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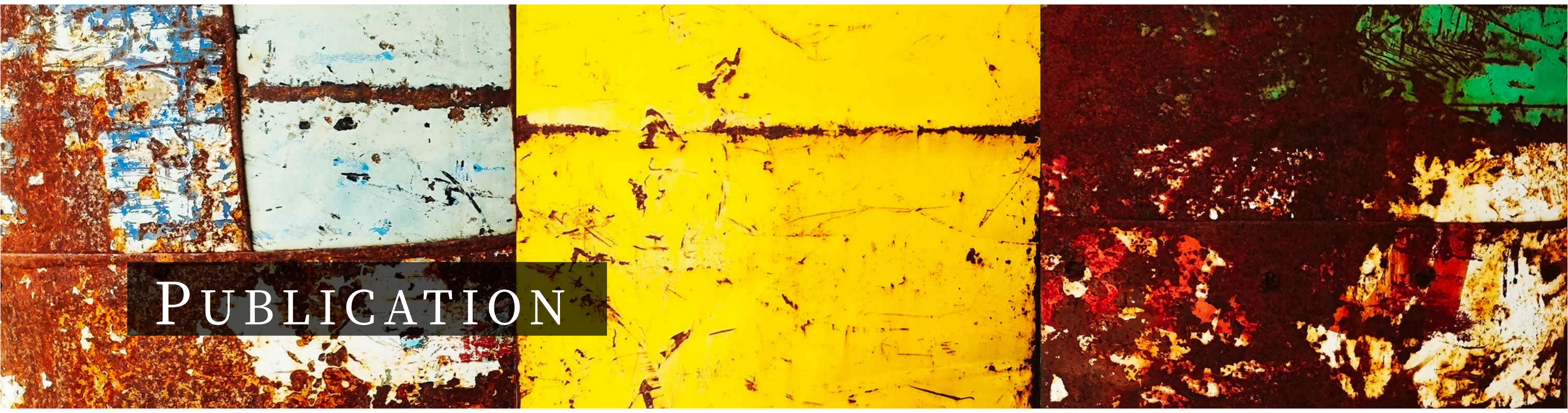

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Sale and purchase of goods and commodities in FRANCE – An overview of the French legal framework (b to b)

Dealing with French suppliers or customers ? Surprised when hearing that title to the goods and risks are implied to have been immediately transferred as soon as parties have reached an agreement on goods and price ?

Knowing the French legal framework of sale, how it may differ from Common law countries, what is codified or implied and what is the scope left to negotiations can indeed make the deal.

We provide you with an overview of rules applying to domestic or international sale of goods or commodities entered into between businesses and governed by French law.

LOUIS CHARLES
AVOCAT AU BARREAU DE PARIS

WWW.ARGALI-CONSEIL.COM
CONTACT@ARGALI-CONSEIL.COM

French legal framework of commercial sale

Domestic framework

As a civil law country, France has a written legal system codified in laws and implementing regulations. In terms of a contract, it means that provisions of the law are implied into the agreement without reference to it or a specific clause to be drafted.

The main piece of legislation governing contracts is the French Civil Code which includes general provisions pertaining to the existence, validity, interpretation, performance and termination of contracts. Specific rules related to sale contracts are also included in the French Civil Code.

Despite being a codified system, the French Civil Code strongly provides for the "*freedom of contract principle*", according to which Parties to an agreement are free to choose the content of it to the extent allowed by mandatory provisions of French laws and French public order. Therefore, the French Civil Code provides for general provisions pertaining to contacts and Parties may by mutual agreement arrange, adapt or derogate to non-mandatory provisions of the French Civil Code or French laws. As a result, the contract becomes the "*law of the parties*".

In addition to the French Civil Code, other specific rules related to the sale of goods may also be found in the French Commercial Code, in the French Transport Code, in the French Monetary Code and in the French Consumer Code for instance.

Please note that a modernization reform has amended the French Civil Code in 2016 (Order no. 2016-131 of 10 February 2016 and Law No. 2018-287 of 20 April 2018) resulting in the creation of three layers of provisions governing French agreements entered into before 1st October 2016, between 1st October 2016 and 1st October 2018, and after 1st October 2018.

International framework

With respect to international sale of goods, France is a Member of the Vienna Convention on Contracts for International Sale of Goods 1980 (CISG) which is directly applicable in France where a sale of goods contract has been entered into between two parties which have their seat in different Member States. Parties may however decide to mutually exclude the CISG of their agreement by drafting a valid choice of law clause. In that case, only the French domestic legal framework will apply.

Where a valid choice of law provision has not been agreed in an international sale of goods, France also applies the Hague Convention on the Law applicable to International Sale of Goods 1955 and, as a Member State of the European Union, the rules set forth in EU Regulation 593/2008 on the law applicable to contractual obligations (Rome I).

France has also ratified a number of Conventions on the carriage of goods by road (CMR Geneva Convention 1956), by train (Berne Convention 1980), by air (Montreal Convention 1999) and by see (Hague-Visby Rules 1924, 1968, 1979).

In addition, while not incorporated in the law, international standard of practice are recognised where Parties have expressly agreed to use them :

- Incoterms, UCP 600, URDG 758 of the International Chamber of Commerce (ICC). With respect to Incoterms, a new version "INCOTERMS 2020" applies as from 1st January 2020.

- UNIDROIT principles of International Commercial Contracts.

Entering into a sale and purchase agreement

“*Freedom of contract*” and “*choice of parties*” are high ranked principles of French contract law but must be exercised with good faith and within the framework provided for by the French Civil Code.

Validity requirements

To be valid, a contract shall :

- be entered into between parties having legal capacity to contract: legal representative of a company or authorised person of the basis of a power of attorney;

- have a lawful, existing and specified purpose. Parties’ obligations must be clear, seller shall have title to the goods to be sold which must exist, be tradable or be available in the future;

- be the result of valid and mutual consent of both parties.

These validity requirements are also to be observed by mercantile or commercial agents and brokers.

Imbalance between the parties in a business relationship as a result of normal trading or market conditions is not a cause of nullity of a sale agreement. However, creating significant imbalance in the rights and obligations of a party is prohibited as well as obtaining an advantage without consideration or of which the value is obviously disproportionate, especially if such party has no bargaining power and was only invited to sign.

Form

In France, a sale of goods contract is legally binding whether entered into orally or in writing. This is merely a matter of commercial evidence.

This principle is however limited in practice as transactions over EUR 1.500 are required to be made in writing (some other types of sales must also be made in writing according to the law i.e. sale of a business, transfer of trademark, sale of real estate, etc.).

In practice, commercial sale of goods will result of a quotation or commercial offer confirmed by a purchase order indicating buyer's commitment to purchase identified goods at the agreed price, and then issuance of receipt by the seller, such agreement to be evidenced by written exchange of documents or e-mails for instance. In that case however, duelling of general terms and conditions of seller or purchaser may arise.

Higher level of evidence would require the seller and buyer drafting a sale of goods contract to be dated and executed by each parties in as many originals as there are counterparts, such as a master sale and purchase agreement. In that case, terms and conditions are reflecting the choice of both parties and will apply to every orders without conflict of general terms and conditions.

In addition, electronic contracts and electronic signature are also recognised forms of written agreements and are enforceable in France. A notary deed or authenticated deed before a public officer is not required for the sale and purchase of goods or commodities.

Negotiations – Offer and acceptance – binding effect

According to French law, a contract is binding as soon as an offer containing all essential elements of the contract has been accepted by the buyer i.e. in a sale and purchase of goods contract : the purpose to sale and to purchase the contract goods at an agreed price.

Considering such binding effect, due diligence must be conducted as early as possible and negotiations be undertaken with care and in good faith within or out of a contract framework. When conducted under a contractual framework, negotiations' costs, goal, steps and termination process will be agreed between the parties. Hence, breach of contract rules will apply, damages and liability may to some extent be limited, unless in event of a material breach such as wilful misconduct or gross negligence.

Please be aware to specific provisions of the negotiation agreement be it called *a letter of intent, memorandum of understanding, non disclosure agreement, non competition agreement, negotiation agreement, etc.* as title of an agreement has very little to no legal value under French law.

Good faith is one of the main principle of French contract law and must be observed at any stage of a business relationship and implies, during negotiations, that :

- a party may not force its counterpart to enter into a contract;
- negotiations shall be conducted loyally and that a party may not abuse of its right to terminate negotiations;

In very broad strokes, breakdown in negotiations at very early stage would have little to no damaging consequence. However, in event of prolonged negotiations, suddenness of termination may trigger a claim for compensation resulting in the award by French Courts of damages amounting to costs incurred during negotiations. Loss of profits would however not be awarded.

- a duty of information relies on the party knowing any information which would have been relevant to obtaining the consent of its counterpart.

  This duty of information includes providing all information related to specifications of the goods, including its normal use conditions and limitations, instructions sheets, plans, tools, care, maintenance and safety instructions (for instance, safety data sheet for chemical products, food information and origin, electrical safety and maintenance requirements).

  Furthermore, this duty of information may also require the seller to supply goods that are fit for purpose when the buyer has mentioned its intended use of the goods.

Once entered into, the sale and purchase of goods agreement produces binding effect on the parties and may only be assigned to or amended with both parties consent. Contract must be performed in good faith and parties must comply with its provisions as well as with implied terms of French law.

Transfer of risks and title

According to French law and unless otherwise agreed by the parties :

- title to the goods is immediately transferred to the buyer upon agreement of the parties on the sale and purchase of the goods and the price;

  Therefore, execution or performance of a sale and purchase agreement results in immediate transfer of ownership to the buyer at the date of the agreement regardless of payment of the price or delivery of the goods. By exception, where future goods are to be sold, transfer of title will only occur upon manufacturing of the goods and where goods require weighting or measuring to be sold in bulk transfer, ownership will only occur after such measurement.

- transfer of risks follows transfer of title and the buyer shall bear the risks at the date of execution of the contract.

However, these provisions of the French Civil Code are not mandatory and parties are free to mutually agree to postpone transfer of title to full payment of the contract price and transfer of risks to availability of the goods for delivery for instance. Transfer of title and risks must be appraised on a case by case basis and in international agreements, care must be observed to the choice of the Incoterm (CCI) which will rule the transfer of risks.

Parties may also agree to provide for a "*retention of title*" clause which is enforceable in France where agreed by the buyer in writing before delivery of the goods.

Performance of the sale : payment of the price and delivery of the goods and legal warranties

Payment of the price and delivery of the goods

Performance of the sale of goods obviously results of the following essential obligations of the parties :

- the buyer has a duty to pay the contract price and to take possession of the goods;

  Unless otherwise agreed, payment must be made at the place and time of delivery of the goods. When agreeing payment terms, care must be observed to financing and documentary evidencing accepted by banking institutions.

  Furthermore, accounting rules related to invoices require that seller's invoice be dated at the date of the sale or at the date of delivery at the latest with up to 30-60 day payment term in most cases (specific payment terms exist depending on the type of goods or in the case of consumer sales).

- the seller has a duty to deliver goods pursuant to contract specifications including goods' quality and quantity (as well as instructions sheets, plans, tools, care, maintenance and safety instructions where applicable).

Delivery has to be performed as per terms and conditions agreed between the parties with respect to place, time and costs. Where no specific terms have been agreed :

- delivery place is implied to be where the goods were located at the time of the sale, most of the time at seller's premises i.e. EX Works (EXW);

- time of delivery implies a reasonable time as from the date of the sale (or condition precedent if any);

- delivery costs are borne by the seller and the buyer shall arrange carriage (EX Works basis) .

As delivery is a key part of the performance of the sale agreement, parties should organise quality and quantity controls at delivery be it partial or definitive. Indeed, recognised trade practices allowing quality/quantity tolerances may also apply if not excluded in the agreement.

With respect to shipping and carriage of goods, a specific legal framework will apply to the transport agreement entered into between the party in charge of shipment and the carrier.

Legal warranties

French law provides for legal warranties that must be observed by the seller in a business to business relationship :

- warranty of quiet possession of the goods : the seller shall make sure that no right attached to the goods will be claimed by himself or a third party and shall cover such claims (in event of breach of IP licensing or lien for instance);

- warranty against latent defects : the buyer has a claim where delivered good suffered from a latent defect that existed at the time of the sale making it unfit for its purpose. This claim has a limitation period of two years from discovery of the latent defect.

Additional commercial or technical performance warranties may also be offered by the seller.

In addition, the French Civil Code provides for a product liability legal framework resulting from EU Product Liability Directive of 1985 allowing a victim of a defective product to have a claim against the manufacturer or the seller for losses and injuries suffered. By defective product the law means a product that does not provide the safety which a person is entitled to expect.

The French Consumer Code also provides for a general duty of care and safety requirements with respect to consumer grade products.

Remedies in event of breach of contract

French contract law offers a wide range of tools in event of a breach of contract. Below is only an overview of main specific remedies related to the sale and purchase of goods, unless otherwise provided for by terms and conditions of the sale.

Remedies of the buyer for non-delivery or late delivery of the goods

Non-delivery, or late delivery provided that date of delivery is not indicative, of the goods entitles the buyer to either claim for delivery (requesting possession of the goods or delivery subject to penalty) or for termination of the sale. In addition, damages may be awarded to the buyer for losses resulting from non-delivery, including to some extent loss of profits.

Remedies of the buyer for goods departing from contract specifications

Where goods depart from contract specifications, the buyer is entitled to refuse delivery, claim for the goods to be exchanged or repaired, price reduction or termination of the sale and seek damages for its losses including to some extent loss of profits.

With respect to commodities out of specifications, the buyer may, to some extent, purchase same commodities to third parties at same market conditions and charge replacement costs to the seller after formal notice (this specific remedy shall be used with due care as its legal framework is very restrictive).

Remedies of the seller for late or non-payment of the contract price

Provided that no extended payment term has been granted to the buyer, the seller is entitled to refuse delivery of the goods, retain the goods, request payment or claim for termination of the contract and seek for damages.

Remedies in event of Force Majeure and Hardship

Force Majeure and Hardship are both specific remedies preventing right to damages in unforeseen events but share different purposes and rules.

Force Majeure has an established statutory legal framework provided for by the French Civil Code and case law which prove to be restrictive and should encourage parties to draft their own Force Majeure clause.

Hardship in private contracts only exists in the French Civil Code as a statutory provision since the 10 February 2016 and only applies to contracts entered into as from the 1st October 2016, provided that parties have not expressly excluded it. In practice Hardship clauses drafted by the parties have been used before and were enforceable, but parties now have the choice between statutory Hardship rules, excluding statutory Hardship or drafting their own Hardship clause.

Statutory Force Majeure

The French Civil Code defines statutory Force Majeure as : "*an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures and prevents performance of his obligation by the debtor.*".

Thus, statutory Force Majeure requires the following questions to be answered :

- At the execution date of the agreement, was the event foreseeable by the Parties ?

- Has the event made performance of the contract impossible, irrespective of all appropriate measures being implemented ? Have all alternative solutions been undertaken by the affected party ?

Then, the affected party must assess if performing its obligations is impossible from an operational point of view. Does all reasonable means to seek alternative solutions have been undertaken such as using alternative suppliers or providers ? In fact, an increase in costs, burdensome, delay or the ability to remotely perform part of the contract prevents any party from raising a Force Majeure event. To the contrary, mandatory act of the government such as premises' closure or any sort of official ban making performance of an agreement impossible may be qualified as a "*fait du prince*" and may constitute a type of Force Majeure event.

In any case, raising statutory Force Majeure is always challenging for companies as it requires a case-by-case approach and French courts have been very reluctant to apply it in the past.

Force Majeure effects depending on short vs long term event

- Contract suspension : where a Force Majeure event prevents a party to perform its obligation for a short period of time, the contract may be suspended and will resume as soon as the event does not meet any more Force Majeure criteria.

- Contract termination : where a Force Majeure event is declared permanent, the contract may be terminated and parties are released from their obligations.

Parties being released from their obligations means that where goods have not been delivered, payment is not due, advance payment must be repaid and any liquidated damages or penalty may not apply.

In any case, the affected party requesting suspension or termination due to a Force Majeure event shall always act in good faith and must :

- Immediately inform its contracting party as soon as being aware of the impossibility to perform its obligations because of a Force Majeure event.

- Provide information on the nature and expected duration of the Force Majeure event.

- Use all reasonable endeavors to remedy as quickly as possible the effect of the said event of Force Majeure.

- Where the event continues, take all measures to limit damaging consequences of its non-performance.

Parties' Force Majeure

Despite being a statutory legal term under French law, exception of Force Majeure may be defined and implemented by parties.

Many French law governed contracts include a provision relating to Force Majeure. A good Force Majeure provision must have a strong definition and implementation process.

In practice, a Force Majeure event lasting for more than six (6) months is generally considered as a long term Force Majeure event allowing either party to terminate an agreement with or without a prior written notice.

Whether a Force Majeure contractual or statutory provision applies, declaring a Force Majeure event is a last resort decision and is not always the best solution to mitigate a contractual relationship.

Statutory Hardship

For agreements entered into as of 1st October 2016, the amended version of the French Civil Code allows a party to request renegotiation of the contract on the basis of an unforeseen change of circumstances. Contrary to Force Majeure, Hardship allows a party to request renegotiation where performance of the agreement is possible but has become excessively onerous due to an unforeseen change of circumstances.

Of course, terms and conditions of the agreement remain binding on the parties during renegotiation.

In case of refusal or failure to renegotiate, parties may agree to terminate the contract or request the Court by mutual agreement to amend or terminate it. Where no agreement has been reached within a reasonable time period, the Court may at the request of one party amend or terminate the contract at a date and under terms it has decided.

This French hardship remedy does not apply to contracts entered into before 1st October 2016 as it was not implemented in the law and Parties may simply have excluded Article 1195 – or any kind of hardship – of their contracts.

Irrespective of such measure, parties may always mutually decide to amend terms and conditions of their agreements.

Miscellaneous : Africa focus

If you are dealing with suppliers or customers located in French speaking African countries, it is important to know that Benin, Burkina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Congo, Comoros, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Democratic Republic of Congo, Senegal, Chad and Togo are the 17 Member States of the Organization for the Harmonization of Business Law in Africa (OHADA), aiming since 1993 to secure investments and facilitate trade at Member States and international levels by harmonizing laws and legal practices.

The legal framework related to sale and purchase of goods in these French speaking African countries shares many similarities with the French legal framework illustrated above.

LOUIS CHARLES
AVOCAT AU BARREAU DE PARIS

ARGALI lawfirm assists you at any stage of your contractual relationships as well as formalities to be accomplished.

We operate throughout the entire French territory and for any international contract governed by French law (or the local law of an OHADA Member State). Please contact us at : contact@argali-conseil.com

Le cabinet ARGALI vous assiste à tous stades de vos opérations contractuelles et des formalités qui en découlent.

Nous intervenons sur l’ensemble du territoire français et vous invitons à nous contacter à l’adresse suivante : contact@argali-conseil.com