

1991

## France

---

### Recommended Citation

*France*, 25 INT'L L. 1062 (1991)

<https://scholar.smu.edu/til/vol25/iss4/13>

This Current Developments is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

ownership to the country of establishment and the PTA Secretariat. Article 16 stipulates that in case of nationalization or any act "having effects similar to nationalization" the nationalizing state is obliged to pay compensation "in accordance with generally accepted rules of international law."

#### IV. Conclusion

Africans are not passively accepting their fate. They are making substantial efforts to establish a framework for democratic and sustainable development that will enable them to overcome their political and economic crises. While these efforts are still tentative and their success is not by any means assured, they are nevertheless significant. The African Peoples Charter for Popular Participation in Development is an attempt to formalize a new relationship between the government and the people in a document that at least has some politically binding force and can become the basis for domestic legislation and policy. Its adoption is a testament to the increasing involvement of the people in civil society, a development that is essential to the creation of sustainable democracies.

The treaty to establish an African Economic Community is an ambitious project that in time could create substantial opportunities for Africans and those interested in working with Africa. In this treaty the African heads of state appear to have acknowledged that integration cannot be mandated by governments but will result from the activities of private persons, and that the role of government is to facilitate these activities. If this treaty enters into force and is implemented, it will help create a supportive framework for private and nongovernmental initiatives, which are essential for sustainable development in Africa. The developments in the PTA seem to indicate that at least part of the continent is beginning to implement this approach to development.

## France\*

### I. Is an Embargo a Case of Force Majeure?

A governmental ban on the delivery of goods already sold has been considered as a case of force majeure in, among other jurisdictions, Switzerland<sup>1</sup> and

---

\*Prepared by Barthélémy Mercadal, Professor at the Conservatoire National des Arts et Métiers, Paris. Translated by Henry Dahl, Boudreau & Dahl, P.C., Dallas, Texas.

1. ATF 42 379, JT 544 (1916); ATF 42 179, JT 464 (1916); ATF 48 215, JT 427 (1922).

the United Kingdom.<sup>2</sup> By contrast, there seems to be no French judicial decision on this topic. However, provided that the embargo proves to be unforeseeable and unavoidable, which was the case of the Iraqi embargo, French courts should accept it as a case of force majeure. The same result should apply if the contract includes a force majeure clause of the kind proposed by the International Chamber of Commerce. Such clauses stipulate that in case of doubt the denial of an export license burdens the local party if it was up to the local party to obtain such a license from the authorities of its own country. This type of clause is aimed at transactions that need governmental clearance. The parties, after all, know the elements present at the time the contract is concluded, but are not necessarily aware of other factors that may intervene at the time of performance.

Although the embargo constitutes a case of force majeure, it can only justify nondelivery if it is established that performance has become impossible. According to a decision of the European Court of Justice,<sup>3</sup> which can be used by analogy, the impossibility of performance need not be absolute. It suffices if abnormal difficulties are present, independently from the debtor's will and manifestly unavoidable even after doing all that is possible. Once the impossibility of performance is recognized, the contract becomes ineffective. It ends automatically, without any formality being required. In particular, judicial intervention to rescind the contract is not necessary.<sup>4</sup>

## II. Hidden Defects of Goods Sold and the Nonwarranty Clause

French courts prevent the professional seller from relying on a nonwarranty clause according to which the buyer may not sue in a case of hidden defect of the goods, or where the buyer's remedy is limited to a stipulated amount.<sup>5</sup> A clause of this kind is only valid when the buyer and the seller are similarly specialized. The clause would work, for instance, between a seller of electronic equipment and a buyer with a line of business that requires knowledge of electronics,<sup>6</sup> or between a manufacturer of nautical equipment and a builder of cargo vessels.<sup>7</sup>

---

2. Court of Appeal, Mar. 18, 1977, [1977] Lloyd's Rep. 201; *see also* Queen's Bench, June 21, 1976, [1977] 1 Lloyd's Rep. 166; Court of Appeal, Jan. 26, 1976, [1976] 2 Lloyd's Rep. 250; Queen's Bench, Apr. 12, 1978, [1978] 2 Lloyd's Rep. 560; House of Lords, July 6, 1978 [1978] 2 Lloyd's Rep. 305; House of Lords, May 18, 1978, [1978] 3 W.L.R. 274.

3. Sept. 17, 1987, Recueil des arrêts de la Cour 354.

4. Cour de cassation, chambre commerciale [Com.] Feb. 25, 1980, Bulletin des arrêts de la Cour de cassation (chambres civiles [Bull.]) I p.59; Com. Apr. 28, 1982, Bull. IV p.128.

5. E.g., Com. Jan. 29, 1974, Gazette du Palais [G.P.] 1974.1 som. 107; Com. Dec. 15, 1975, Juris-Classeur périodique [J.C.P.] 1976.IV.53; Com. Dec. 7, 1976, Recueil Dalloz [D.] 1977.I.R.128.

6. Paris, Mar. 23, 1982, Bulletin rapide de droit des affaires F. Lefebvre [B.R.D.A.] 1982/10 p.22.

7. Com. Dec. 3, 1985, Bull. IV p.244.

But these solutions are only completely reliable for sales that are exclusively ruled by French law. The Cassation Court recently overruled a decision that had struck a nonwarranty clause for hidden vices in a contract between a French buyer and a Dutch seller where the contract was subject to Dutch law. The Cassation Court ruled that the inferior court should have determined if Dutch law allowed or disallowed such a clause.<sup>8</sup>

In our opinion, the clause favorable to the seller that excludes or limits the warranty for hidden vices may also be valid in an international contract, even when French law applies. There are no cases known to us supporting the view that French international public policy would be contravened by such a clause.<sup>9</sup>

### III. Guaranteed Employment for the Seller of Shares

It is current practice in the sale of shares of French corporations for the holder of a majority interest to obtain a commitment that he or she will remain on the board of directors, or in another salaried position, during a certain time period, which usually coincides with retirement age. Such an agreement can never bind a corporation. The latter is always allowed to replace a board member, except when the decision is merely for the purpose of harassment,<sup>10</sup> or when applicable labor rules would be violated. The buyer of the shares, however, remains bound by his or her promise. Such a promise is part of the bargained price and the buyer becomes personally liable.<sup>11</sup>

### IV. Showing in France of a Colored Version of a Film

The general principle is that French courts impose a strict respect for an author's product and forbid unauthorized alterations of that product.<sup>12</sup> However, such strictness is not automatically transferred to international contracts for the marketing of artistic works. In this sense it has been decided that French international public policy<sup>13</sup> concerning the author's moral rights over his or her work is not breached by coloring a film that was originally made in black and white only. The case at bar concerned a film where marketing rights had been granted according to American law, and the colored version was shown in France.<sup>14</sup>

8. Cour de cassation, chambre civile [Civ.] Oct. 4, 1989, Rev. Crit. Dr. Int'l Priv. 1990.316, with a note by Lagarde.

9. Concerning French international public policy, see B. MERCADAL, DROIT DES AFFAIRES 1991, Nr. 5538.

10. Com. Oct. 11, 1988, Revue des sociétés [Rev. soc.] 1989.46, with a note by Chartier.

11. Versailles, May 10, 1990, Bull. July 1990.770.

12. Civ. Dec. 1, 1987, Bull. I P.229; Paris, Oct. 25, 1989, D. 1990.som.54 obs. Colombet.

13. On this concept, see B. MERCADAL, *supra* note 9.

14. Paris, July 6, 1989, G.P. 1989.741, Delafaye.