courts yet.

¹²⁰ Whether the application of the CISG or opting for a foreign law can avoid this risk will be discussed below mn. 92 et seq.

¹²¹ For instance, *Cass.civ.* 3^{ème}, 25.5.2011, 10-10790; more generally Poumarède, mn. 3225.31; Huet, *JurisClasseur Code civil*, Art. 1641–1649 (fasc. 60), mn. 19.

¹²² *Cass.com.*, 23.6.1992, 90-15045; 31.1.1995, 93-10536; *Cass.com.* 19.3.2013, No. 12-23346; *civ.* 1^{ère}, 15.5.2015, 11-19275; *Cass.civ.* 1^{ère}, 3.11.2016, 15-18340; 1.6.2017, 16-14402; summarised in Huet *ibid.* mn. 37 et seq.

¹²³ Bloch, *JurisClasseur Synthèse, Responsabilité civil et Assurance*, mn. 9, 13 17 et *passim*.

¹²⁴ See *infra* (fn. 150).

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buildings and infrastructure: the '*garantie de parfait achèvement*' (warranty of perfect achievement, Art. 1792-6(2) Cciv), the '*garantie de fonctionnement*' (warranty of function, Art. 1792-3 Cciv) and the '*garantie décennale*' (ten year warranty after acceptance, Art. 1792, 1792-2, 1792-4-1 Cciv).¹²⁵ Several parties, which the law defines as '*constructeurs*' (constructors, Art. 1792-1 Cciv) are jointly and severally liable under these warranties: the builder, the architect technicians and other persons which are linked to the builder by works contracts. Art. 1792-5 Cciv provides specifically that contract clauses limiting or excluding the scope of these warranties or the joint and several liability of the constructors are deemed not written.

These three legal warranties cover make good and damages. Damages include those 82 affecting the building as such but also ensuing consequential and financial damages. The French courts hold that Art. 1792-5 Cciv renders any limitation even of indirect economic damages non written.¹²⁶

IV. The international context

The following concerns the application of the above described legislation and case law 83 in an international context, focusing especially on the applicable law, French law as mandatory overriding provisions (*lois de police*), and jurisdiction issues.

1. The applicable law

As general conflict of law and jurisdiction matters are dealt with in a separate 84 contribution,¹²⁷ we focus on particularities from the French perspective including the applicable law in tort matters.

a) Choice of law issues. The Rome I Regulation applies in France to determine the 85 applicable law of contractual obligations.¹²⁸ From the French perspective there are several aspects which require special attention.

In case of a sales contract for goods (and provided the parties have opted for the 86 application of French law or if French law applies by virtue of Art. 4 Rome I), one has to examine the application and the provisions of the CISG, of which France is a member state.¹²⁹

Applying French law implies the application of the CISG (Art. 1 (1)(b) CISG), unless 87 the parties have entirely or partly excluded its application (Art. 6 CISG).¹³⁰ This 'opt out' has to be made explicitly or may result from conclusive acts of the parties.¹³¹ The CISG is (as far as its scope reaches) *lex specialis* to the Civil code.¹³²

Four matters are of particular interest here: 88

- (i) Art. 4(a) CISG provides that the Convention is not concerned with the validity of the contract or any of its provisions. The question therefore arises whether

¹²⁵ The law provides for compulsory insurance coverage for all of these warranties, Art. L 241-1 *Code des assurances*. Such an insurance cover is seldom without a limitation. Hence there may be an uncovered risk for the '*constructeurs*'.

¹²⁶ Cf. Boubli, mn. 625 with further references.

¹²⁷ See the contribution by Pfeiffer, in this volume.

¹²⁸ For more detail see the contribution by Pfeiffer, in this volume.

¹²⁹ Ratified by France, Décret 87-1034 of 22.12.1987.

¹³⁰ Cass.com., 13.9.2011, 09-70305 (general reference to French law means application of CISG); Mistelis, Art. 6 mn. 15 et seq. in Kröll/Mistelis/Perales Viscasillas.

¹³¹ Cass.civ. 1^{ère}, 25.10.2005, 99-12879, (tacit exclusion by pleading (both parties) only the provisions of the Code civil). Cf. Lamazerolles, *JurisClasseur Contrats-Distribution* (fasc. 405), mn. 10.

¹³² Cass.com. 13.9.2011, 09-70305.

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Art. 1171 and as well Art. 1170 Cciv apply as being outside the realm of CISG. There is case law in Germany stating that the validity of GCT is an issue not governed by CISG.¹³³ International legal doctrine also supports this position.¹³⁴ It is specifically said that ‘invalidity’ includes ‘deemed not written’, which is only a legislative technique for achieving the same result.¹³⁵ At present, there is no case law in France with respect to this question, which is hardly surprising as Art. 1171 Cc is relatively new.

- 89 (ii) With respect to the conclusion of the contract and even the battle of the forms, the CISG contains its own rules (Art. 14–24 CISG), which exclude the application of the corresponding provisions of the Civil code (Art. 1113–1122)¹³⁶.
- 90 (iii) A much more sensitive issue is the ‘*vice caché*’ problem. By treating all professional sellers as acting in bad faith through an extensive application of Art. 1645 Cciv, any limitation of liability for the consequences of non-conformity of the goods is null and void.¹³⁷
- 91 Art. 40 CISG deals with a seller acting in bad faith. Such a seller is not entitled to rely on the provisions of Art. 38 and 39 CISG if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer. Art. 38 CISG provides for the buyer’s obligation to examine the goods and Art. 39 CISG contains the loss of the seller’s rights for non-conformity if no specific notice of a defect is given in time. Thus, CISG limits the consequences of the seller’s bad faith to the content of Art. 40. The French *Cour de cassation* held in 2005 that the bad faith presumption of French domestic law prevails by virtue of Art. 4(a) CISG¹³⁸. However, a more recent decision of the *Cour de cassation*¹³⁹ holds that, in case the CISG applies, there is no presumption that the professional seller knew of the non-conformity. Application of the CISG may thus allow to adapt the seller’s warranty and to reduce its liability. It further results from this decision that the *vice caché* case law of the *Cour de cassation* is not mandatory on the international level.
- 92 (iv) With respect to the validity of clauses excluding or limiting contractual liability this issue is one of Art. 7(2) CISG (internal ‘gaps’)¹⁴⁰. In 2015, the CISG Advisory Board adopted the position that ‘the Convention does not pre-empt (i.e. govern) provisions for the protection of the obligee under the applicable law or rules of law, relying on notions such as intentional or wilful breach, gross negligence, breach of an essential term, gross unfairness, unreasonableness, or unconscionability, but that in the application of these provisions, the international character of the contract and the general principles underlying the CISG are to be observed, including the principles of freedom of contract and reasonableness.’¹⁴¹ Hence, the issue of validity of limitation of liability clauses remains a problem of domestic French law.
- 93 One also has to ask whether the choice of law other than French law is valid in respect of the ‘hidden defects’ problem. It is astonishing to state that there are no

¹³³ Djordjevic, Art. 4 mn. 25 (references in fn. 66), in Kröll/Mistelis/Perales Viscasillas.

¹³⁴ *ibid.* mn. 25 with further references; Djordjevic, Art. 4 mn. 24, in Kröll/Mistelis/Perales Viscasillas.

¹³⁵ Djordjevic, Art. 4 mn. 12 (fn. 39), in Kröll/Mistelis/Perales Viscasillas.

¹³⁶ Cass.civ., 13.2.2007, 05-13538.

¹³⁷ See *supra*, mn. 76–80.

¹³⁸ Cass.com., 4.10.2005, 02-15981.

¹³⁹ Cass.com., 4.11.2014, 13-10776.

¹⁴⁰ Djordjevic, Art. 4 mn. 46 and Art. 74 mn. 38, in Kröll/Mistelis/Perales Viscasillas. The decision quoted under Art. 4, n 143, Cass.civ., 13.2.2007, 05-10424, does not support the authors’ opinion.

¹⁴¹ CISG Advisory Council, Opinion No. 17 (adopted 16.10.2015) 7, available under <http://www.cisg.law.pace.edu/cisg/CISG-AC-op17.pdf>.

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specific court decisions on this issue, though one may rely on two very strong indications: there is a quite old decision of the *Cour de cassation* of 1989, in which the Court held that the lower courts are obliged to determine the applicable law for the validity of an exclusion of liability for ‘*vice caché*’¹⁴². If the ‘*vice caché*’ position of French law would be mandatory in the international field, a determination of the applicable law would be superfluous; French law would apply anyway. *Huet* is against considering Art. 1645 Cciv as an overriding mandatory provision on the international level.¹⁴³ A second strong indication that Art. 1645 Cciv is only nationally mandatory can be drawn from a 2014 decision of the *Cour de cassation* in respect to Art. 40 CISG.¹⁴⁴ If Art. 1645 Cciv gives way to the CISG, this is a clear sign that its application is not extended beyond the national context and the application of domestic French law.

b) The applicable law to an action based on Art. L 442-1 Ccom. Since court review 94 of B2B-contracts will be based on Art. 1171 Cc but also on Art. L 442-1 No. 2 Ccom (previously Art. L 442-6 II No. 2 Ccom), it is necessary to examine the applicable law to this kind of action.

One may opine that even in case of Art. L 442-1 Ccom the parties are contractually 95 bound and have agreed on an applicable law to their contract. On the other hand, Art. L 442-1 Ccom is a claim in tort, to which Rome II Regulation applies. This issue has been dealt with in the *Amazon* and *Expedia* cases discussed above.¹⁴⁵ In both cases the contracts at stake provided for the application of another than French law (Luxembourg law and English law, respectively). The court of first Instance in *Expedia* had followed the defendant in his approach and applied English law, but had nevertheless overruled the chosen law by the application of Art. L 442-6 II No. 2 Ccom as ‘*loi de police*’ (Art. 9 Rome I).

The *Cour d’appel* in *Expedia* and the *Tribunal de Commerce Paris* in *Amazon* went 96 the other way. Both considered that Art. 442-II No. 2 Ccom is a tort action, to which Rome II applies. Art. 4 Rome II provides to apply the law of the country where the damage has occurred, which in these cases was France –*Expedia* concerned bookings with hotels in France, whereas in *Amazon* the vast majority of the suppliers were French. The court in *Amazon* added that a contractual choice of law stipulation cannot be opposed to an action by the French administration. It is important to note that both courts based their decision not only on Art. 4 (1) Rome II, but additionally on Art. 16 Rome II, which provides the overriding application of *lois de police* of the deciding court. They did not argue step-by-step and did not treat the *loi de police* argument as overriding, setting aside the normal application of the conflict of law rule of Art. 4 (1) Rome II. The *loi de police* argument is simply added to the application of Art. 4 (1) Rome II. The *loi de police* argument is superfluous from a logical point of view. In our opinion, the reason for stressing the *loi de police* argument is to make it abundantly clear that in any case Art. L 442-I Ccom and Art. L 442-1 Ccom are mandatory and cannot be set aside contractually.

Yet there is an additional problem. If, as we have argued, Art. 1171 Cciv 97 and Art. L 442-1 No. 2 Ccom both apply in commercial matters, the action based on Art. 1171 Cciv remains contractual and is governed by Rome I. This requires an examination of whether Art. 1171 (and Art. 1170 Cc) are themselves overrid-

¹⁴² Cass.civ. 1^{ère}, 4.10.1989, No. 87-13020, Bull.civ. I No. 304; cf. *Huet*, *JurisClasseur Code civil* Art. 1641–1649 (fasc. 60), mn. 29.

¹⁴³ *Huet*, *ibid.*, mn. 29.

¹⁴⁴ Cf. Cass.com. 4.11.2014, 13-10.776; see above fn. 139 and mn. 92 et seq.

¹⁴⁵ See above mn. 46 et seq. and 50.

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ing mandatory provisions in terms of Art. 9 Rome I (or '*loi de police*' in French terminology). This would lead to their application even if the parties had not agreed on French law.

98 c) Art. 1171 Cciv or any other article of the Civil code's 3rd book as '*loi de police*'?

Art. 1171 Cciv is a mandatory provision in French law. In terms of domestic French law it is a '*loi de police*'.¹⁴⁶

99 However, a distinction has to be drawn between '*loi de police*' in a national context and on the international level. Being mandatory on the national level does not mean that a norm is mandatory internationally; the notion of 'overriding mandatory provision' in Art. 9 Rome I must be construed more narrowly than the category of national mandatory provisions.¹⁴⁷

100 Does Art. 1171 Cciv qualify as an 'overriding mandatory provision' in terms of Art. 9 Rome I and require application, even if another national law governs the contract? This is not the place to debate in depth Art. 9(1) Rome I. There is ample ECJ case law on the criteria which a national provision has to fulfil,¹⁴⁸ but nonetheless still a lot of uncertainty. None of the various domains where the ECJ had to intervene¹⁴⁹ bears any resemblance to that of Art. 1171 Cciv. It would not be appropriate to treat Art. 1171 Cciv like a consumer or labour protection provision, since there are very specific legal rules for both fields nationally and in Rome I. Furthermore, it will be difficult to find as strong a link to France as, for instance, building sites,¹⁵⁰ or fair competition on the French market.¹⁵¹ In case of individual contract relations, the connection with France may exist, but it will be of a different character. Art. 1171 Cciv only protects private interests, not competition in a market segment or business sector.

101 There are strong reasons that Art. 1171 Cciv does not qualify as '*loi de police*' under Art. 9 Rome I. It would extend protection of the weaker party to matters which Rome I has not deemed appropriate to protect.¹⁵²

102 Our position is not the same for all legal provisions of the 3rd book of the Civil code, which are nationally mandatory. With respect to Art. 1170 Cciv we are inclined to defend it on the international level. This provision should, however, rather be applied by virtue of Art. 21 Rome I (public order).¹⁵³ There are still others such as Art. 1231-4 (moderating role of the courts in case of excessive contractual penalties) or Art. 1112-1(5) 5 (precontractual obligation to reveal) and no permanent obligations (Art. 1210 Cciv) which should not be qualified either as *loi de police* or as part of public order, since they are more technical and their content of justice is weaker than that of Art. 1170 or 1171 Cciv. We are, however, at the beginning of their application in practice and nothing can be forecast with certainty.

¹⁴⁶ Heyraud, mn. 30. The reform of the 3rd book of the Cciv completely neglected its international application and impact.

¹⁴⁷ Recital 37 Rome I. As examples of French mandatory provisions which are not 'mandatory' in an international context Cass.com., 13.7.2010, 10-12154, note Jault-Seseke (direct payment claim of the carrier against the forwarder and the consignee); Cass.civ. 1^{ère}, 16.9.2015, 14-10373 (mandatory mentions on an act of personal guarantee). Cf. Gaudemet-Tallon, JurisClasseur Droit International (fasc. 552-15) mn. 94 et seq.

¹⁴⁸ Gaudemet-Tallon, *ibid.*; Latil, JurisClasseur Droit International (fasc. 552-100) mn. 23-59.

¹⁴⁹ Labor and consumer law in particular, cf. Latil, *ibid.* mn. 23-37.

¹⁵⁰ Direct claim of a subcontractor based on the French law on subcontracting of 31.12.1971: choice of law clause in favour of German law, French law applicable as *loi de police*: Cass.ch.mixte., 30.11.2007, 06-14006.

¹⁵¹ Like in the *Amazon* and *Expedia* cases, mn. 46 et seq. and 50. Cf. Latil, JurisClasseur Droit International (fasc. 552-100) mn. 56-60.

¹⁵² Heyraud, mn. 18 et seq.

¹⁵³ *ibid.* mn. 32.

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2. Jurisdictional issues

The matter could quite easily be dealt with if it were not for Art. L 442-1 Ccom being 103 an action in tort. We will discuss at first some particular issues from the French point of view with respect to contractual matters before we approach the jurisdictional side of Art. L 442-1 Ccom.

a) Jurisdiction in contract litigation. Two situations may be distinguished: cases 104 where the Brussels I bis Regulation applies (i) and where not (ii).

(i) The first setting is dealt with elsewhere in this volume.¹⁵⁴ The various places of 105 jurisdiction – Art. 4, domicile of the defendant, Art. 7(1) place of performance of the obligation which is the subject of the litigation, special jurisdictions in Art. 10 (insurance matters, Art. 17 Consumer litigation, Art. 20 employment matters and Art. 24 (exclusive jurisdiction) – have to be considered.

Art. 25 Brussels I bis raises one issue which is particular in France and which has 106 not yet been submitted to the ECJ, namely prorogations, where one party has the choice of different places of jurisdiction which the other party has not. One often finds jurisdiction clauses which provide for the competence of the courts at the seat of the party having set the GCT. Additionally, this party has the option to sue the other party at its seat or domicile or any other place having jurisdiction.

The ECJ decided in a number of cases on the issue of specificity of jurisdiction 107 clauses.¹⁵⁵ Its position can be summarised that the clause must contain the elements allowing the court to determine its jurisdiction.¹⁵⁶ However, there are no decisions in which the ECJ controlled whether a jurisdiction clause is balanced or equitable; Art. 25 Brussels I bis does not contain any such element or condition.¹⁵⁷

In a decision handed down in 2012,¹⁵⁸ the *Cour de cassation* invalidated a clause 108 allowing a bank to sue its customers at their domicile or place of business, whereas the customer had to sue at the bank's seat. In the matter at hand, a customer sued a Luxembourg bank in Paris; the bank opposed the prorogation in favour of the courts in Luxembourg. The *Cour de cassation* held that the clause contained a voluntary element allowing the bank to decide where to sue. Contractual commitments depending on the obligee's discretion are invalid in French law (Art. 1304-2 Cciv)¹⁵⁹.

It has to be stressed that the claimant in this case was not a consumer or at least 109 did not avail itself of consumer protection provisions (such as Art. 15 Brussels I bis). The decision of the *Cour de cassation* is part of quite a number of cases where the French courts disregarded such optional prorogations.¹⁶⁰ All the quoted decisions concern commercial contracts.

(ii) In situations where EU law is not applicable, French law allows international 110 prorogation between commercial parties provided there is no mandatory French

¹⁵⁴ See the contribution by Pfeiffer, in this volume.

¹⁵⁵ ECJ, C-269/95 *Benincasa* ECLI:EU:C:1997:337; C-387/98 *Coreck* ECLI:EU:C:2000:606.

¹⁵⁶ ECJ, *Coreck* *ibid.*; more recently ECJ, C-222/15 *Hószig* ECLI:EU:C2016:525.

¹⁵⁷ One may recall Art. 17 (4) Brussels Convention, where a prorogation exclusively in favour of one party allowed this party to sue the other party as well at its place of business (and not the opposite).

¹⁵⁸ Cass.civ. 1^{ère}, 26.9.2012, No. 11-26.022.Cf. Niggemann (2014) 194; more recently Cass.civ., 3.10.2018, No. 17-21309.

¹⁵⁹ 'condition potestative' previously Art. 1174 Cc, see Chantepie/Latina, 702 et seq. at mn. 770 et seq.

¹⁶⁰ CA Paris, 5.7.1989, No. 89/4373; Cass com., 24.4.1990, No. 88-19877; CA Rennes, 29.9.1990, (1993) *Droit maritime français* 308; CA Rouen, 17.1.1991, (1992) *Droit maritime français* 136. The two latter decisions concern bills of lading. See also Barbet/Rosher.

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national jurisdiction.¹⁶¹ Unfortunately, this case law may gain new applications after 'Brexit'.

- 111 b) Jurisdiction in tort matters.** Actions based on Art. L 442-1 Ccom (and previously on Art. L 442-6 I Ccom) are, by their explicit formulation, tort actions. We have seen in *Amazon* and *Expedia*,¹⁶² that the French courts are competent for any action brought by the French Ministry for the Economy and Finance, irrespective of any choice of forum clause. In *Expedia*, the Paris appeal court held that the competence flows from Art. 5 (3) Brussels I (now Art. 7(3) Brussels I bis).¹⁶³ The *Amazon* decision is less specific; it is simply said that French law applies to the case as far as jurisdiction and the merits are concerned.¹⁶⁴
- 112** With respect to claims raised by commercial claimants, one has to examine whether there is a choice of forum clause between the parties. The *Cour de cassation* accepts in international and even non-European tort cases the validity of a choice of forum clause.¹⁶⁵ In *Monster Cable* the parties had chosen the courts of San Francisco/California; the French dealer claimed damages on the basis of Art. L 442-6 I No. 5 Ccom, for undue termination.¹⁶⁶ Even though that damages claim is, like Art. L 442-6 I No. 2 Ccom, a tort claim and based on a French '*loi de police*', the *Cour de cassation* maintained the validity of the choice of forum stipulation.¹⁶⁷ The clause must, however, be worded in broad terms to include any claim arising out of or in connection with the contract, its execution and termination.¹⁶⁸ According to the ECJ, claims for damages may be raised at the chosen forum, provided the claim arose out of the contract or in close connection with it.¹⁶⁹
- 113** The ECJ uses the criterion of surprise: if the other party could not expect such a claim raised at the contractual forum it should be able to avail itself of the ordinary tort jurisdiction forum.¹⁷⁰ In a 2018 decision the ECJ held that actions based on Art. L 442-6 I No. 5 Ccom are closely linked to contract execution and fall into the ambit of the choice of forum clause.¹⁷¹
- 114** If the action is not covered by the jurisdiction clause or if there is none, another choice has to be made: does such an action fall under Art. 7(1)(a) or (b) (place of performance) or Art. 7(3) (tort action; place where the tort act was carried out or where the damage occurred). The terms of EU Brussels I bis are construed by the ECJ autonomously, disregarding national concepts;¹⁷² the national concepts are disregarded in favour of the European principles of interpretation. Hence it is irrelevant whether

¹⁶¹ Cass.civ.1^{ère}, 17.12.1985, 84-16338; see also Ancel/Lequette, mn. 72.

¹⁶² See above mn. 46 et seq. and 50.

¹⁶³ CA Paris, 21.6.2017, No. 15/18784; see above mn. 50.

¹⁶⁴ TC Paris, 2.9.2019, No. 2017050625, 11; see above mn. 46 et seq.

¹⁶⁵ Cass.civ. 1^{ère}, 22.10.2008, No. 07-15823 '*Monster Cable*'; in the same sense Cass.civ. 1^{ère}, 18.1.2017, No. 15-26105 *Rivera Motors v. Aston Martin*. In this decision the court examined the wording of the clause which has to be wide enough to include tort actions for undue termination.

¹⁶⁶ 'Abrupt' termination of a commercial relationship (not only a contract) with too short a notice period.

¹⁶⁷ This decision has triggered a great number of comments in legal doctrine, most of which was hostile to so much 'liberal thoughts', see Kessedjian, *JurisClasseur Droit international* (fasc. 571-20) mn. 88. It is indeed very likely that the foreign court will give much less weight to the French mandatory provisions.

¹⁶⁸ Cass.com. 20.03.2012, No. 11- 11570 ; civ. 1^{ère}, 18.01.2017 No. 15-26105.

¹⁶⁹ ECJ, C-352/1321 *CDC Hydrogen Peroxide* ECLI:EU:C:2015:335, paras 68–70; ECJ, C-196/15 *Grannarolo* ECLI:EU:C:2016:559, para. 28; cf. Cass.com., 20.9.2017, No. 16-14812.

¹⁷⁰ Cf. ECJ *Grannarolo* *ibid*.

¹⁷¹ ECJ, C-595/17 *Apple Sales International* ECLI:EU:C:2018:854, paras 28–30.

¹⁷² ECJ, C-548/12 *Brogstetter* ECLI:EU:C:2014:148, paras 18 and 29; ECJ, C-189/87 *Kalfelis* ECLI:EU:C:1998:459, paras 15–16.

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French law qualifies an action based on Art. L 442-1 Ccom as tort or contractual. The ECJ holds that claims for damages resulting from the performance (or non-performance) of a contract, are contractual matters.¹⁷³ The competent court is to be determined by application of Art. 7(1) Brussels I bis.

V. Final remarks

We have come to the end of our voyage through the meanders of French law on 115 unfair terms in business contracts. And 'meanders' there are. It is far from being merely a discussion about GCT or the validity of certain clauses. Competition law enters the arena as do tort actions. Additionally, there is an air of a Comedy of Errors, not with twins but rather with triplets. The whole becomes quite notable on the international scene, where we have choice of law and jurisdiction issues to which a third spice is added, namely the issue of overriding mandatory provisions. One of the challenges of our contribution was to give you an Ariadne's thread to help you through the maze.

This slightly meta-juridical view has a serious background: The legal situation is 116 complex, or for those, who are opposed to regulation of business transactions, it is an ideal playground. Unless one is caught in the DGCCRF's mesh, there are, in particular on the international level, ways to avoid the maze, provided the choice of law and the jurisdiction clauses are well drafted.

You will certainly have realised that the present contribution is of a high actuality due 117 to the two major legal changes in 2016/2018 and 2019. Both have strengthened the arsenal against imbalanced contract terms. It is certainly regrettable that the result is confusing, but the recent nature of the changes partly explains the situation. It may be that we are witnesses of a fundamental change to look at business transactions under a more egalitarian angle even on the international level. As a practicing lawyer, one observes abuse of party autonomy in commercial contracts in cases of unequal bargaining power, but one remains closely attached to the principle as such. We will have to keep looking for intelligent compromises.

¹⁷³ ECJ, *Brogstetter* *ibid.* para. 24.