



Sanctions for contractual non-performance under French law

From the Napoleonic Code to
Order N° 2016-131 of 10 February 2016



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*Empereur des Français, Roi d'Italie,
et Protecteur de la Confédération
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A FLORENCE
CHEZ MOLINI, LANDI, ET COMPAGNIE
MDCCCIX.

More than 210 years after it was drafted, the “Civil Code of the French people” is still in use in France...

My real glory lies not in the fact that I won forty battles; Waterloo will erase the memory of so many victories; what nothing will erase, what will exist forever, is my Civil Code.

Napoléon Bonaparte

Sanctions for contractual non-performance under French law

I. Contractual non-performance in the Civil Code and in case law

Article 1134 of the Civil Code expresses the principle “*Pacta servanda sunt*”:

*“Agreements lawfully entered into have the force of law for those who made them. They **cannot be revoked**, except by **mutual consent**, or for **reasons authorised by law**. They must be performed in good faith”.*

➔ Thus: French law favours the **continued existence of the contract**

Sanctions for contractual non-performance under French law

A. Mechanisms encouraging the performance of the contract

(i) Liquidated damages clause (“*clause pénale*”)

Penalty clause pursuant to which a co-contracting party undertakes, in the event of non-performance of its main obligation (or in the case of delayed performance) to **pay the other party as damages a lump-sum amount** that, in principle, **cannot be decreased or increased by a judge**, unless it is **clearly excessive or is derisory**.

(ii) The exception of non-performance (“*exceptio non adimpleti contractus*”)

The exception of non-performance enables a party faced with non-performance by its partner to **suspend the performance** of the contract. Although the Civil Code does not expressly contain this principle, it nevertheless refers to the latter, in particular, as regards sales (C. civ., art. 1612).

French case law has extended the exception to include **all bilateral relationships**, characterised by the **interdependence of reciprocal obligations**.

The non-performance, whether **complete or partial**, must be **sufficiently serious** to justify the suspension of the contract.



Example: A delay in paying two invoices is not sufficient; it is necessary to demonstrate a repeated and persistent refusal to pay (see Cass., 1st Civil division, 9 July 2002, No. 99-21.350 ; Cass. 3rd Division, 15 September 2015, No. 13-24.726 and 13-25.229.).

Sanctions for contractual non-performance under French law

B. Sanctions in response to the non-performance of the contract attributable to the debtor

- Article 1184 of the Civil Code provides:

“A condition subsequent is always implied in bilateral contracts in the event that one of the parties does not perform its undertaking.

*In this case, the contract is not rescinded by operation of law. The party in whose favour the undertaking has not been performed has the choice either **to force the other to perform the agreement**, if this is possible, or to **request rescission with damages**.*

*Rescission must be requested by **an action at law** and, depending on the circumstances, **additional time** may be granted to the defendant.”*

- The main options available to the victim of contractual non-performance are:
 - (i) Enforcement (“*exécution forcée*”)
 - (ii) Rescission (“*résolution*”)
 - (iii) Damages (“*dommages et intérêts*”)

Sanctions for contractual non-performance under French law

(i) Enforcement

- A measure taken by the Court of Cassation to **include all obligations**, notwithstanding the terms of Article 1142, which excludes this in the event of the non-performance of the obligations to do and not to do;
- Ordered by a judge, **irrespective of the seriousness of the contractual breach**;



Example: A few individuals had a house built. It turned out that the height was 33 centimetres below the height that had been agreed in the contract entered into with the builder. They referred the matter to a judge and demanded the demolition and reconstruction of their house in accordance with the contract. The Aix-en-Provence Court of Appeals, which, no doubt, found said request excessive, if not abusive, dismissed their action on the ground that “*the non-compliance with the contractual stipulations did not cause the building to be unfit for its intended use and did not concern the essential and decisive parts of the contract.*”

The Court of Cassation mercilessly quashed this decision for violation of Art.1184 of the Civil Code (see 3rd Civil division, 11 May 2005, No. 03-21.136).

Sanctions for contractual non-performance under French law

(i) Enforcement

- That can be obtained on an urgent basis as part of a **procedure called “référé”** [urgent application]: if an obligation is **beyond serious question**, the *juge des référés* can **compel the defaulting party to perform**, even before the final determination of the case;
 - The application is ensured by an enforcement **measure called “astreinte”** [periodic financial penalty]: this is a way of putting **financial pressure** on a party in order for the latter to abide by a decision by the judge within the stipulated time limit. Thereafter, it shall be required to pay an amount, the payment frequency of which shall be decided by the judge (day, week, month);
- ➔ For the debtor, this is a **dreaded measure**, since the “*astreinte*” is **independent of the damages** that can be requested by the creditor.

Sanctions for contractual non-performance under French law

(ii) Rescission

- The general rule is that contracts can **only be terminated by order of a court**: it is up to the judge to decide if rescission is an appropriate solution based on the circumstances, which follows from the principle that “*no one can take justice into his own hands.*”
- Exception: an *a posteriori* judicial examination in the following scenarios:
 - Application of a **contractual termination clause**
 - **Unilateral termination “at the creditor’s risks”**: ever since a judgment by the Court of Cassation on 13 October 1998 (see 1st Division, 13 October 1998, No. 96-21.485), French case law has allowed that one of the parties, accusing the other of serious breaches, can terminate the contract itself, immediately, on the ground that it would not be possible to continue to apply the contract for very long.
- When the court orders rescission, the contract becomes **null and void**. The nullity is **retroactive**. This means that the contracting parties must therefore return to each other what they have already delivered.
- However, when the contract in question is **successive or continuous in nature**, such as a rental contract, **rescission will not be retroactive**. In such contracts, the effects produced before the resolution continue to apply.

Sanctions for contractual non-performance under French law

(iii) Damages

- The purpose of damages in French law is to **put the creditor in the same position as it would have been in had the contract been performed.**



In order to put the creditor in this position:

- a court can award damages to the creditor as the **creditor's primary recourse**, which is granted in lieu of performance in kind,
- or it may award damages as a **supplementary measure**, in combination with either performance in kind or rescission.

Sanctions for contractual non-performance under French law

(iii) Damages

- Rules governing awards of damages (Articles 1146 to 1152):
 - A party owed an obligation cannot proceed against a defaulting debtor with regard to a claim for damages until after the debtor has been **given notice to perform by means of a “mise en demeure”**;
 - The creditor can request compensation for:
 - The **actual loss** = the loss suffered by the creditor as a result of the non-performance of contractual obligations by the debtor
 - The **lost gain** = the profits that the creditor would have made had the debtor performed its obligations as required under the contract;
 - The creditor is **precluded from claiming damages that are not the direct consequence of the breach by the debtor**, even when that breach is the result of fraud by the debtor;
 - The victim of a breach of contract has **no duty to mitigate its loss**;
 - **A third-party may also have a damages claim in tort in respect of a breach of a contract.** In 2006, the Court of Cassation held that to establish liability it is **not necessary** to prove that the contractual breach constitutes a **separate tort** against the third-party. Evidence that the breach has caused loss to the third-party is sufficient (see Plenary session, 6 October 2006, No. 05-13.255).

Sanctions for contractual non-performance under French law

II. Order No. 2016-131 of 10 February 2016 reforming contract law, the general rules and the proof of obligations

- Reform instituted at the time of the bicentennial of the Civil Code based on the observation that contract law had become a largely **judge-made law**, **incomprehensible** to non-specialists and often **unpredictable**.
- Since 1804, contract law has evolved very significantly **outside the Code** thanks to the Court of Cassation, which has established very important rules that govern positive law but that have not found their place in the Civil Code.
- Accordingly, the **first goal of the reform was to codify rules** created by the Court of Cassation, notably, those regarding contractual non-performance.

Sanctions for contractual non-performance under French law

II. Order No. 2016-131 of 10 February 2016 reforming contract law, the general rules and the proof of obligations

- New article 1217 lists the **sanctions for contractual non-performance**:

“The party to whom the obligation was not performed or that was partially performed, can:

- *refuse to perform or suspend the performance of its own obligation;*
- *enforce the specific performance of the obligation;*
- *request a reduction of the price;*
- *rescind the contract;*
- *request reparation for the consequences of the non-performance.*

Sanctions that are not incompatible can be accumulated; damages can be added to these at any time”.

Sanctions for contractual non-performance under French law

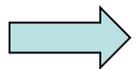
II. Order No. 2016-131 of 10 February 2016 reforming contract law, the general rules and the proof of obligations

- Main modifications as regards contractual non-performance:
 - Enforcement of specific performance can be excluded if there is an **imbalance between the cost of the enforcement of specific performance for the debtor and its benefit for the creditor**;
 - A contracting party who is a victim of a non-performance that is sufficiently serious will have two options:
 - it can either **petition a judge for rescission**
 - or it can **notify it to the debtor**Accordingly, unilateral rescission is established as a competing principle of a judgment voiding a contract [*résolution judiciaire*];
 - The **exception of anticipatory non-performance** (“*exceptio timoris*”), a new provision in the Code, inspired by the Principles of European contract law (Art. 9: 201), will entitle a creditor, after notice to remedy, to unilaterally suspend the performance of its obligations if:
 - it is clear that its co-contracting party will not perform its obligations by the stipulated date
 - the consequences of this non-performance will be sufficiently serious on its interests;
 - The creditor can have a **third-party perform** the obligation entered into by the defaulting debtor, at the **latter’s expense, without petitioning a judge for prior authorisation**.

Sanctions for contractual non-performance under French law

II. Order No. 2016-131 of 10 February 2016 reforming contract law, the general rules and the proof of obligations

The reform will take effect on 1 October 2016 and it will only apply to contracts entered into as of that date.



To be continued...

Sanctions for contractual non-performance under French law - ANNEX

Order No. 2016-131 of 10 February 2016 reforming contract law,
the general rules and the proof of obligations

Civil Code

Book III

Part III - SOURCES OF OBLIGATIONS

Sub-part I - THE CONTRACT

Chapter IV - The effects of the contract

Section 5 - Non-performance of the contract

Art. 1217. The party to whom the obligation was not performed or that was partially performed, can:

- refuse to perform or suspend the performance of its own obligation;
- enforce the specific performance of the obligation;
- request a reduction of the price; -rescind the contract;
- request reparation for the consequences of the non-performance.

Sanctions that are not incompatible can be accumulated; damages can be added to these at any time.

Art. 1218. Contractual force majeure exists if an event outside the control of the debtor and that could not be reasonably foreseen at the time the contract was entered into, the effects of which cannot be avoided by appropriate measures, prevents the performance of its obligation by the debtor.

If the impediment is temporary, the performance of the obligation is suspended unless the resulting delay justifies the rescission of the contract. If the impediment is permanent, the contract is automatically rescinded and the parties are released from their obligations in the conditions defined in Articles 1351 and 1351-1.

Sanctions for contractual non-performance under French law - ANNEX

Sub-section 1 - Defence based on non-performance

Art. 1219. A party can refuse to perform its obligation, even though said obligation is due, if the other party does not perform its own obligation and if this non-performance is sufficiently serious.

Art. 1220. A party can suspend the performance of its obligation if it is clear that its co-contracting party will not perform its own obligations on a timely basis and that the consequences of this non-performance are sufficiently serious for it.

Sub-section 2 - Enforcement of specific performance

Art. 1221. The party owed an obligation can, after notice to perform, enforce specific performance unless this performance is impossible or if there is a clear imbalance between its cost for the debtor and the benefit of the performance of said obligation for the party who is owed the latter.

Art. 1222. After notice to perform, the creditor can also, within a reasonable period of time and for a reasonable cost, itself have the obligation performed, or, if authorised in advance by a judge, it can destroy what has been performed in violation thereof. It can ask the debtor to reimburse the amounts incurred for this purpose.

It can also petition a court to have the debtor advance the amounts necessary to this enforcement or to this destruction.

Sub-section 3 - The reduction of the price

Art. 1223. The creditor can, after notice to perform, accept a partial performance of the contract and request a proportional reduction of the price.

If it has not yet paid, the creditor shall notify its decision to reduce the price as quickly as possible.

Sanctions for contractual non-performance under French law - ANNEX

Sub-section 4 - Rescission

Art. 1224. Rescission shall result either from the application of a termination clause or, in the case of sufficiently serious non-performance, from a notification of the creditor to the debtor or by a court decision.

Art. 1225. The termination clause specifies the obligations the non-performance of which shall give rise to the rescission of the contract.

Rescission is conditional upon notice to perform going unheeded, if it has not been agreed that the latter would result merely from non-performance. The notice to perform shall only be effective if it expressly mentions the termination clause.

Art. 1226. The creditor can, at its risk, rescind the contract by notification. Except in the case of an emergency, it must first give the defaulting debtor notice to perform its obligation within a reasonable period of time.

The notice to perform must expressly mention that if the debtor fails to perform its obligation, the creditor shall be entitled to rescind the contract.

If the non-performance persists, the creditor shall notify the debtor of the rescission of the contract and the reasons for said rescission.

The debtor can at any time contest the rescission by referring the matter to a judge. In this case, the creditor must prove the seriousness of the non-performance.

Art. 1227. Regardless of the circumstances, rescission can be requested in legal proceedings.

Art. 1228. Depending on the circumstances, the judge can formally acknowledge or announce the rescission or order the performance of the contract, if applicable, by granting a period of time to the debtor to perform the latter, or it can simply award damages.

Sanctions for contractual non-performance under French law - ANNEX

Art. 1229. Rescission shall terminate the contract.

Rescission takes place, as the case may be, either in the conditions defined by the termination clause, or on the date of receipt by the debtor of the notification made by the creditor, or on the date defined by a judge or else, on the day of the summons to appear in court.

If the services exchanged could only be useful in the case of the complete performance of the rescinded contract, the parties must return everything they received from each other.

If the services exchanged were useful as and when each of the parties performed the contract, restitution is not necessary for the period preceding the last service for which the corresponding service was not performed; in this case, rescission is deemed as termination.

Restitutions take place in the conditions defined in Articles 1352 to 1352-9.

Art. 1230. Rescission shall not affect the clauses concerning the resolution of disputes, nor those intended to apply even in the case of rescission, such as the confidentiality and non-competition clauses.

Sub-section 5 - Reparation of the loss resulting from the non-performance of the contract

Art. 1231. Unless the non-performance is permanent, the damages shall only be due if the debtor has first been served notice to perform within a reasonable period of time.

Art. 1231-1. If applicable, the debtor is ordered to pay damages, either for the non-performance of the obligation, or for the delayed performance, if it does not prove that performance was impeded by force majeure.

Art. 1231-2. In general, the damages due to the creditor are the loss that was made and the gain that was deprived, save for the exceptions and modifications below.

Art. 1231-3. The debtor is only bound to pay the damages that were provided for or that could be provided for at the time the contract was entered into, unless non-performance is due to gross or intentional negligence.

Sanctions for contractual non-performance under French law - ANNEX

Art. 1231-4. In the event even that the non-performance of the contract results from gross or intentional negligence, the damages only include those that were the immediate and direct result of the non-performance.

Art. 1231-5. If the contract stipulates that the defaulting party shall pay a certain amount as damages, a larger or smaller amount cannot be awarded to the other party.

However, the judge can, including on its own motion, decrease or increase the thus agreed penalty, if it is manifestly excessive or is ridiculous.

If the obligation was partially performed, the agreed penalty can be reduced by the judge, including on its own motion, in proportion to the benefit obtained by the creditor as a result of the partial performance, without prejudice to the application of the previous paragraph.

Any stipulation that conflicts with the two previous paragraphs is deemed not written.

Except for permanent non-performance, the penalty is only incurred if the debtor has been given notice to perform.

Art. 1231-6. The damages due for a delay in the payment of an amount of money consisting of the interest at the official rate, as of the notice to perform.

These damages are due without the creditor being required to prove any loss.

The creditor, to whom its delayed debtor caused, due to its bad faith, a loss independent of this delay, can obtain damages separate from the delay interest.

Art. 1231-7. In any case, the order to pay a compensation shall entail interest at the official rate, including in the absence of a request or a special provision in the judgment. Unless otherwise provided for by law, this interest shall accrue as of the handing down of the decision, unless otherwise decided by the judge.

In the event that the appeals judge unconditionally confirms a decision awarding compensation as reparation of a damage, the latter shall automatically accrue interest at the official rate as of the first instance judgment. Otherwise, the compensation awarded on appeal shall accrue interest as of the appeal decision. The appeals judge can derogate from the provisions of this paragraph at any time.

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