Recent French M&A/PE Case Law

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by
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Recent French court cases reinforce confidence in the French legal framework applicable to mergers, acquisitions and private equity (M&A/PE) deals. Described below are some of these cases, dealing with (1) the duty to disclose, (2) distressed acquisitions and (3) correcting a "scrivener's error".

1. Duty to disclose

The French civil code was modified in 2016 by the addition of a new article 1112-1 [1] dealing with mandatory disclosures by contracting parties. This article has given rise to a plethora of recent cases.

As in the US, French legal doctrine long ago moved away from the strict *caveat emptor* approach endorsed by some 19th century scholars, illustrated by a Cour de cassation ruling in 1901 standing for the principle that the contracting party who made a bad bargain "because he was too credulous or negligent in his verifications has only himself to blame."[2] Some case law since then eroded this principle, affirming liability of sellers who did not disclose key information.[3]

New article 1112-1 affirms and expands on this jurisprudence, setting out a general mandatory disclosure standard, applicable to all contracts subject to French law. It provides that prior to concluding a contract each party must provide, to the other, information deemed to be "determinative" of the latter's decision to contract. Such "determinative" information must have a "direct and necessary" relation to the "content of the contract" or the "nature of the parties". The disclosure obligation does not apply to a party's view on the value subject of the contract. A party which proves that such "determinative" information was not disclosed and that it was "legitimately" unaware thereof (or that it "legitimately" relied on its counterparty in this respect) can obtain damages (on the basis of tort liability) or, if the omission resulted in error or fraud,[4] rescission of the contract. This new statutory provision has the status of mandatory public policy and cannot be limited or excluded by contract.

Fears that French courts would interpret this new obligation very broadly have turned out to be misplaced, as illustrated by several recent cases, which clarify that a party seeking relief under article 1112-1 has the burden of proving that

- the information not revealed was "determinative" for its decision to contract;
- the other contracting party knew such information at the time of contracting; and
- such other contracting party knew at such time that the information was "determinative" for the other party.

Here are some examples:

- **Is all information having a "direct and necessary" relation to the contract necessarily "determinative"?** Not according to the Cour de cassation (the French supreme court for civil, commercial and penal matters). In a recent case,[5] the purchaser of a fast-food restaurant discovered some time after closing that, although the restaurant had an existing ventilation system, condominium rules prohibited expanding it, with the result that the restaurant could not make fried foods as it wished. The purchaser argued that since this restriction has a "direct and necessary' relation to the "content of the contract", it constituted information "determinative" of its decision to purchase. The court rejected this argument, stating that not all information that has a "direct and necessary" relation with the content of the contract is automatically "determinative".

This interpretation, followed by other courts,[6] is not the only possible reading of article 1112-1, and so constitutes a welcome check on overbroad interpretation of the text.

- **Does the obligation to disclose "determinative" facts apply during due diligence?** Indeed it does – but of course the seller has no liability if the information was in fact disclosed. For example, in a recent Cour de cassation case,[7] the parties signed an LOI including a tentative purchase price, but during due diligence the potential buyer found that receivables were significantly overstated and proposed a reduced price. The seller broke off negotiations. The potential buyer claimed costs including for its due diligence, arguing that the true state of the receivables was a "determinative" factor which the seller should have disclosed. The court examined the claim of failure to disclose during due diligence but denied liability, since the relevant information was in fact ascertainable by the seller during due diligence.
- **The duty to disclose arises only if a party knows that the undisclosed information was "determinative" for the other party.** Several recent cases have affirmed this principle.
    - A Cour de Cassation ruling[8] arose out of a public works contract for emergency lighting in tunnels of a metro line. The general contractor sued its lighting fixture supplier, claiming the latter's failure to provide certain information about the brightness of the lighting fixtures was a violation of its duty to disclose under article 1112-1 and also amounted to fraud. These claims were rejected because the general contractor had not identified this brightness specification as relevant when entering into the contract.
    - A recent appellate court decision[9] involved a sale (under locked box terms) by several PE funds of a target which was likely to breach a bank loan financial covenant. Pointing out that the sale process involved extensive due diligence, including access to accounts showing the likely breach of the bank loan covenant, and that the buyer showed no interest in this issue during due diligence, the court held that the covenant breach was not a "determinative" fact for the buyer.
- **Can a passive buyer rely on the disclosure obligation?** The answer may depend on the relevant facts. One appellate court decision[10] suggests that a buyer which does not take even elementary investigation of the financial viability of the purchased business cannot expect relief under the new mandatory disclosure requirement.
- **Can the terms of a letter of intent ("LOI") impact what information is deemed determinative?** In one recent case[11] the answer was "no". The LOI set out a price calculation for acquisition of an insurance brokerage, including a multiple of "recurring" commissions. Asserting that the seller knew that some past commission might not be recurring, the buyer claimed breach of the seller's disclosure obligations. These claims were rejected by the court, which pointed out that the share purchase agreement, signed three and a half months later, after the buyer conducted due diligence, stated only a lump-sum price, without reference to the multiple. But in other cases LOI terms have been taken into account in assessing whether information is "determinative".[12]
- **When does non-disclosure amount to fraud?** Under French law, fraud (*dol*) can exist when a party lies, engages in "maneuvers" or intentionally hides information "which it knows is determinative for the other party"[13] – the latter standard taking some elements listed in article 1112-1, but adding the extra element of intent. In one recent appellate case,[14] involving acquisition of a wind-turbine maintenance company subject to a locked box price term, the court inferred the intent necessary for fraud from the failure of the seller to spontaneously reveal the loss of a key client, when the information disclosed, including in a data room, did not allow the buyer to discover this information easily.
- **What relief is available for breach of the mandatory disclosure obligation?** French courts seem unlikely to be overgenerous in awarding such damages. This lesson can be drawn from an appellate decision from 2023,[15] affirmed by the Cour de cassation in 2025,[16] involving a €310M sale of a dietary-supplements group to a PE buyer. The court analyzed in detail the buyer's claims based on fraud, failure to make a mandatory disclosure of "determinative" information and breach of rep/ indemnification obligations set out in the share purchase agreement. The court of first instance rejected the fraud claim, awarded €2M for breach of the mandatory disclosure

obligation, rejected a contract-based indemnification claim and awarded €100K to the buyer for legal fees (an unusually high amount for such an award in France). On appeal parties reiterated and expanded their claims; for legal fees, the buyer requested an additional €100K and the seller requested €600K. The appellate court's decision described in detail the provisions of the LOI, the price negotiations between the parties and the extensive due diligence process (noting that the data room contained 18,000 pages, the Q&A featured more than 500 questions and the buyer's advisors prepared detailed due diligence reports). The court rejected the fraud claim and approved the buyer's claim for failure to make mandatory disclosures of "determinative" information. It found that, although the possible reduction in price attributable to the non-disclosed information amounted to about €12.3M, considering the parties' negotiating positions the buyer's chances of negotiating a lower price were small, so awarded only 5% of that amount, i.e. about €616K. The court admitted in principle the contractual indemnification claim but found that there were no net damages. As for legal costs, the court overruled the lower court's award to the buyer and decided not to award such costs to either party.

Although the need to account for article 1112-1 is well known in French M&A practice, **language addressing the issue in share purchase agreements** may be of limited impact. For example, for a seller to assert that it has "not intentionally withheld or omitted to disclose information that would be material to a reasonable purchaser's decision to purchase" does not avoid seller's liability if in fact there has been failure to disclose. There are other formulations that may be more protective for sellers.

2. Distressed acquisitions and carve-outs

Under French law, managers of a French company falling into bankruptcy can have liability for cash shortfalls in the bankrupt estate, if the shortfall was caused, even in part, by their "management errors"[17] – an ill-defined but potentially broad concept. The "managers" (*dirigeants*) potentially subject to this liability include *de jure* managers, i.e. those holding certain managerial positions, and *de facto* managers, i.e. others – potentially, a controlling shareholder – who participate in or exercise management functions. Liability can be significant, including back pay and extensive severance payments to employees, among other factors.

The extent of the risk to a controlling shareholder was illustrated by a case[18] involving the carve-out, from a multinational lighting manufacturing group, of a fluorescent light manufacturing division, placed in a new company and sold to a third party in December 2012 for one euro – while the seller at the same time entered into a commercial assistance contract for a four-year term. In 2017 the company fell into bankruptcy and was liquidated. The liquidator claimed that the seller was liable for a large part of the cash shortfall of the liquidation, and the lower court agreed, awarding the liquidator damages of over four million euros. But the court of appeal reversed, rejecting the liquidator's claims including that the activities carved out and sold were structurally loss-making and that the business plan of the buyer was inadequate. In reversing the lower court judgment, the court of appeal pointed out that a parent company has no obligation to verify the business plan of a purchaser of its subsidiary; that a court is not to second-guess the business choices made by management of a company which is not insolvent; that any evaluation of whether actionable management errors were made should take account of the situation at the time, rather than in hindsight; that the seller following the sale did not act as a *de facto* manager of its former subsidiary; and that the purchaser of the carved-out business was qualified to turn it around – even if the business ultimately failed.

3. Scrivener's error – or the case of the misplaced parenthesis.

In this 2025 appellate case[19] the parties entered into a JV agreement in 2016 incorporating transfers, via separate share purchase agreements, of their respective shareholdings in subsidiaries operating old-age homes (*établissements d'hébergement pour personnes âgées* or EHPAD), as well as call options for further transfer of shares in those subsidiaries. After a change of control in 2019, one party exercised its call option for purchase of the remaining shareholdings in subsidiaries of its JV partner. The call options included a formula for calculation of the purchase price – but the formula was different from the one used in all the other share purchase agreements signed and executed by the parties. Instead of

Shareholding % x (Multiple x Earnings less Net Debt)

the formula in the call option was written

Shareholding % x (Multiple x Earnings) less Net Debt

with the result that the full amount of net debt, rather than a percentage share, was deducted from the price. Relying on Civil Code article 1188 (formerly article 1156), pursuant to which a contract is interpreted based on "the common intention of the parties, rather than the literal terms thereof", the court corrected the scrivener's error in setting the price for the share. Based on the facts set out in the decision this seems to be fair. But it took six years of litigation to reach this result. A better strategy: careful proofreading!

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[1] French Civil Code ("**C. civ.**") article 1112-1.

[2]« *Le contractant qui s'est trompé parce qu'il a été trop crédule ou négligent dans ses vérifications ne doit s'en prendre qu'à lui-même* », attributed to Cour de cassation (**Cass.**), Chambre des requêtes, 07.01.1901 :D.1901.I.128.

[3] Cass. 1ère chambre civile 24.11.1976 n° 7'-12.352 (seller of a used car did not reveal to a professional buyer that the odometer had been altered); Cass. 3ème chambre civile 30.06.1992 n° 90-19.093 (seller of a building lot did not reveal that the water table height made construction of a house impractical without disproportionate cost).

[4] See C. civ articles 1130 *et seq*.

[5] Cass. Chambre commerciale (« **com.** »), May 14, 2025, n° 23-17.948.

[6] See Cour d'appel of Orléans, December 18, 2025, n° 23/0144 (additional ventilation for a restaurant not indicated to be determinative for the purchaser).

[7] Cass. com. Feb. 26, 2025, n° 23-18.119

[8] Cass. com. Jan. 21, 2026, n° 24-13.471.

[9] Cour d'appel of Paris, Jan. 22, 2026, n° 24/20013.

[10] Cour d'appel of Caen, Dec. 4, 2025, n° 24/01009 (claims against seller of small business rejected when the sales contract recited communication of financial statements).

[11] Cour d'appel of Toulouse, Dec. 9, 2025, n° 2 »/04428.

[12] See Cass. com. June 18, 2025 n° 23-23.208, discussed in text at note 15.

[13] C. civ. article 1137.

[14] Cour d'appel of Rennes, May 27, 2025, n° 24/03183.

[15] Cour d’appel of Paris, Sept. 14, 2023, n° 21/22491.

[16] Cass. com. June 18, 2025, n° 23-23.208 .

[17] See Code de commerce article L651-2.

[18] Cour d’appel of Dijon, July 10, 2025, n° 22/01112.

[19] Cour d’appel of Paris, June 26, 2025, n° 24/06835.