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Mind the third party in the gap: breach of contract, third-party liability simplified by the *Cour de Cassation*

Can third parties sue a party to a contract for a breach of its contractual obligations under statutory law?

Third-party liability refers to the right of a person to seek remedies for damages suffered as a result of the performance of a contract they are not a party to.

French law does not specifically provide for an autonomous right of action based on a contractual breach/non-performance for the benefit of third parties, even when such breach has caused them damage. Third-party liability derives from a *contrario* reasoning.

The French Civil Code states that a contract can only create legal obligations between parties. However, the performance of a contract must not cause harm to third parties. This legal framework has not been amended by the 2016 Contract law reform, the wording of article 1165 of the French Civil Code[1] was moved to article 1199.[2]

Moreover, it is a well-established principle of French law that parties issuing a claim must choose their legal ground: a party may only seek a remedy for specific damage either on the basis of a contractual (article 1217 of the French Civil Code) or a tortious breach (article 1240 of the French Civil Code).[3] If the damage suffered derives from a breach of contract, claimants have no option but to base their claim on a breach of contract. This principle is known as the non-cumulative right of action.

Consequently, it should not, in principle, be possible for third parties to base their claim on a breach of a contract. After all, the law is clear, a contract only creates obligations among the parties.[4] Furthermore, the imperative to choose a legal ground can further constitute a barrier to third parties' right of action if the non-performance/ breach of contract does not constitute on its own a civil offence.

However, the French Judiciary Supreme Court (*Cour de Cassation*) has set two exceptions to the principle of non-cumulative legal action on contract and tort law**.** The first exception relates to the right of victims of personal injury to choose on which legal ground to sue. The second exception is the option given to third parties to obtain compensation for damage suffered from a breach of a contract.[5]

What is the legal test third parties have to meet?

The *Cour de Cassation's* position on the legal requirements to be met by third parties has fluctuated over time, creating legal uncertainty.

In its early decisions, the *Cour de Cassation* required the claimant to prove that the contractual breach alleged could also be qualified, independently from the provisions of the contract, as a civil misdemeanour. Therefore, the onus was on the claimant to prove that the breach of contract could also fit in an established ground for civil liability, ie, tort.[6] From an English law perspective, it meant the claimant had to show that the defendant's breach of contract amounted to, for example, a breach of a general duty of care or a nuisance.

Conversely in some cases, the court chose to equate a breach of contract to a civil wrong,[7] essentially lessening the evidentiary burden for the claimant.

These diverging precedents are understandable since every breach of contract does not necessarily qualify as a civil wrong.[8]

In 2006 the *Cour de Cassation*[9] decided to clarify the divergent positions of its different divisions and equated a contractual breach to a civil wrong. Following this decision, it should have been enough for a third party to simply establish the breach of contract and show causation to win his case.[10]

However, the 2006 decision was not always followed in subsequent cases decided by the *Cour de Cassation* itself. Its Commercial division

followed the 2006 decision and equated a breach of contract to a tortious wrong,[11] whereas the Civil division reverted back to the civil fault-base mechanism; therefore, applying the legal test prior to the 2006 decision.[12]

Fast-forward to 2017, on the 18 May 2017, in the midst of the reform of French Contract Law, the Civil Division of the *Cour de Cassation* rendered a decision that was published in the *Court Journal*.

In substance, the *Cour de Cassation* decided that a breach of contract, being a breach of an obligation of result, on its own was not sufficient to give rise to a civil liability toward a third party.[13] Yet, six days later, on 24 May 2017, a different Chamber of the Civil Dvision of the same court applied the 2006 precedent in the case before it. Although the second case was not published in the *Journal*, it appeared that, even within the various Chambers of the Civil Division of the *Cour de Cassation*, there were two diverging positions.

The decision rendered on 18 May 2017 was interpreted by legal professionals as a signal that the 2006 case had been overruled, especially considering the nature of the contractual obligation at stake.

That analysis was also supported by a draft article in the proposed Civil Law Reform bill which sought to limit the right of a third party to sue for a contractual breach.

Article 1234 of the preliminary draft proposal on Civil liability stated that third parties who suffered a damage as a result of the performance of a contract can only issue a claim under tort law and must demonstrate that the breach of contract fits into an established ground for civil liability. Alternatively, third parties with a legitimate interest could sue for a contractual breach if they accepted they would be bound by all the terms and conditions of the contract. In this second option, third parties would potentially be subject to all restriction of liability clauses.[14]

In June 2019, the Paris Court of Appeal reviewed this proposal and issued a report recommending a departure from the 2006 case to make French law more attractive for investors. The Paris Court of Appeal is in favour of distinguishing a contractual breach from a tortious breach to set a stricter legal test.

The legal uncertainty remained intact until the decision of the *Cour de Cassation* of January 2020. In a decision published in its *Journal*, the *Cour de Cassation* set out, once again, to clarify its position on third party liability.[15]

Reverting back to its 2006 precedent, the *Court de Cassation* decided that a contractual breach amounts to a civil wrong; therefore, a third party is not required to prove that the breach of contract may also qualify as a misconduct under tort law.

The consequences of the 2020 case on the burden of proof

In its legal reasoning, the *Cour de Cassation* stated that a breach of contract which causes damage to a third party qualifies as a misdemeanour under tort law, which should not be made difficult to remedy. The Court therefore intends to simplify the burden of proof for third parties.

Article 1200 of the French Civil Code seems to support this lighter evidentiary burden as it allows third parties to rely on a contract to prove a fact.

Third parties only need to show that a party to a contract has not fulfilled its obligations, and establish causation. The defendant would in turn bear the burden of showing that it has in fact adequately performed its obligations, or alternatively to show that the breach did not cause damage to the claimant.

How does the 2020 case affect the enforceability of restriction of liability or insurance pact clauses?

When drafting a contract, the parties may seek to limit their personal liability to the extent allowed by law, in case of breach of contract. To that end, it is customary to insert in the contract a clause restricting the parties' personal liability. Some clauses in English contracts go as far as excluding liability for physical harm. Under French law, it is a public policy that parties may not exclude their liability for physical injury, death or tortious wrongdoing.

Moreover, clauses which restrict a party's liability are not enforceable against third parties suing on a tortious ground. Article 1199 of the French Civil Code states that contracts cannot create obligations or rights (unless otherwise provided/accepted) for third parties. As a result, third parties may avail themselves of a breach of contract to seek compensation, and yet be shielded from the restrictions negotiated by the parties.

To mitigate the risk of having to indemnify third parties for bad performance of the contract, it is advisable to rely on insurance pact clauses. Such clauses provide that the party which is at fault shall indemnify the other against any actions, sanctions or

damages it is ordered to pay to a third party. Clauses that shield a party against the harm caused to third parties by the other side are valid and enforceable under French law.[16] It is important to note that these clauses do not create a blanket immunity against third parties' legal actions. It simply gives the innocent parties a right to sue their contracting partners in order to recover any sum they may have to pay to third parties or to call them as a guarantor in a legal action.

It is therefore highly advisable to negotiate insurance pact clauses carefully or to require the subscription of a third party's liability insurance policy especially in contracts involving a high risk of damage to third parties.

As the *Cour de Cassation* has just clarified its position, one can speculate on whether the legislator will codify the draft proposal of article 1234 on civil liability or abandon it in the light of the *Cour de Cassation's* recent decision.

In the meantime, contracting parties in France should be mindful of the ability of third parties to recover loss as a result of damage caused by the performance of the contract, and consider avoiding this 'gap' by using a carefully negotiated insurance pact clause.

Notes

1 'Conventions shall have effect only as between the contracting parties; they shall not be detrimental to the third party, and they shall benefit him only in the case provided for in article 1121.' Article 1165 of the French Civil Code, in its wording prior to the reform.
2 'The contract creates obligations only between the parties. Third parties may neither seek performance of the contract nor be compelled to perform it, subject to the provisions of this section and to those of Chapter III of Title IV.' Article 1199 of the French Civil Code, after reform.
3 Cass civ, 2e, 29 May 1996, No 94-18.820; Cass civ, 2e, 9 July 2002, No 99-15.471.
4 See footnotes 1 and 2 *op cit.*
5 Civil liability: Necessary developments (Senate) .
6 Cass civ, 3e, 18 April 1972, No 70-13.826; Cass civ, 1e, 11 April1995, No 91-21.137 and 92-11.086; Cass com, 2 April 1996, No 93-20.225; Cass com, 5 April 2005, No 03-19.370.
7 Cass civ, 1e, 15 December 1998, No 96-21905 and No 96-22440.
8 'Any contractual fault is not necessarily tortious with regard to third parties.' Dimitri Houtcieff, *Contract Law*, 3rd edn, Brylant, p 530.
9 Judges from the Chancery and the Civil division of the *Court de Cassation.*
10 Cass Ass, Pl, 5 October 2006, No 05-13.255.
11 Cass com, 6 March 2007, No 04-13.689.
12 Cass civ, 3e, 22 October 2008, No 07-15.692; Cass civ, 1re, 15 December 2011, No 10-17.691.
13 Cass civ, 3e, 18 May 2017, No 16-11.203.
14 'Relativity of contractual breach: The turnaround is confirmed', *Dalloz News*, 16 June 2017.
15 Cass Ass Pl, 13 January 2020, No 17-19.963.
16 Cass civ, 2e, 15 April 1961, No 275.