

Doing business in France – key legal points for contractual limitation of liability in contracts under French law



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The limitation of liability clause is one of the points at the centre of negotiations on the conclusion of contracts under French law.

The rift between the interests of the parties is particularly wide here: The client usually insists on unlimited liability on the part of the contractor, in particular with regard to the financial consequential damages of non-performance or poor performance of the contract. The contractor, on the other hand, is especially interested in limiting its liability as far as is legally possible, in particular for said financial consequential damage, in order to keep its risks manageable and so as not to jeopardise the survival of its company with each new engagement.

This conflict of interest often includes allusions to the alleged ineffectiveness of the limitation of liability clause proposed by the contractor.

First of all, it should therefore be noted that the exclusion or limitation of liability in contracts is generally permitted under French law. Nevertheless, there are restrictions in turn:

1) Clearly ineffective limitations of liability

A contractual limitation of liability is always ineffective:

- if contractual obligations are breached either wilfully or through gross negligence,

• Article 1231-3 Code civil

- vis-à-vis consumers,
- for non-contractual tortious liability claims,
- for personal injuries,
- in cases of product liability.

• Article R. 212-1, 6° Code de la consommation

The impossibility of agreeing on a limitation of liability may also result from special provisions for certain contract types; particularly concerning liability for construction defects and liability arising from the various types of transport contracts.

• Settled case law, most recently Cass. Civ. I, 05/07/2017, No. 16-13.407; however, this differs in cases of non-contractual liability with statutory presumption of fault or strict liability,

2) Limitation of liability and material contractual obligations

The question of the effectiveness of limitations of liability given a breach of a material contractual obligation is the subject of the extensive case law of the Chamber for Commercial Matters of the *Cour de Cassation*.

• Prohibition ultimately results from the impossibility of contractual limitation of tortious liability

In the context of the reform of the law of obligations in 2016, the legislators added the following provision to Article 1170 of the *Code civil* (new):

‘Any clause which empties a material contractual obligation of its meaning shall be deemed not written’

• Article 1245-14 Code civil

This new statutory provision is broad and is not only aimed at contractual limitations of liability. However, this reform was (also) welcomed by commentators as a codification of case law on the limitation of liability given a breach of a material contractual obligation.

• Particularly Chronopost I, 22/10/1996, Chronopost II, 09/07/2002, Chronopost III, 22/04/2005, Chronopost IV, 30/05/2006, Chronopost V, 13/06/2006, Faurecia I, 13/02/2007 and Faurecia II, 29/06/2010

When applying this provision, it can be noted as a rule that a limitation of liability clause is not ineffective *per se* given a breach of a material contractual obligation. However, it may be ineffective if it empties the material contractual obligation of its meaning.

As there is hardly any robust case law on Article 1170 (new) of the *Code civil* to date, the scope of this rule must also be assessed

against the background of the old case law:

➤ *What is a 'material contractual obligation'?*

There is no legal definition for this term. According to case law and legal literature, these are obligations without which the contract is not economically viable. In other words, these are obligations that were decisive for the respective other party in concluding the contract.

➤ *When is a material contractual obligation emptied of its meaning?*

Such a loss of meaning occurs when the poor performance or non-performance of a material obligation does not result in any consequences: A limitation of liability must not have the effect of leaving the creditor of the breached material contractual obligation empty-handed.

It is evident that the assessment of a limitation of liability given a material contractual obligation always depends on the concrete circumstances of the individual case. Here, the judges base their assessment not only on the wording of the contract but also on the will of the parties.

The findings of the second *Faurecia* case law are of great importance in this respect. According to this case law, a material contractual obligation is not emptied of its meaning if the limitation of liability is offset by a consideration. In the judgement in question, the judges referred to the discount granted in return for the limitation of liability and also emphasised that the maximum amount of the limitation of liability was not disproportionately low.

• Faurecia II, Cass. Com. 29/06/2010

Based on a decision of the Chamber for Commercial Matters of the Court of Cassation from January 2020 – which was however issued based on the legal situation before the reform of the law of obligations came into force – it further follows that the exclusion of liability for certain damages, in this case pecuniary damages, is also permissible given the breach of a material contractual obligation, since the duty to fulfil the material contractual obligation was not affected by this.

According to the legal literature, the old case law is to be codified in Article 1170 (new) of the *Code civil*. To date, no decision to the contrary has been issued under the new law. In this respect, the findings from the old case law, in particular from the *Faurecia II* decision, must still serve as a guide for the drafting and negotiation of liability limitation clauses.

3) Limitation of liability and 'contractual imbalance'

Limitations of liability may also be attacked from the 'significant contractual imbalance' angle.

French law prohibits a contracting party from imposing obligations on the respective other party which result in a significant imbalance in the rights and obligations of the parties:

- For contracts between business people, this follows from Article L 442-1, I, 2° of the *Code de commerce*. This provision constitutes a specific situation of non-contractual tortious liability. This means that the party subject to such imposition may claim damages from the other party.

Cass. Com. 15/01/2020, No. 18-22.734

- The aforementioned reform of the law of obligations in 2016 also adopted the concept of 'significant imbalance' in the new Article 1171 of the *Code civil*. Accordingly, provisions in non-negotiable contracts (meaning general terms and conditions) from which such an imbalance results are deemed not written.

Even if the legal consequences of the two provisions outlined above are not identical, both may lead to the same result in practical terms: The limitation of liability does not apply.

Nevertheless, there do not appear to be any existing cases at present which touch on the application of these provisions to limitations of liability in B-to-B contracts.

4) Outlook – pending reform of liability law

A reform of liability law has been under discussion at the very latest since the adoption of the reform of the law of obligations. In July of this year, a first draft was presented by three members of the upper house of the French Parliament. This draft is currently being discussed in the parliamentary committees.

With regard to limitations of liability, the draft provides that Articles 1284 to 1286 (new) of the *Code civil* will now explicitly state that such clauses are in principle effective unless the law provides otherwise. The new Articles of the *Code civil* itself are to stipulate that liability for personal injury, liability in case of wilful intent or gross negligence and tortious liability may however not be excluded or limited by contract.

If the currently proposed wording is adopted, the reform of liability law with regard to contractual limits of liability would ultimately amount to a codification of the rules currently resulting from case law and legal literature.