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The Limits of Contractual Freedom: Analyzing the Admissibility and Exceptions of Agreements Limiting or Excluding Tort Liability under French Civil Law

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Abstract

Under French civil law, agreements that exclude or limit tort liability have traditionally been deemed null and void on grounds of public order, in stark contrast to the broad contractual freedom permitted in contractual liability. This paper examines the core legal question of when, if ever, such clauses may be valid, analyzing the narrow exceptions emerging in doctrine, jurisprudence, and, most significantly, the 2020 draft reform of French civil liability. The study identifies three key exceptions to the general prohibition: (1) clauses remain invalid in cases of gross negligence or intentional wrongdoing; (2) any exclusion or limitation of liability for bodily injury is categorically prohibited; and (3) consumer protection rules, particularly under EU-inspired unfair terms legislation, further restrict enforceability in B2C contexts. While current law maintains a rigid prohibition, the proposed reform (Articles 1284-1286) tentatively embraces the principle of validity, albeit confined largely to no-fault

or vicarious liability scenarios, marking a pivotal shift toward aligning French law with comparative legal trends. The paper critically assesses this evolution, weighing the tension between contractual autonomy and the protective imperatives of tort law.

KEYWORDS *Tort Liability, Agreements, Unfair Terms, Contractual Liability, Public Order Related*

Introduction

It is imperative that any activity undertaken by a person is accurately calculated in order to determine the full financial cost that may be incurred as a result of that activity. If a person does not consider some elements, the costs resulting from his activities may be extremely high, and he may not be able to bear them. It is expected that the greater the financial risks associated with a person's economic activities, the more likely he will be to make decisions in regard to changing or mitigating these activities, thus affecting the economic movement of society. When tort liability is excluded, a level of social security is achieved, which, in turn, creates a conducive environment for the expansion of economic activity, or at least the free operation of this activity.

As a result of its critical role in achieving economic balance in society, the exclusion of tort liability is of fundamental importance. A person who agrees to exclude tort liability will be able to determine the actions for which he will be responsible. Consequently, he will be aware in advance of the level of risk he may incur in his decisions and activities, as well as the amounts of future payments he may incur.

The Evolution of Civil Liability Agreements in the 19th Century coincided with the emergence of liability systems designed to address new sources of risk. The advent of agricultural mechanization and industrial growth in society elevated civil liability to a prominent legal concern in comparative law. Machinery, transportation innovations, and animals constituted the primary sources of damage at that time. Concurrently, a rise in litigation was observed, as victims increasingly pursued compensation for various harms without hesitation. Subsequently, liability insurance expanded to accommodate the growing number of claims. These factors collectively contributed to the development of both contractual and non-contractual civil liability frameworks[1].

[1] Marie Leveneur-Azemar, Study on Limiting and Exonerating Liability Clauses (PhD Diss., LGDJ, 2017), 7.

In recent years, civil liability conventions have become more prevalent as the sources of risk have changed. As a result of these agreements, the potential party responsible is allowed to adjust the rules of civil liability. These conventions have a wide range of objectives.

Initially, the possible responsible party may need to adjust his or her liability. Modifications may be in the form of restrictions or aggravations. Thus, reducing agreements may limit the potential victim's right to compensation by setting a ceiling; or limit liability to the occurrence of certain damages. Conversely, aggravation of liability may result in an extension of liability to circumstances not covered by the law, such as force majeure. Additional obligations can also be imposed, such as the payment of an additional sum of money in addition to the compensation provided to the victim.

Therefore, the adjustment may consist of the early elimination of the civil liability incurred by the possible responsible party. In this case, we refer to an exclusion of liability, an exoneration agreement, an evasive liability clause, or a non-liability clause. Focusing on conventions that reduce civil liability has practical implications and is justified by recent developments in this area, particularly the civil liability reform initiative in French law[2].

Additionally, we note that in this area, a classic difference in regime exists between contractual liability and tort liability. Despite the fact that conventions on civil liability are generally accepted in contractual matters[3], they have been declared null and void in tort matters[4]. Civil liability conventions have historically focused exclusively on contractual matters. French law determines the form and scope of the civil liability, but agreements between parties may amend it.

In further, we find that contractual liability clauses are diverse, and can be divided into three main types. It is the first type of contractual clause that increases the debtor's responsibility, and in this case, we are discussing the guarantee clause. In the second type, the debtor's responsibility is reduced by reducing the scope of his contractual obligations, or by reducing the amount of compensation he will be required to pay. A third type specifies a lump sum as compensation to motivate the debtor to fulfill his obligations, which is referred to as a penal clause.

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2 Philippe Bas, Jacques Bigot, André Reichardt, et al., Civil Liability Reform Project, Text No. 678 (2019–2020), submitted to the French Senate, July 29, 2020.

3 Muriel Fabre-Magnan, Law of Obligations – Volume 2: Civil Liability and Quasi-Contracts, 3rd ed. (Paris: Presses Universitaires de France [PUF], 2013), no. 446.

4 Boris Starck, Henri Roland, and Laurent Boyer, Civil Law, vol. 1: Delictual Liability (Paris: Litec, GF Collection, 1996).

As for the guarantee clause, it is intended to increase the debtor's responsibility by requiring him to provide a guarantee. There is a contractual obligation for the debtor to fulfill the contract regardless of the circumstances, even in the event of force majeure. Only in the case of an event not specified in the contract will the debtor be released from the obligation to execute the contract[5] terms of liability reducing clauses, we distinguish between those which limit the debtor's obligation and those which restrict or exclude compensation. The difference between these two types of clauses is clear from a theoretical standpoint: they both alleviate or exclude contractual liability, but the former acts on the source of the liability, the breach of contract. Seconds on its effects, the obligation to repair[6].

Concerning the penal clause, it is used to encourage the debtor to execute the contract, the penal clause provides a compensation-interest package. Thus, it has a triple nature; it is contractual agreement, it determines a lump sum compensation, and it is of a punitive nature[7]. At the outset, contractual liability clauses functioned as a simple reversal of the burden of proof[8] (the debtor being unable to avoid paying damages if the creditor was able to establish his fault in the non-performance of the contract). Afterward, the courts gave them full effect, exonerating the debtor even if his fault is established9. The principle of contractual freedom and autonomy of will justifies admission. Although there are numerous exceptions to the general rule, including cases of gross negligence and willful misconduct[10]; but also, and more generally, the application of unfair clauses and unbalancing clauses. We have observed a phenomenon of "reflux"[11] of these conventions in terms of contractual liability over the past twenty years. Additionally, we can observe a growing interest in conventions concerning extracontractual civil liability.

Traditionally, contract and tort liability have been seen as opposing concepts. In the French tradition of law of obligations, these two subjects are based on reasoning that is specific to each of them. Contracts are rooted in the

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5 Marie Leveneur-Azemar, Study on Limiting and Exonerating Liability Clauses (PhD diss., LGDJ, 2017), 8.

6 Christophe Quézel-Ambrunaz, Limiting Liability Clauses (Paris: LGDJ, 2016), 25.

7 Jordan Abras, Contractual Anticipated Arrangement of Extracontractual Liability (PhD diss., Presses Universitaires d'Aix-Marseille [PUAM], 2008), 3.

8 Cour de cassation [French Court of Cassation], November 9, 1915, DP 1921(1): 23; S 1921(2): 1.

9 Cour de cassation [French Court of Cassation], June 15, 1959, D 1960, 97. Note by Rodière.

10 Philippe Brun, Extracontractual Civil Liability, 5th ed. (Paris: LexisNexis, 2018), no. 100.

11 Thomas Genicon, "Immunity and Liability Clauses," in Civil Liability Immunities, ed. Olivier Deshayes (Paris: CEPRISCA, Presses Universitaires de France [PUF], 2009), 125.

principle of freedom of contract, whereas liability has a restorative function[12]. Generally, civil liability refers to the obligation to compensate others for damage they have suffered. The concept of extracontractual civil liability may appear paradoxical at first glance. Nevertheless, we are dealing with conventions which modify beforehand the legal reaction provided by a tort liability rule. It is possible for a potential responsible party and a potential victim to agree to adjust this rule even before the damage has occurred.

The drafters of the Civil Code of 1804 did not consider it necessary to address conventions adjusting the rules of extracontractual civil liability. The issue did not arise during the development of the Code, so the drafters did not address it. Furthermore, for them, the prohibition of the conventions in question was obvious. Perhaps it was too obvious to be documented. At the time of writing the Code of 1804, no reference was made to conventions in tort matters. Jurisprudence has only established a principle of prohibition by declaring that "articles 1382 and 1383 of the Civil Code are of public order, and their application cannot be neutralized contractually by anticipation, so that exemptions and other clauses are null and void."[13].

Notwithstanding the 2020 reform's progressive stance, a significant legal gap persists in French law: the enduring ambiguity surrounding the precise boundary between permissible liability limitation, grounded in contractual freedom, and clauses that violate mandatory rules of public order, particularly in non-contractual (tort) contexts involving non-professional parties or bodily injury. While the draft legislation (Articles 1284–1286) tentatively aligns French law with comparative trends, especially common law systems that conditionally accept liability-limiting agreements, it simultaneously collides with deeply entrenched civil law principles that treat tort liability as inherently non-waivable and protective of fundamental societal interests. This tension raises critical questions: How can the new framework reconcile the functional flexibility of contractual risk allocation with the traditional French commitment to victim protection and the imperativeness of tort norms? And under what conditions can such clauses be deemed compatible with public order without undermining the compensatory and deterrent functions of tort law?

This study employs a doctrinal and historical legal research methodology, grounded in the systematic analysis of primary and secondary legal sources within the French civil law tradition. The research centers on the interpretation

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[12] Zoé Jacquemin, "Contracts Relating to Liability," Revue des Contrats [RDC], no. 116(1) (2019): 275.

[13] Cour de cassation, 2nd Civil Chamber, February 17, 1955, SNCF v. Cie La Préservatrice et autres, JCP 1955(II): 8951. Note by Rodière.

and evolution of statutory provisions, particularly Articles 1240-1243 of the French Civil Code (formerly Articles 1382–1386), as well as pivotal jurisprudence from the Court of Cassation, especially rulings issued by its Civil and Commercial Chambers that have shaped the doctrine of tort liability and the validity of liability-limiting agreements. In addition, the analysis draws extensively on leading French legal scholarship, including authoritative treatises, academic commentaries, and journal articles, to trace doctrinal debates and contextualize judicial reasoning. Historical insights into the 19th-century development of civil liability frameworks are also integrated to illuminate the enduring tension between contractual autonomy and the protective imperatives of tort law. This combined approach enables a nuanced understanding of both the current legal landscape and the trajectory of ongoing reform.

In light of this, it will be necessary to expose the rules relating to conventions on extracontractual liability in French law and then in comparative law. In order to accomplish this, we will analyze positive law solutions. In addition, we will examine the possibility of consecrating the principle of validity in French law in light of the solutions proposed by foreign law, doctrine, and the reform project. In this study, we will explain the current position of French law, which is to reject agreements that exclude or mitigate tort liability. We will then examine the comparative law position on these agreements, and finally we will discuss the French legislator's position on the draft tort law.

The Introduction part should contain at least five previous studies concerning to the topic. At this part, author should emphasize the urgency of the research, as well as the significant of the research. Authors also have to explore and combine some previous studies. It is important for reader to know the uniqueness, novelty, urgency, and significance of research. Most of reader is non-native English speaking, therefore, Author should use a formal simple language, as well as, for international reader, author also have to add and improve some global perspectives.

French Law's Prohibition Principle

As a general summary of the position of French law, we can state that the French legislator has remained silent on this point, but French case law has specifically rejected this type of agreement, which we will study in more detail in this part.

A. The Silence of the Legislator

The drafters of the Civil Code of 1804 decided not to legislate on conventions that regulate tort liability before a possible damage has occurred.

As a matter of fact, they considered that such agreements were clearly prohibited, in the sense that neutralizing the application of the rules relating to tort liability was impossible[14]. There was no open discussion on this topic.

Despite the rigidity of the drafters' position, some authors have proposed the introduction of a principle of validity for conventions regarding tort liability. The attempt, however, proved to be in vain and was viewed as an insult by the drafters of the Civil Code. There is no general principle in the Civil Code prohibiting agreements relating to tort liability. There is a possibility that this principle is so self-evident that it has not been considered useful and necessary to put it in writing. There were, however, some specific cases in which the legislator intervened occasionally in order to prohibit conventions that limited or exonerated extracontractual liability.

There is a similar prohibition in farm leasing and hunting rights, where legislators sanction non-liability clauses for holders of hunting rights on neighboring properties for "*damage caused to crops by wild rabbits and game living in their woods*" (Article L. 415-6 of the Rural and Maritime Fishing Code). This prohibition is still present in the area of liability for defective products. As part of the legislation, clauses that aim to exclude or limit liability are forbidden. However, clauses stipulated by professionals that target "*damage caused to property that is not mainly used by the victim for his own use or his own consumption*" are permitted (Article 1245-14 of the Civil Code). Legislative interventions thus mitigate the legislator's silence, but do not replace the establishment of a general prohibition principle. As a result, the judge intervened in the case.

B. Judge's Intervention

Case law established a prohibition principle very early on. During the 20th century, it affirmed its principled position in several judgments. Some decisions from the 19th century, however, prohibit conventions that limit and exonerate liability in tort matters, such as work accidents [15]. In this area, the general principle of prohibition has traditionally been established by a 1955 ruling. According to the judge of the Court of Cassation, "articles 1382 and 1383 of

[14] Jordan Abras, Contractual Anticipated Arrangement of Extracontractual Liability (PhD diss., Presses Universitaires d'Aix-Marseille [PUAM], 2008), 3.

[15] Cour de cassation [French Court of Cassation], August 19, 1878, S 1879(1): 422 (concerning workplace accidents).

the Civil Code are of public order, their application cannot be neutralized by anticipation in contracts, so that any exemption or mitigation clauses are void[16].

The principle of prohibiting tort liability conventions is no less clear and was reaffirmed several times during the second half of the 20th century. This solution was clear and constant, so much so that the authors had already exposed the nullity of the conventions limiting and exonerating tort liability in the manuals. Today, the positive law on the subject remains intact, and textbooks still display the traditional solution to principle.

It is crucial to emphasize that, despite significant doctrinal and legislative developments in French contract law, particularly following the 2016 reform, the Court of Cassation has consistently maintained its unwavering stance regarding liability-limiting clauses in tort contexts. From the landmark 1955 ruling to the most recent decisions, the Court has repeatedly affirmed that Articles 1240-1241 (formerly 1382–1383) embody rules of public order that cannot be derogated from by agreement, rendering any exclusion or limitation of tort liability null and void. This position was reaffirmed in a pivotal decision of 5 July 2017, wherein the Court of Cassation explicitly held that "Articles 1382 and 1383, now renumbered as Articles 1240 and 1241 of the Civil Code, constitute rules of public order, and their application cannot be contractually neutralized in advance; consequently, any clause seeking to exclude or mitigate tort liability is null and void." This ruling underscores the Court's enduring commitment to the principle that the foundational norms governing extra-contractual liability are imperative and non-derogable, thereby preserving the protective function of tort law against private contractual arrangements aimed at circumventing liability.[17]

In stark contrast, the Court's jurisprudence on contractual liability has evolved considerably in the post-2016 era. While upholding the principle of contractual freedom, the Court of Cassation, guided by new statutory provisions such as Articles 1170 and 1231-3, has refined its criteria for assessing the validity of liability-limiting clauses, particularly in cases involving gross negligence, imbalance of bargaining power, or unfair terms. This dual trajectory, doctrinal rigidity in tort, and calibrated flexibility in contract, constitutes a defining feature of contemporary French liability law and underscores the enduring conceptual divide between the two regimes. Indeed, under French contract law, liability-limiting and exemption clauses are

[16] Cour de cassation, 2nd Civil Chamber, February 17, 1955, SNCF v. Cie La Préservatrice et autres, JCP 1955(II): 8951. Note by Rodière.

[17] Cour de cassation, Civil Division, 1st Civil Chamber, July 5, 2017, Case No. 16-13.407, unpublished.

generally valid in principle, reflecting the foundational role of party autonomy. This principle finds statutory reinforcement in Article 1231-3 of the Civil Code, which confines the debtor's liability to damages that were foreseeable at the time of contract formation, a rule that aligns with longstanding jurisprudence recognizing the legitimacy of such clauses. Consequently, these clauses are commonly employed in commercial contexts such as transport or moving contracts, where parties routinely agree on ceilings for recoverable damages once contractual fault is established. However, this permissiveness is not absolute. The 2016 reform introduced significant safeguards, most notably Article 1170 of the Civil Code, which deems unwritten any clause that deprives an essential contractual obligation of its substance. Moreover, sector-specific legislation imposes further restrictions: for instance, Article L. 1231-4 of the Labour Code prohibits anticipatory waivers of rights related to dismissal, while Article 4(m) of the 1989 Housing Act nullifies any clause in residential leases that exempts the landlord from liability. Thus, while contractual liability remains amenable to private ordering, the law carves out important exceptions, particularly where essential obligations are undermined or where public policy considerations demand heightened protection, thereby tempering contractual freedom with substantive fairness and legal certainty.[18]

C. Public Order as a Basis of Prohibition

In French case law, conventions limiting and exonerating liability in tort matters are prohibited due to their public order nature. It appears from the study of the case law on the subject that the courts refer to public order when they sanction conventions on tort liability. In the judgment, the judge seems to refer only to the imperativeness of tort liability rules in the event of damage caused by the fault of the person responsible. Again, we note the existence of greater clarity in matters of tort liability for fault. We then find the classic formula of the 1955 judgment according to which *"the clauses of exemption or mitigation of liability in tort matters are void, as articles 1382 and 1383 of the Civil Code are of public order and can be paralyzed by convention before their application is made*".

It is interesting to note that the judge does not refer to the notion of public order when he annuls an agreement which limits or eliminates a case of strict liability. A similar principle applies to vicarious liability, as well as to liability for the actions of things. In a few marginal judgments, the judge took

[18] Anne-Sophie Lampe, "Limitation of Liability Clauses Do Not Apply Where the Underlying Contract Is Voided," Dalloz IP/IT (2023): 181.

care to justify the prohibition of conventions on extracontractual no-fault liability by the imperativeness of the rules, but these decisions remain anecdotal.

It is important to note that the public order nature of tort civil liability has several components. The law of civil liability traditionally serves two functions: the normative function, which punishes harmful behavior, and the compensatory function, which compensates for damages[19]. Additionally, it is important to note that the public order character of the rules on tort liability is derived first and foremost from their normative function. The existence of this function justifies the prohibition of conventions that limit or exonerate extracontractual liability. The French judge condemns such arrangements precisely because of the need to deter deviant behavior[20]. The purpose of this is to encourage agents not to relax their vigilance. Conventional immunity would prevent the prevention and repression of harmful behavior. In spite of this, the person responsible must accept liability for their actions. It is therefore easy to relate the normative function of tort liability to the imperativeness of the rules in this area.

Furthermore, public order is built upon the "*necessary balance between respect for individual freedom and individual security*"[21]. Therefore, it is appropriate that individuals do not have the opportunity to deviate it. In this case, we find the idea that the normative function justifies the imperativeness of the rules of tort liability. It involves limiting the risks that might result from agreements that limit or eliminate an agent's tort liability.

In addition, the basis of public order for tort liability rules is derived from their compensatory function. As a result of this compensatory function, tort liability rules are imperative in order to protect victims. The protection of victims is strongly linked to the principle of full reparation, according to which victims are entitled to full compensation for the damage they have suffered: the entire damage and nothing more than the damage. Due to this rule, lump sum compensation is not allowed, unless there is a statutory provision that expressly allows it, and punitive damages are prohibited. The principle of full compensation justifies the prohibition of limitations or exclusions of extracontractual liability.

While the prohibition of liability-excluding agreements in tort has long been anchored in the public order rationale, emphasizing victim protection,

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[19] Philippe Le Tourneau, Law of Responsibility and Contracts: Indemnification Regimes, 11th ed., Dalloz Action, no. 010.11 (Paris: Dalloz, 2017).

[20] Jordan Abras, Contractual Anticipated Arrangement of Extracontractual Liability (PhD diss., Presses Universitaires d'Aix-Marseille [PUAM], 2008), no. 95.

[21] Liza Veyre, "What Future for Clauses and Contracts Excluding or Limiting Repair?," Chronique des clauses contractuelles [CCC], no. 12, study 13 (December 2016).

deterrence, and the imperative nature of tort rules, the 20th and 21st centuries have witnessed mounting pressure to adapt this rigid doctrine to the realities of modern risk society. While the prohibition of liability-excluding clauses in tort law remains formally grounded in the imperative nature of Articles 1240–1241 of the Civil Code and the need to protect victims, the reality of contemporary economic and insurance practices has progressively challenged this doctrinal rigidity. The generalized development of liability insurance, the complexity of contractual chains in globalized markets, and the functional necessity of allocating risks efficiently have led both scholars and legislators to reconsider the absolute nullity rule. Although the Court of Cassation continues to reaffirm the principle of non-derogability in its case law, sectoral statutes, particularly in areas such as defective products, medical liability, or digital services, have introduced calibrated exceptions that implicitly acknowledge the limits of a purely public-order-based approach. This gradual, albeit cautious, doctrinal reflux signals a shift toward a more functional conception of civil liability, one that seeks to reconcile victim protection with the practical exigencies of risk distribution in a modern economy[22].

The Exclusion of Tort Liability in Comparative Law

A comparison of comparative laws indicates that a significant number acknowledge the validity of agreements that exclude tort liability, but it must also be considered that this acceptance is not absolute, but is subject to some restrictions in specific cases. We will examine the validity of these agreements in the light of comparative legislation, and then we will examine the legal basis for their acceptance.

A number of the legislations directly affected by the French Civil Code declared agreements related to the exclusion of tort liability invalid, such as Moroccan law, Emirati law, Egyptian law, Syrian law, Libyan law, and Jordanian law. Despite belonging to the school of civil law, a number of comparative legislations recognize the validity of such agreements.

In most European countries of the civil law school, agreements that exclude tort liability are recognized as valid. Belgian law, which is largely influenced by French civil law, accepts these types of agreements23. It was recognized very early on by the Belgian Court of Cassation that the parties

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[22] Bérénice de Bertier-Lestrade, "Reform of Civil Liability: The Preferential Treatment Granted to Victims of Personal Injury," Revue Lamy Droit Civil, no. 194 (July 1, 2021).

[23] Cour de cassation de Belgique [Belgian Court of Cassation], February 21, 1907, Pasicrisie [Pas.], 1907(1): 135.

could, by prior agreement, increase or restrict the scope of tort liability. It was confirmed by the same court in 2004 when it stated that: The conditions limiting liability are valid in principle. It is the same principle that is adopted by the Canadian province of Quebec. As far back as the end of the 19th century, jurisprudence has accepted the possibility of amending tort liability rules through agreements. This rule was indirectly enshrined in the Civil Code of Quebec in 1994[24].

There is a similar position in other legislations related to the civil laws school, such as Swiss law, Polish law, Turkish law, Italian law, Portuguese law, and Swedish law. The position of these comparative legislations is justified for two reasons: one is that these legal systems accept the issue of combining both contractual and tortious liability, and the second is that these legal systems do not regard tort liability as a matter of public order as a matter of jus cogens[25]. Under English law, according to the Unfair Contract Terms Act 1977, there are several provisions related to excluding or restricting tort liability as follows:

1. Regarding The Negligence Liability

Negligence under this law means the breach:

a. of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;
b. of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);
c. of the common duty of care imposed by the M1 Occupiers' Liability Act 1957 or the M2 Occupiers' Liability Act (Northern Ireland) 1957.
d. Under this law, exclusion or restriction also includes:
e. making the liability or its enforcement subject to restrictive or onerous conditions;
f. excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
g. excluding or restricting rules of evidence or procedure; and also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

Under 2 (1), (2) and (3), A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or

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[24] Cour de cassation de Belgique [Belgian Court of Cassation], March 26, 2004, No. C020038F, unpublished.

[25] Geneviève Viney, Patrice Jourdain, and Suzanne Carval, The Effects of Liability (Paris: LGDJ, 2017), 300.

restrict his liability for death or personal injury resulting from negligence. In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness. Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

2. Regarding The Liability for Breach of Duty

Under 16 (1) of Unfair Contract Terms Act 1977, Where a term of a contract, or a provision of a notice given to persons generally or to particular persons,] purports to exclude or restrict liability for breach of duty arising in the course of any business or from the occupation of any premises used for business purposes of the occupier, that term:

a. shall be void in any case where such exclusion or restriction is in respect of death or personal injury;
b. shall, in any other case, have no effect if it was not fair and reasonable to incorporate the term in the contract or, as the case may be, if it is not fair and reasonable to allow reliance on the provision.

3. Regarding The Consumer Rights Act 2015

Under 61 (8), the Consumer Rights Act 2015 governs the validity of any notice (written or any other communication or purported communication). And a notice is, according the section 61 (4), one which concerns relates to rights or obligations as between a trader and a consumer, or purports to exclude or restrict a trader's liability to a consumer. Section 65 entitled Bar on exclusion or restriction of negligence liability, specifies that a trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence. Where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader's liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to or knew about the term or notice.

4. Regarding the OLA Act 1957

Under s 2 (1) of the OLA 1957, the occupier's common duty of care extends to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise. However, whether a business occupier can validly exclude liability towards trespassers (whether for personal injury, property damage, or other) is unclear,

given that the OLA 1984 and UCTA 1977 do not refer to the issue at all nor does any judicial authority to date, so far as the author's searches can ascertain[26].

An occupier who permitted the claimant to enter the land for recreational purposes outside of the scope of the occupier's business activities is not prohibited from excluding liability for personal injury and death under the CRA 2015: CRA 2015, s 66. However, the consumer may still attempt to prove that the notice is unfair. The UCTA 1977 provides a similar exception when the occupier allows the claimant to enter the land for educational or recreational purposes that do not relate to the occupier's business activities: UCTA 1977, s 1(3)(b). In these circumstances, occupiers are permitted to exclude their liability for losses caused, regardless of whether the exclusion is fair.

The French Legislator's Position on The Draft Tort Law

Following the reform of French contract law, proof, and obligation regime in February 2016, a reform of civil liability is anticipated in the near future based on a reform proposal drafted by the Ministry of Justice, the final version of which was released in March 2020. As part of the future reform of civil liability, an entire part of the French Civil Code will be rewritten, which has not been substantially modified since 1804. Several sources of inspiration have been used to develop the civil liability reform project, including foreign experiences of civil law or common law. There is a certain relevance to the Quebec experience, as the civil liability law in Quebec was reformed around twenty years ago (Civil Code of Quebec, 1994), and case law having since undergone very interesting developments in this matter[27].

A. Principle of Validity

A significant innovation of this project compared to current French law is its admission of the principle of the validity of conditions excluding or specifying tort liability. Researchers in French law are aware that this acceptance of the principle of contractual liability has become self-evident. As for tort liability, the French Court of Cassation has consistently and consistently ruled that these types of agreements are invalid. According to the court, Articles 1240 and 1241 of the French Civil Code are public order and nothing can be agreed upon that contradicts or prevents their application. In French law, this

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[26] Rachael Mulheron, Principles of Tort Law, 2nd ed. (Cambridge: Cambridge University Press, 2020), 636.

[27] Gustavo Cerqueira and Vanessa Monteillet, "The Civil Liability Law Reform Project," Dalloz (2020): 5.

established rule has been a subject of constant debate until the new project came along to reconsider this established rule.

The reasons on which the French Court of Cassation rejected the validity of these agreements are no longer compelling. Articles 1240 and 1241 should not be considered to be part of the public order, and the fact that French law originally rejected the principle of combining tort liability with contractual liability proves this error. It is important to note that this principle actually prevents the application of tort law every time harm is caused to the victim due to a breach of a contractual obligation between the two parties. As a result, if the tort liability provisions related to public order, the contract would not have posed an obstacle to their implementation[28].

If we exclude this fundamental reason for rejecting these agreements, it is impossible to accept the notion of rejecting their validity, even if their application is rare, but in daily life, it remains possible. For example: These agreements can be imagined between neighbors, as well as in gatherings based on the idea of volunteering or assistance, and this also applies to negotiations prior to a contract, as well as all situations in which people may come together without any contractual relationship between them. Therefore, the tort liability project accepted the legitimacy of these agreements in Article 1284, thus destroying the distinction between tort liability and contractual liability. This article states that: "*Unless otherwise provided by law, clauses having the object or effect of excluding or limiting liability are valid*".

B. The Limits of This Validity

The principle of acceptance of these conditions was not made absolute by Article 1284, but was rather subject to some limitations. Article 1284 states in its second paragraph that: "However, no one can limit or exclude their liability for bodily injury". Accordingly, this exception arises from the legislator's desire to emphasize the importance of protecting human physical integrity, as well as the possibility of compensating such damages outside the framework of contractual liability29. Particularly since Article 1233 of these draft states in its second paragraph that: "*However, when this non-performance results in bodily injury, the co-contractor who suffers this injury may also be entitled to compensation*

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[28] Jean-Sébastien Borghetti, "Liability for Things: A Regime That Has Run Its Course," Revue Trimestrielle de Droit Civil 60 (2010).

[29] Jean-Sébastien Borghetti, "The Behavior of the Victim," in The Reform of Liability Law: Proceedings of the Colloquium on November 25, 2016, Faculty of Law and Political Science of Montpellier, ed. Louis-Frédéric Pignarre (Montpellier: Faculty of Law and Political Science of Montpellier, 2017), 75–101.

under the extracontractual liability rules". According to article 1285 of the draft, there is a second exception to the validity of agreements excluding or limiting tort liability, as it states that: "In contractual matters, limiting or exclusive liability clauses do not apply in the event of gross negligence or willful misconduct".

According to Article 1231-3 of the Civil Code, the debtor is only responsible for damages that were foreseen or could have been foreseen at the time the contract was concluded, unless the non-performance is caused by severe or fraudulent fault. Therefore, for a damage resulting from non-performance of a contract to be reparable, it must be foreseeable, or the parties must have envisaged it in their contract. It must be noted that when a gross or willful fault is likely to be ascribed to the debtor, the co-contracting party will be justified in claiming full compensation for its damage, i.e. beyond what the contract stipulates. This exception pertains to cases where the contract excludes or limits liability, and the victim suffers damage due to a gross or willful fault. This article of the draft is consistent with Article 1170 of the French Civil Code, which states: "*Any clause that deprives the essential obligation of the debtor of its substance is deemed unwritten*".

There is no question as to the purpose of this exception, which is to prevent a person from benefiting from his grave fault because it involves the deliberate intent to harm others. Consequently, if the legislator accepts these clauses in this case, he is legislating illegal situations or encouraging the debtor to harm the creditor. There is also a third exception to the principle of the validity of clauses that exclude or limit tort liability, as stated in Article 1286 of the draft: "*In non-contractual matters, no one can exclude or limit their liability for fault*".

It is necessary to provide an explanation of the tort liability system in French civil law in order to understand this exception. A person who, through their fault, damages another must repair the consequences of their actions in accordance with the principle of liability for fault - also known as personal liability - under civil law. In other words, if I cause harm to another (and I am not bound by any contract), I must repair the damage. Article 1240 of the Civil Code outlines this principle of liability for fault. It should be noted, however, that article 1241 of the Civil Code specifies that negligence or imprudence can also result in a person's civil liability. The Civil Code also establishes a system of vicarious liability in Article 1242, and liability for the fact of things is addressed in Article 1243. As a result of these two responsibilities, the individual is not only responsible for his own fault, but is also sometimes responsible for the acts of others and of the things.

Based on the above, this restriction relates to tort liability for personal action only. As a result, a person cannot exclude his tort liability under a prior agreement if this liability arose from his own mistake. There are some authors on French law who do not agree with this exception, and believe that it would eliminate all perceived benefits from the principle of validity of conditions that exclude or limit tort liability.

Our belief is that, indeed, this exception will narrow the scope of application of these conditions in the future, and its application will be restricted to cases of liability without fault, vicarious liability, or liability for the action of things, and this is in direct contrast to the openness of French law to other comparative law systems. Also, it contradicts the essence of this amendment, which was originally intended to make these conditions legal under French law. As part of this project, the French legislature generally accepted agreements that excluded or limited liability, but set some restrictions that must be adhered to.

Conclusion

In final assessment, French law continues to uphold a robust pro-victim stance in the domain of tort liability, rooted in the imperative protection of individual security and the principle of full reparation. This orientation is most pronounced in cases involving bodily injury, where any attempt to exclude or limit liability remains categorically prohibited, reflecting an unwavering commitment to the inviolability of physical integrity as a core value of public order. Nevertheless, recent doctrinal developments and, more significantly, the 2020 draft reform signal a pragmatic shift: while maintaining strict safeguards in personal injury and consumer contexts, French law has begun to acknowledge limited exceptions in professional and commercial settings. These exceptions, particularly in non-fault-based liability scenarios such as vicarious or liability for things, demonstrate a cautious willingness to accommodate contractual freedom where economic actors possess comparable bargaining power and where risk allocation serves broader functional and systemic needs. Thus, the emerging framework seeks a delicate equilibrium: preserving the protective essence of tort law while selectively integrating flexibility in spheres where autonomy and predictability are paramount.

Following the analysis presented, it becomes clear that the French legal position on agreements excluding or limiting tort liability reflects a combination of entrenched legal traditions and legislative developments. The French judiciary adheres to the principle of prohibiting such agreements based on the public order nature of tort liability, a position that emphasizes the protection of

victims and ensures the fair administration of compensation. In tort liability, a dual function is at work: the normative function, which discourages harmful behavior, and the compensatory function, which ensures that damages are fully repaid.

On the other hand, comparative law reveals a range of acceptances for these agreements under specific conditions, illustrating the diversity of legal and cultural priorities among legal systems. Various legal systems also combine contractual and tortious liabilities flexibly, resulting in diverse legal outcomes. It is intended that the new French legislative project will provide a balanced legal framework that acknowledges the validity of such agreements while imposing certain restrictions that will protect the fundamental rights of the parties involved. This initiative represents a significant development in French law, as it attempts to strike a balance between enhancing contractual freedom and protecting public order and social interests.

Compared to current French law, this project is notable for its admission of the principle of validity for clauses which exclude or limit tort liability. The shift reflects the increasing acceptance of such principles in a number of comparative legal systems. Re-evaluation is underway of the historical position of the French Court of Cassation, which has consistently ruled against the validity of these agreements. There has been ongoing debate over the Court's rationale, which is that Articles 1240 and 1241 of the French Civil Code concern public order. This new project challenges this traditional view, arguing that these provisions should no longer be viewed as immutable.

It is possible to accept their validity even if their practical application remains rare if we disregard the fundamental reason for rejecting these agreements. These agreements can be envisioned, for example, between neighbors or in voluntary or assistive gatherings, as well as in pre-contractual negotiations and other non-contractual relationships. By dismantling the historical distinction between tort liability and contractual liability in Article 1284, the tort liability project in French law recognizes these agreements as legitimate. Article 1284 states: "Unless otherwise provided by law, clauses having the object or effect of excluding or limiting liability are valid."

Under Article 1284, acceptance of these conditions is not absolute. The legislator emphasizes protecting physical integrity and ensuring compensation for such damages outside contractual liability. In addition, it specifies limitations, such as the inability to limit or exclude liability for bodily injury. Moreover, Article 1285 limits or excludes liability clauses in contractual matters in cases of gross negligence or willful misconduct. In general, severe faults, which involve a deliberate intent to harm, should not benefit the wrongdoer.

In addition, Article 1286 prohibits excluding or limiting tort liability for personal fault. In fault-based liability, individuals are responsible for repairing damage caused by their own actions. The exception is criticised by some French law scholars, who believe it undermines the principle's benefits and limits application of these clauses primarily to cases of no-fault liability, vicarious liability, or liability for things' actions. It remains a challenge to strike a balance that reflects modern legal developments, meets the needs of the French legal community, while also considering comparative experiences. It is anticipated that the upcoming reform of French civil liability law will modernize and harmonize French legal principles with global standards, maintaining fundamental protections while meeting contemporary needs.

This study identifies three core jurisprudential and statutory rules that firmly limit the admissibility of agreements excluding or limiting tort liability under French law. First, any clause seeking to exclude or reduce liability for bodily injury, including harm to life, physical integrity, or health, is categorically void. This absolute prohibition, reaffirmed in both current jurisprudence and Article 1284 of the 2020 draft reform, reflects the principle that human dignity and physical security constitute non-derogable values of public order. Second, clauses are unenforceable in cases involving gross negligence or intentional misconduct, as allowing a party to evade liability for such serious fault would undermine the normative and deterrent functions of tort law and contravene the principle that "no one may benefit from their own wrongdoing." This rule applies with particular force in contractual contexts (Art. 1285 of the draft; Art. 1231-3 of the Civil Code) but also informs the broader public policy stance in tort. Third, exclusion clauses that contravene mandatory statutory provisions, especially those enshrined in consumer protection law or other public order norms, are null and void. This includes clauses that conflict with EU-inspired unfair terms legislation or sector-specific prohibitions (e.g., in product liability under Art. 1245-14). Together, these three pillars underscore French law's enduring commitment to victim protection, even as it cautiously opens the door to limited contractual risk allocation in non-sensitive, non-fault-based scenarios.

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