FRANCHISING CONSTRUCTIVE TERMINATION: QUIRK, QUAGMIRE OR A FRENCH SOLUTION?

By

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INTRODUCTION

Just as the key moments in a flight are the take-off and the landing, so for business franchises the key points are their formation and conclusion. Between these end points is the franchise relationship, usually intended to be long-term and renewable, but once the parties have entered that bond – an overarching issue is when and how the relationship may end. Termination before completion of the term could be catastrophic, especially for franchisees heavily invested in a franchised business network. Indeed, when a franchisee alleges severe mistreatment by the franchisor, it may consider its situation to be on par with that of actual franchise dissolution; it would allege constructive termination.

In the franchising context, constructive termination is a wrongful cessation of franchisee rights in which the franchise has not actually been terminated but the franchisor’s conduct towards the franchisee constitutes, in effect, a termination of the franchise. In *Mac's Shell Services Inc. v. Shell Oil Products*, the Supreme Court evaluated the availability of the doctrine of constructive termination for franchisees operating businesses governed by the Petroleum Marketing Practices Act (PMPA). The PMPA regulates the relationship between oil companies and independent franchised gas retailers. The case arose from the franchisor, Shell Oil, assigning its rights under multiple, pre-existing franchise agreements to a third party. The franchisees, Mac’s Shell and additional gas station owners, brought suit against Shell Oil for a claim of relief under PMPA on the grounds that the franchisor’s assignment of lease rights constituted constructive termination.

However, the Supreme Court unanimously denied the use of constructive termination for cases involving the PMPA. It held that allowing franchisees to obtain relief under the doctrine of constructive termination would ignore the scope of the PMPA. The Court articulated that the Act is limited to describing circumstances in which franchisors may terminate a franchise or decline renewal. The court stated that to accept a constructive termination claim before the franchisee has abandoned its franchise would require courts to articulate a standard for deciding which act was so serious that it constructively terminated the franchise, a standard, the Court concluded, that "simply evades coherent formulation." In effect, the Court decided abandonment is required because allowing the franchisee to do anything less would produce untenable, even impalpable, standards. The *Mac’s Shell* decision has had many pro-franchisor after-affects in that it limits franchisees’ relief only to situations where actual termination is found. This provides franchisees that are faced with wrongful nonrenewal of the franchise relationship or *Mac’s Shell*-like franchisor conduct with no recourse under the PMPA.

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The Court in *Mac’s Shell* was wrong. This article describes how the Court gave franchisors a way out that was never intended under the Petroleum Marketing Practices Act (PMPA).\(^\text{10}\) Under the PMPA, Congress only gave franchisors the ability to deny renewal of a franchise under very specific requirements.\(^\text{11}\) Franchisors must provide written notice and a specific reason for termination.\(^\text{12}\) The PMPA created a specific cause of action for franchisees that fell victim to improper treatment by franchisors.\(^\text{13}\) While the PMPA might not explicitly allow a claim of constructive termination,\(^\text{14}\) Congress did not necessarily intend the PMPA to be an all-encompassing, four-corners-only type of document.\(^\text{15}\)

Congress enacted the PMPA for the purpose of “protect[ing] franchisees from arbitrary or discriminatory termination or non renewal of their franchisees.”\(^\text{16}\) The Act was crafted to meet this goal by addressing three common concerns for franchisees: “(1) that franchisee independence may be undermined by the actual or threatened termination or nonrenewal to compel compliance with franchisor marketing policies; (2) that gross disparity of bargaining power may result in franchise agreements that are or tend to become contracts of adhesion; and (3) that termination or nonrenewal may disrupt the reasonable expectation of the parties that the franchise relationship will be a continuing one.”\(^\text{17}\)

This article opens with an examination of why the Supreme Court’s proposed solution of requiring abandonment is an unsound choice economically.\(^\text{18}\) Next, the article looks at how other courts handle this issue; it explores possible solutions from other nations, particularly France.\(^\text{19}\) The Article will explore how the French courts have authority to police the fairness of franchise contracts, the effects of contract breaches, and impose heightened requirements for termination clause enforcement. Through this model analysis, the Author will demonstrate why the French franchising model is the preferable approach to these common franchise issues, or at least will instill a sense of the types of solutions that could remedy our American system. Then, the article evaluates why constructive termination works by looking at the difficulties of proving actual termination,\(^\text{20}\) where the *Mac’s Shell* analysis went adrift.\(^\text{21}\) Lastly, the article posits as a conclusion that related fields of American law, and other nations’ franchise law, show that constructive termination presents a fairer, more efficient standard reflecting the particular parties’ expectations and, more generally, the norms for most franchised enterprises.

I. TERMINATION AND WHY ABANDONMENT IS NOT THE ANSWER ECONOMICALLY

To comprehend how the *Mac’s Shell* reasoning is flawed, one must start by examining the nature of franchising. In both France and the United States, franchising is “a business relationship based on contract law in which a franchised business grants a franchisee the rights to use its trademarks and proprietary information in exchange for royalties.”\(^\text{22}\) The legal requirements for franchises vary between the two countries, as do the definitions of officially recognized franchise systems.\(^\text{23}\) However, the types of franchise systems recognized in both countries are essentially the same, and parties entering into franchise relationships in either country do so for the same reasons.\(^\text{24}\) The motivations for franchising include expansion of capital for the franchisor and a greater chance at success for the franchisee due to the use of the franchisor’s tested business plan, training and educational programs, and advertising.\(^\text{25}\)

In all business there is risk. For franchised businesses, a monumental risk is termination. The prospect may be small, but the consequences are enormous, and so it is fair to conclude that, for all franchised systems and for all franchisees, termination is a brooding omnipresence.
Every franchise agreement created goes through a life cycle. After the franchisee fills out a franchise application and all background information is gathered, the franchisor may extend an offer, governed by specific terms, to the franchisee. Upon acceptance of that offer, the franchise contract commences, and from this birth onward, the parties cannot ignore the franchise’s potential demise. To do otherwise, is to ignore the proverbial 800-pound gorilla in the room: that the ultimate enforcement weapon in any franchisor’s hands is the ability to terminate a franchise.26 Throughout the term of a franchise, the overarching issue remains when, and for what, the franchisor may bring the franchise contract to an early conclusion. Conversely, when may a franchisor’s treatment of the franchisee, as if the latter were no longer a member of the franchisor’s network, give the franchisee the right to consider himself a terminated, former franchisee entitled to the same damage awards or other relief as if it were actually, typically expressly, terminated?

Unfortunately, Mac’s Shell provides no concrete answer to the practical problems of a real, albeit constructive termination and instead leaves the analysis buried in a jumble of jargon about “abandonment.” The Court’s analysis fails to address the flaws of compelling actual abandonment,27 as discussed in the newsletters and other popular press devoted to franchising.28 These flaws have been described by scholars as the “loss of significant relationship-specific investments, lack of available attractive alternatives, significant switching costs, and… a severe legal risk that the franchisee will not be able to recover damages for the aforementioned abandonment losses under a constructive termination claim.”29

However, the Court of Appeals did evaluate the issues that arise when requiring actual abandonment before Mac’s Shell went to the Supreme Court.30 When faced with actions that would ordinarily amount to constructive termination, but cannot be claimed as such under the PMPA because of Mac’s Shell, a franchisee may attempt to salvage whatever fragmented franchise relationship still exists as an effort to save their business costs and years of work. This effort is usually a waste because the new terms the franchisees are forced to operate under are materially different from those, which they established their franchise system under, and are usually designed to force the franchisee out of the relationship. Franchisee-plaintiffs in Marcoux described the hardships they endured in going into personal debt, filing for bankruptcy, etc.31 The Court noted that these outcomes frustrate the congressional plan for the PMPA by requiring a franchisee to go out of business before the PMPA can provide franchisee protection.32 Ultimately, requiring abandonment before allowing claims of constructive termination fails because it effectively strips the constructive termination doctrine of its very nature and purpose and calls into question whether “constructive” acts can even occur.33 In Mac’s Shell, the Supreme Court severely underestimates the abandonment costs for franchisees.34 For starters, the lump sum fee that franchisees pay upfront is often hefty.35 In addition, starting a franchise requires many investments specific to the venture, leaving franchisees contemplating abandonment to consider the large loss abandonment would require.36 These investments — known as idiosyncratic investments — hold little to no value if a franchisor-franchisee relationship goes sour due to these investments’ specific and tailored nature.37

One example of such an investment comes in property improvements. Franchisees often have to make improvements to their location, including walls, doors, cabinets, light fixtures and floor coverings.38 Potential franchisees face large investments in property improvements — up to $130,000 for a Subway franchise39 or possibly $175,000 for a Jimmy Johns franchise.40 Businessmen interested in potentially opening a Subway franchise could face anywhere from $59,000 to more than $134,000 in leasehold improvements. The crux for franchisees, however,
stems from the fact that franchisees usually are forced to rent the property from the franchisor. Thus, franchisees face a large sunk cost for property they not only fail to own, but - even worse - the setup gives the franchisor even more leverage and more reason for the franchisee to doubt wanting to abandon. Franchisees are also generally prohibited from selling property improvement to a third party.

Another cost unlikely to be recovered after abandonment is the time and money spent in training. Most franchisees will have to attend training held by the franchisor. The training is not short either: new McDonald’s franchisees will often train for more than two years and spend 2,000 hours in another McDonalds learning the ropes, completely on the new franchisee’s dime. In addition, training is often very specific to the franchisor’s business type. More generally, the majority of franchising duties still tend to fall upon the franchisee. As mentioned above, the franchisee must pay the franchisor the initial franchising fee, plus a percentage of revenues, as a pre-requisite to even using the franchising system and trademark goodwill. Even when the franchisee is given such usage rights, the franchisee is restricted in the types of uses allowed with the trademark. Then, these uses are even further limited by the requirements of franchisee compliance with operations manuals and system-wide standards. The franchisee’s failure to comply may result in a default on the franchise contract, which brings into play the risk of termination.

Certainly, the potential financial losses leave franchisees skittish about abandonment, which according to Mac’s Shell seems necessary for pursuing a constructive termination claim. Multiple statistical studies confirm this fear. Robert Ping conducted a survey of U.S. hardware retailers by mailing a questionnaire to a group selected from the subscription list of a well-known publication within the industry. The survey’s respondents showed that high exiting costs — similar to franchisees facing losses due to abandonment — play a large role in convincing franchisees to continue the relationship even when they are unsatisfied. Another Ping survey of U.S. retailers showed that hardware retailers who have few alternative options are even less likely to abandon relationships with their suppliers.

Unless the franchisee contracts otherwise, the franchise agreement is terminated when property is sold. Because the franchise does not follow the property, a franchisee may not sell the brand to someone else, but rather the buyer must then contract for a new franchise agreement with the franchisor in order to become a franchisee and gain the right to use the franchise brand. This often arises in the hotel franchising industry and further limits alternatives for a franchisee that is dissatisfied with his or her franchise agreement. Finally, Professors Hibbard, Kumar & Stern surveyed suppliers and dealers of consumer durables. The 626 questionnaires showed that as a dealer becomes more and more economically dependent on its supplier, the dealer is less likely to abandon the relationship even after destructive acts by a franchisor.

II. THE FRENCH CONNECTION

The United States franchising community may learn from, and perhaps incorporate concepts from, France. French franchising is among the oldest, most thoroughly entrenched systems in the world. Indeed, the growth of French franchising has been tremendous. In 1971, just 34 domestic franchisors operated in France; within six years, the number had tripled to approximately 108 networks (with about 7,500 stores or sites). In the 15 years following (ending in 1992), the number had grown to 430 networks and 21,300 franchises. Steady growth continued throughout the 1990s and the following decade, with the franchisor numbers
ultimately tripling, and the number of franchisees increasing 250% by the start of 2010.\textsuperscript{59} Finally, by 2011, there were 1,477 franchise networks, with 58,351 franchisees,\textsuperscript{60} an increase in one year of over 7% and 11%, respectively.\textsuperscript{61} International growth has also been exponential; recently, for example, during 2009 over 310 French networks exported their concepts abroad, placing their product or service expertise in over 10,000 stores throughout the world.\textsuperscript{62}

This movement abroad makes it difficult to determine how many French franchise contracts have been created, and perhaps also terminated throughout the world. However, one can estimate that the number must be in the hundreds of thousands. Indeed, France has more franchisors than every other European nation, and only five countries in the world have more franchisors than France: Brazil, China, India, South Korea, and the United States.\textsuperscript{63} Per capita, the French degree of franchising is far higher than any of these nations except South Korea.\textsuperscript{64} Moreover, while the United States continues to lead the world in numbers of franchisors (about 3,000 as of 2008) and franchisees (about 900,000),\textsuperscript{65} its growth rate has slowed compared to most other nations;\textsuperscript{66} larger, older American franchised systems now grow principally via foreign expansion,\textsuperscript{67} and some foreign nations’ franchising grows much faster than does the U.S. system.\textsuperscript{68}

a. **Expiration, Termination, Suspension, and Flawed Performance**

Generally, French judges have power to ensure that franchise contracts are fair.\textsuperscript{69} This supervision often operates in tandem with the duties of the franchise parties; for instance, termination of the franchise contract creates different duties for franchisor and franchisee.\textsuperscript{70} In the end, those duties and the qualities arising therefrom may give to the franchise network an “identity” and a “reputation.”\textsuperscript{71} Mandatory provisions, such as of confidentiality and non-competition, provide each party the opportunity to protect its own interests before, during and after the contract.\textsuperscript{72}

A typical French franchise contract is entered into for a specified duration that can vary from one year to ten years.\textsuperscript{73} A sample contract provision about the term of a French franchise contract states:

The contract is concluded for a duration of five years from its signature date. It can be tacitly renewed in the same condition, for a length of [whatever is stated in the contract], unless, at least six months before the deadline, one of the parties sends a notice by registered letter with acknowledgement of receipt that the present contract will be terminated.\textsuperscript{74}

This clause means that, if neither party takes any action (i.e., neither party sends a termination letter), the contract automatically renews for the length of time to which both sides agreed in the original contract.\textsuperscript{75}

Other methods of termination include annulment or rescission when circumstances vitiate consent.\textsuperscript{76} These circumstances in effect undermine one of the four requisites for a valid contract, consent (the others being capacity, a definite object, and lawful cause).\textsuperscript{77} The typical grounds for annulment or rescission include duress,\textsuperscript{78} misrepresentation (fraud),\textsuperscript{79} impracticability, and, in some cases, mistake.\textsuperscript{80} The contract is also deemed void due to illegality, undue influence, economic duress, or the franchisor having lied during its provision of pre-contractual information.\textsuperscript{81} Further, one party may terminate the contract when the other
party breaches the contract, i.e. fails to follow or deliver on any of the various provisions of the franchise agreement.82

In order for the contract to be officially deemed void or breached, however, French Civil Code Article 1184 requires a judicial pronouncement.83 In essence, this article states that until the judge officially declares the contract breached (and perhaps damages are awarded), the contract remains in effect.84 In the meantime, the party that moved the action to the courts also can choose to force the performance of the contract. Tremendous judicial discretion gives to French judges an “appreciation power” (un pouvoir d’appréciation) to assess and respond to the seriousness of an alleged breach.85 The judge can grant the breaching party additional time in view of the circumstances86; however, this extension cannot be renewed indefinitely,87 with even force majeure88 leading only to a brief suspension of deadlines, nothing more.89

A French judge may note the non-performance while ruling on a termination request due to non-performance of the contract’s terms90; she thus can set a non-extendable deadline by which time the non-performing party must take remedial actions.91 In a 1987 case, the Cour de Cassation affirmed a lower court’s decision to terminate a contract because the one-year deadline granted to the non-performing party to perform its obligations was not met.92 In case of total non-performance, however, a judicial termination will be decreed, unless a time extension is granted, as described above.93

When a party partially performs the contract, the judge will look at the seriousness of the breach to determine whether the whole contract is jeopardized, in which case termination is justified.94 In a 1996 case, the Commercial and Financial Chamber of the Cour de Cassation reviewed a lower court holding about the lease for a restaurant-nightclub property and an accompanying license to operate a pub on that property.95 The high court faulted the lower court’s failure to understand the remedies for partial breaches of the agreement,96 which was a type of contract referred to as a synallagmatic contract.97 Along these lines, a partial non-performance during the performance time limit allowed can justify a French judge’s decision to order a total, retroactive termination of the contract.

Judicial termination can also be sought after a notice, a mise en demeure, is performed. However, if the infringed obligation is an obligation de ne pas faire (“a duty to not do”), the notice will not be required due to the nature of this obligation.98 Courts may consider the document instituting the proceedings, l’acte introductif d’instance, to be sufficient notice.99

At times, judges may interpret the contract terms, the parties’ action, and the parties’ subsequent actions as implying the retroactive termination of the franchise agreement as if the franchise agreement had never existed.100 Each party will have to return what he has received from the other.101 In addition, a party can seek damages for any injury, so long as the presiding judge ultimately holds that the contract termination is insufficient to repair the creditor’s injury.102 The judge also might declare that both parties are liable if both failed to fulfill their respective contractual obligations. In that case, the judge will determine each party’s level of injury and terminate the contract.103 Alternatively, the parties can draft in their contracts a termination clause known as a clause résolutoire.

b. An Express Provision in the Contract: The Clause Résolutoire
An example of a resolution clause is as follows:

In case of breach of the present contract, it will automatically be terminated in the forms and conditions anticipated in article 19 [of this contract]. In case of serious or repeated faults, the contract will be
terminated automatically if no cure is done in a timeline of 48 hours or thirty days following the reception of a mail pointing out the termination provision, reproducing exactly its wording.

In addition, the parties agree that:

In application of the article L. 441-6 of the commerce code, the late penalty will be calculated on the basis of 1.5 times the legal interest rate, and increased by the possible collection fees:

- that the present contract will be automatically terminated if the franchisee comes to owe to the franchisor a sum superior or equal to .....Euros, 15 days after delivery of a payment order referencing the present termination provision;
- that the totality of the sum will become immediately payable and that the present contract will be automatically terminated in case of nonpayment … 15 days after delivery of a payment order referring to the present termination provision.104

In this provision, the franchisor can state several reasons to justify a termination, including non-payment of royalties, wrongful disclosure of sales and organization methods, bad management, failure to pay for goods delivered by the franchisor, refusal to implement controls, and noncompliance with non-competition provisions.105 This clause résolutoire is intended to deprive the judge of his appreciation power.107 Because, for these fact patterns, the judge cannot adequately measure a breach’s seriousness, the judge only can “record” the termination that happened automatically, no matter how severe or slight the breach in fact was.108 Hence, many, if not most, French franchise contracts have express termination provisions, clauses de résolution expresse, which anticipate the possibility of retroactive termination (résolution) in case of non-performance. However, the French courts demand absolute clarity from these resolution clauses.109 In effect, without a clear, absolute contractual provision, the judges may supervise the manner and substance of a termination as if the contractual clause did not exist. The judges will decide, according to the facts, whether the contract should be terminated or not.110

The resolution-clause-as-termination-provision can penalize only expressly stipulated obligations in the contract.111 In the words of the Cour de Cassation: “The termination provision can only be triggered by the failure to perform an express provision of the lease.”112 In that case, the litigation involved a commercial lease contract.113 The lessees were constructing a building on the rented premises, and the landlord invoked the termination provision to demand the lessees return the premises to their original state.114 However, such a requirement was not an expressly stipulated duty, which made the use of the termination provision inappropriate.115 In the case of commercial leases, the provision comes into play only after a notice, a mise en demeure, is given.116 Such notice must describe in detail the breaches, the reasons for the anticipated termination, and a deadline for curing the breaches. In a 1968 case, the Cour de Cassation stated that a mise en demeure has to indicate in a precise manner the alleged failures that must be remedied.117 In that case, the lessor was ill-advised on the nature and scope of the offenses that it had to stop.118 Therefore, he could not be deemed at fault for not having satisfied, within a deadline of one month, the injunction to which he had been subjected.119

Numerous commentators wish that the judge had the power to moderate the termination provision, as is the case for penalty provisions.120 The terminology here is somewhat confusing.
French law distinguishes résolution and résiliation. The main distinction is the effect of each regime for termination. A termination-résolution typically concerns one-time execution contracts such as the sale of a car between non-merchant individuals: The contract not only has no future effect, but past events are deemed never to have actually existed. Everything returns to the status quo ante.

For the contrats à exécution successive, that is, successively executed contracts such as a franchise contract or a lease agreement, there is no need for past events to be “destroyed.” That form of termination, called résiliation, only applies prospectively. For example, a franchisee could not request the reimbursement of royalties paid to the franchisor for the period of time not really challenged by the franchisee (when the franchise agreement functioned well). In effect, perhaps it is the difference in common law remedies between a breached executory contract and a breached executed contract. For the former, a “clause résolutoire” may make more sense as the contractual relationship has just started and performance issues have arisen immediately. As time passes and the contractual relationship becomes stable and long settled, then, in case of performance breaches, the résiliation regime would apply more effectively than resolution.

c. Special Solutions: The Non-Performance Exception and the Unilateral Termination

A temporary non-performance exception, exception d’inexécution, arises when a party refuses to perform its obligation because the other party did not perform its duties, either. This exception is a temporary device, but its effect is an immediate suspension of the contract. There is a public order mechanism (relève de l’ordre public) that proceeds from the structure of the contract itself. Therefore, as a public policy, one cannot draft a provision for their contract prohibiting a non-performance exception.

Unfortunately, no article in the Civil Code defines the non-performance exception. Only Article 1612 deals with it for the sale of goods. However, in French case law, the courts have acknowledged this right to suspend any expectation of continued performance from the party that has not received satisfaction. Some conditions still must be met for the non-performance execution to be valid. First, it must be a contrat synallagmatique, that is, a contract where there is consideration from both of the parties. Second, the breach must be grave, so as to justify the other party’s lack of performance (inexecution). When there is only a partial breach, the non-breaching party may only suspend its obligations in proportion to the non-performance of the breaching party’s obligations.

Another limited approach is the unilateral termination, which, under French law, is strictly an emergency measure, one for which a notice period, délai de préavis, or a notice to perform, mise en demeure, is not required. French contract law considers termination by judicial proclamation to be the norm. The extrajudicial unilateral termination, as an exception to this principle, is recognized only in cases of emergency where there are severely harmful consequences (current or potential) because of one of the contractual parties’ behavior. The present or possible injury justifies the other party’s unilateral termination of the contract, but at its “own risk and expense.” Continuing or threatened unlawful display of a trademark, or violation of public safety laws are situations that would surely constitute an emergency for invoking this exception. Refusal to pay royalties may fall short, however. The non-performing party’s acts have to be “serious” and urgent. Even if the contract has a termination clause, a
unilateral termination can be successfully challenged if a breach is not severe or the situation is not an emergency. 137

d. Constructive Termination in French Franchise Law

The French franchisor must perform its contractual obligations in good faith, including the provision of commercial and financial assistance to the franchisee for the duration of the contract. 138 Without that continual aid or know-how, the contract could be terminated. 139 However, that is not how the doctrine of constructive termination arises in the French franchising context. Instead, if a court finds that the alleged franchising arrangement is actually something else, such as a salary arrangement, rather than the independent contract associated with franchising, then constructive termination arises.

The concept of constructive termination is recognized in French law, but mostly in the employment arena, similarly to what is found in American law of constructive discharge. That is, the employer’s conducts towards the employee is so severe that the employee in effect dismisses herself. When a claim for constructive discharge of an employee is brought in the United States, courts evaluate the events surrounding the employee’s departure from employment. 140 There are no requirements that the employee object to the employers’ actions, etc. Under French law, the judge is not bound by the qualification chosen by the parties for the contract and the judge can re-qualify the contract; 141 so, if a judge determines that the matter at hand was actually employment in nature, the franchisee could thereby receive protection. 142 Ordinarily, that would be the case if the franchisee performs its duties in a place provided by the franchisor, if the franchisee sells products provided exclusively by the franchisor, and if prices are determined by the franchisor. 143 In essence, the constructive termination doctrine could then apply to a franchise agreement that has been reclassified as an employment contract; considering the franchisor’s behavior, the franchisee would be entitled to get damages. 144

French law is more likely to treat a franchisee as an employee or consumer, which permits the implementation of constructive termination or similar remedies. 145 Such interpretations are not prominent in U.S. law, and therefore the Mac’s Shell reasoning, if applied beyond the PMPA to business format franchising generally, could prove damaging to American franchising. As the franchisee-as-employee model is controversial and likely unworkable except in extreme cases, where it still remains controversial, 146 and as constructive termination – at least in it general sense – is not easily applied under French law, more guidance from afar, such as France, may have to come in areas as discussed above – performance suspensions, resolution clauses, unilateral termination principles, and other doctrines and processes.

III. Why Constructive Termination Works

a. The Difficulties of Proving Actual Termination

Shell Oil argued before the Supreme Court that it would be impossible to articulate a standard that could be used in constructive termination. 147 This argument proved persuasive to the Court, which concluded that conduct must cause the franchise to end in order for that behavior to be prohibited by the PMPA. 148 However, it is nearly impossible to prove actual termination, and, if actual termination occurs, the franchisee is left in a precarious financial state.

Under the Court’s analysis, termination does not occur until one of the parties demonstrates the intent to end its dealings with the other party. 149 While generally termination
can take many forms.\textsuperscript{150} in Mac’s Shell the Court cast aside constructive termination despite the fact it may be just as harmful to a contractual relationship as actual termination.\textsuperscript{151} Franchisees “should not have to wait until the end of the relationship to defend themselves from predatory practices by a franchisor.”\textsuperscript{152} The Court tries to advance the notion that franchisees do not necessarily have to go out of business to receive relief, pointing to the possibility of injunctive relief.\textsuperscript{153} However, in oral argument, Chief Justice Roberts noted that some decisions by franchisors could lead to franchisees “los[ing] the right to operate.”\textsuperscript{154} The Court, in effect, does not deny that franchisees may face unfair treatment, but overlooks or even outright rejects any remedies.

b. Where Mac’s Shell Went Astray

The Court’s analogies seem to be off-point. First, the Court compares the franchisor-franchisee relationship to employment law and constructive discharges.\textsuperscript{155} The constructive discharge doctrine grew out of courts’ need for a way to protect workers who have been forced out of their jobs without actually being fired.\textsuperscript{156} The standard for constructive discharge claims is whether “a reasonable person would have felt compelled to resign” based on the working conditions.\textsuperscript{157} A claim of constructive discharge carries a heavy burden of proof.\textsuperscript{158} In fact, the genesis of the constructive termination doctrine was intended to ease the concern of employees considering staying in jobs with poor working conditions but hoping to be fired so that they might sue for wrongful termination. The doctrine fights the waste, the lies, and the dysfunction associated with having employees who are already out the door psychologically nonetheless engage in pretense, remain – at least ostensibly – on the job, and simply wait. Without constructive termination, this sham may be necessary because an “honest” resignation would leave the employee without any remedy at all.\textsuperscript{159} There is a stark contrast between the similar-sounding concepts of constructive discharge and constructive termination. The constructive discharge doctrine grew from a desire to give people the power to leave their jobs without losing all remedies.\textsuperscript{160} Constructive termination, however, is designed to allow franchisees to pursue claims without “leaving the job.”\textsuperscript{161} So, while the Court may appear to have a persuasive comparison on the surface, these simply are not analogous fields. Indeed, in many circumstances, it may be far easier to find another job compared to starting anew after abandoning a franchise (and likely absorbing a large monetary loss in the process).\textsuperscript{162}

As stated above, there are many financial costs incurred by the franchisee in establishing itself in a franchise system. The franchisee must make a lump sum payment to acquire the right to use the trademark or franchise goodwill in addition to the costs in starting up a new establishment (i.e. hiring and training costs, purchasing supplies and goods, renovations, etc.). The resources involved in obtaining a new job, such as minor interview expenses and time, are incomparable to the massive expenditures necessary in beginning a new franchise relationship. With the lost capital from the terminated or unsuccessful franchise relationship, the franchisee may find itself in a vicious and unforgiving cycle of contributing large amounts of resources with little return or guarantee of success.

Second, the Supreme Court draws parallels to landlord-tenant law and constructive eviction.\textsuperscript{163} Here, again, the Court fails to step back and look at the entire landscape. While the Court is correct in its discussion of constructive eviction\textsuperscript{164} — a tenant must leave the property before pursuing such a claim\textsuperscript{165} — the Court fails to acknowledge that a tenant has other options. The tenant may bring an action for rent or rent abatement, show reliance on their landlord’s
promises as a justification for delaying their departure from the premises, or find a new place to live. Additionally, landlords can violate the implied warranty of habitability when they do not uphold their end of a leasehold agreement; there is no comparable implied warranty in the franchising context. While the legal doctrines have similarities, the matters at stake are far greater for the franchisee than for the tenant.

In fact, the Court may have missed an opportunity to make a proper analogy across legal doctrines. Contract law’s doctrine of anticipatory breaches went seemingly unmentioned in briefs or in oral arguments throughout the case. In this situation, a party having a present duty of performance may violate a contract under the doctrine of breach by anticipatory repudiation. Here, a party’s words or actions before a substantive breach occurs can constitute a refusal to perform, etc. at the time they were made or done. For anticipatory breaches, court must decide whether the non-violating party should continue in the contract based off of the extent of the breach. This type of evaluation is comparable to France’s treatment of franchise terminations, which also looks at whether continuing in the relationship is possible and beneficial. Looking to contract law concepts should help ease the Court’s fears about setting a particular standard for constructive termination, as it will not be paving new ground after all.

Judges and commentators have exposed concern over whether constructive termination claims are better resolved through other causes of action. The Supreme Court reasoned that the availability of state law claims allows other avenues for franchisees to recover. The Court’s analysis accepted Shell Oil’s argument that federal constructive termination claims were, to put it colloquially, “piling on.” Thus, the Court reasoned, breach of contract law may be enough for franchisees. However, both Justices Roberts and Stevens pointed out on separate occasions that contract law and constructive termination need not be mutually exclusive. Furthermore, a strong counterpoint to the “piling on” argument of Shell Oil’s attorney would be Congress’ own expression that the PMPA’s statutory language does not limit judicial discretion to provide effective, equitable relief.

Mac’s Shell simply may not have been the best test case for constructive termination proponents. Those franchisees that sued on nonrenewal claims, despite later agreeing to renewal contracts, bolstered the Shell’s argument against recognizing constructive termination claims. Also, the Mac’s Shell attorney faced extensive questioning by the justices with few strong answers; perhaps at least one judicial ally on the high court, if not at the oral argument then at least in the opinion itself, would have ensured if not a different holding at least a more sound opinion – one that addressed all relevant issues and perhaps even considered the opinion’s tone with respect to a fractured industry (gasoline dealerships) and a structurally compromised business model (franchising itself).

c. American Case Law in Favor of Constructive Termination; Other Policy Grounds for a Counterweight to the Mac’s Shell Holding

Existing case law shows the suitability of constructive termination in the franchising context. In fact, there is much judicial authority backing such claims. The First Circuit’s opinion in Mac’s Shell, although certainly not authority, has reasoning that remains accessible to future litigants. The First Circuit held that the claim of constructive nonrenewal of the lease under PMPA was not available for the franchisees because of the fact they signed a lease renewal, instead of ruling out the claim of constructive termination as a whole. It’s holding was based on the policy concerns that allowing a party to “sign a contract and simultaneously challenge it” was contrary to the goals of the PMPA. Indeed, one could say that the Circuit
Court’s analysis was stronger than the facts of the case perhaps merited, while the Supreme Court’s reasoning was the opposite: weaker and with gaps in its consideration of the constructive termination doctrine because of (1) the factual peculiarities of the Mac’s Shell case, and (2) the absence of a dissenting opinion that may have compelled the high court to consider all the ramifications of its holding. Based on the First Circuit’s analysis of the applicability of constructive termination when the franchisee has signed a renewal agreement, it seems unnecessary for the Court to have analyzed the applicability of the doctrine as a whole against the spectrum of PMPA cases.

The First Circuit is not alone in deciding this issue far differently than the Supreme Court did in Mac’s Shell. Four other circuits — the Second, Fourth, Ninth, and Tenth — also sided with franchisees on the Mac’s Shell issues and similar termination controversies. In Peterreit v. S.B. Thomas Inc., the Second Circuit found that “total abrogation” is not needed for a franchise to be effectively terminated. While that court also cautioned that not every negative impact would be considered a constructive termination, it put forth the very argument supported in this article: requiring abandonment would deal a near-fatal blow to the doctrine of constructive termination. The Second Circuit even went so far as to offer some guidance on constructive termination analysis: “a franchisor may take action that results in less than the complete destruction of a franchisee’s business, but yet [sic] so greatly reduces the value of the franchise as to epitomize the very abuse of disparity in economic power that the Act seeks to prevent.”

In Barnes v. Gulf Oil Corp., the Fourth Circuit cited directly from the PMPA’s legislative history while finding that part of the reasoning for PMPA’s passing stemmed from franchisors coercing franchisees to comply with franchisor’s marketing policies. The Fourth Circuit held that assignment of a franchise that increases the retailer’s cost of gasoline to higher than the franchisor’s stipulated price gives rise to a cause of action. Similarly, in Pro Sales v. Texaco, the Ninth Circuit looked to the PMPA’s legislative history when deciding in a franchisee’s favor. The Ninth Circuit went even further, however, by allowing a cause of action when a renewal contract was signed under protest. Finally, in American Motors v. Semke, the Tenth Circuit made an analogy to good faith dealing. The court stated that a franchisor cannot pressure a franchise to take supplies the franchisee does not want or cannot use. The Tenth Circuit found it reasonable to interpret the act as allowing a cause of action based on coercive or intimidating acts.

All of these holdings present a glimmer of light as to future franchise termination jurisprudence. Likewise, the French law shows that – even without a direct reversal of the constructive termination in Mac’s Shell – American courts can construct a more equitable and efficient legal environment for franchised businesses.

IV. CONCLUSION

The Court’s decision in Mac’s Shell to disallow constructive termination inappropriately withdrew a major franchisee protection. Effectively, franchisees have no recourse under the PMPA for constructive termination unless the franchisor has abandoned the franchise system entirely. The requirement of abandonment before constructive termination is out of touch with the concept of constructive termination and fails to consider the associated economic penalties. There are many doctrines within the American legal system that deal with the concept of “constructively” implying an action; for example, constructive eviction, constructive notice, etc. The idea behind these doctrines is to impute the action upon an individual without requiring the
full showing for the actual action. Requiring actual abandonment before allowing a claim of constructive termination violates the entire policy behind the doctrine of constructive termination.

Additionally, the United States does not have many of the other pro-franchisee aspects which French law possesses, such as savoir-faire, territorial protections, goodwill, and indemnity, among others. Thus, constructive termination might not be as necessary a concept in France as in the U.S., where pro-franchisor written agreements dominate the franchising arena. A decision such as *Mac’s Shell* therefore requires other considerations for franchisees in order to maintain hospitable conditions for their dealing with franchisors. American policymakers should learn from the French legal system which, while in one respect fostering a hostile environment for franchisees through its treatment of constructive termination, has remedied that with other considerations not available in the United States. The French legal system has established mechanisms such that the judiciary has the ability to monitor the franchise system and terminations, as well as other types contractual relationships and breaches. The *Mac’s Shell* requirement of abandonment strips away any judicial power to find a termination of a PMPA-governed system based off of a franchisors’ actions. Thus, no matter what actions a franchisor is taking against its franchisee, the court cannot intervene to uphold the franchisee’s rights. While the French case law related to franchise termination may not fit directly into the American legal system, the pro-franchisee morale may be an easier fit. With the economic benefits franchise systems bring to the U.S. economy, it is important to encourage the franchisees that make these enterprises possible to continue in their efforts. Allowing franchisees to seek recourse through the avenue of a constructive termination claim is one method towards reaching this goal.

2 See 62B Am. Jur. 2d Private Franchise Contracts § 319; *see also* *Black’s Law Dictionary* 356 (9th ed. 2009) (noting that “constructive” means “[l]egally imputed” and is a “legal fiction” that courts usually grant “for equitable reasons”).
4 Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2841 (1978). The Court tries to toe the line by declaring numerous times that it is not closing the door on constructive termination claims. *See e.g.*, 130 S. Ct. at 1260, n. 8 (“we do not decide whether the PMPA contemplates claims for constructive termination”). However, throughout *Mac’s Shell* — and even later in the same sentence of that same footnote — the Court *constructively* eviscerates any possibility of constructive termination claims by dismissing the proposed legal standards. *Id.* (“we observe that the Court of Appeals’ unwillingness or inability to establish a more concrete standard underscores the difficulties and inherent contradictions involved in crafting a standard for finding a ‘termination’ when no termination has in fact occurred”).
5 559 U.S. at 175.
6 *Id.*
7 *Id.* at 176.
8 559 U.S. at 176. In this regard, the Court adopts Shell’s argument. Brief for Respondent at 10, *Mac’s Shell Services, Inc. v. Shell Oil Prods.*, 559 U.S. 175 (2010). Such strong language probably hurts any chances of lower courts looking at *Mac’s Shell* as particularly narrow or fact-driven.
9 *Supra* note 3.
12 *Id.*
14 Although curiously, the PMPA’s statute of limitations clause for claims under §2805(a) would seem to suggest termination might not be necessary to pursue the claim as the PMPA requires claims to be brought within one year.
after:
“(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or
(2) the date the franchisor fails to comply with the requirements of section 2802, 2803, or 2807 of this title.” §2805(a)(1)-(2).

15 Ann Hurwitz, Franchisor Market Withdrawal: “Good Cause” for Termination?, 7 FRANCHISE L.J. 3, 26 (1987). Congress elected to leave some discretion to the courts. Id. (“Congress decided to ‘leave to the courts the task of resorting to traditional principles of equity to maximize attainment of the competing statutory objectives . . .’”); see also PMPA, 15 U.S.C. § 2805(b).


17 Id.

18 See infra, part I.

19 See infra, part II.

20 See infra, part II-A.

21 See infra, part II-B.


23 Emerson, A French Comparison, supra note 22, at 320-23, 330-33. The United States does not have uniform requirements across all 50 states – about 11 states have specific franchise laws and the others use the Federal Trade Commission’s requirements for franchises. The FTC defines a franchise as a continuing commercial relationship where the franchise seller, orally or in writing, promises (1) that the franchisee will have the right to operate a business identified by the franchisor’s trademark, or to offer, sell, or distribute goods or services with the franchisor’s trademark; (2) that the franchisor can exert significant control over the franchisee’s method of operation or provide significant assistance in the same; (3) and that before commencing operations as a franchisee, the latter is required to make payment or commit to make a payment to the franchisor. John R.F. Baer & Susan Grueneberg, United States of America, in International Franchise Sales Laws United States-7 (Andrew P. Loewinger & Michael K. Lindsey eds., 2011). The French Franchise Federation now defines franchises as requiring (1) a system of marketing goods/service/technology, (2) based upon a close, ongoing collaboration, (3) whereby the franchisor grants to the franchisee the right to conduct business in accordance with the franchisor’s concept. Emmanuel Schulte, France, in GETTING THE DEAL THROUGH: FRANCHISE 2013, 74, 75 (Philip F. Zeidman ed., 2012), available at http://www.franchise.org//uploadedFiles/F2013%20france.pdf.

24 Id. at 330.

25 Id.

26 Such an enforcement mechanism is necessary so that the franchisor can better control the quality of the franchised product or service and maximize revenues for the franchisee and itself. Jonathon Klick, et al., Federalism, Variation, and State Regulation of Franchise Termination 3 ENTREPRENEURIAL BUS. L.J. 355, 359 (2009); 2 W. Michael Garner, Franchise and Distribution Law and Practice, §10:5 (2013).


28 See W. Michael Garner, Fraud, Breach and Wrongful Termination, BLUEMAU MAU, OCT. 13, 2010, available at http://www.bluemaumau.org/fraud_breach_and_wrongful_termination (“franchisees should not have to wait until the end of the relationship to defend themselves from predatory practices by a franchisor”).

29 See Uri Benoliel, Rethinking the U.S. Supreme Court’s Abandonment Requirement in Mac’s Shell Service Inc. v. Shell Oil Products, 43 RUTGERS L.J. 77 (2011)

30 See generally Marcoux v. Shell Oil Prods, 524 F.3d 33 (1st Cir 2010).

31 Id. at 46.

32 Id. See also Pro Sales, Inc. v. Texaco, U.S.A., Div. of Texaco, Inc., 792 F.2d 1394 (9th Cir. 1986) (discussing the policy rationales underlying the PMPA).

33 High abandonment costs make the Supreme Court’s requirement of abandonment before recovery for constructive termination unreasonable and problematic. See generally Uri Benoliel, Rethinking the U.S. Supreme Court’s Abandonment Requirement in Mac’s Shell Service Inc. v. Shell Oil Products, 43 RUTGERS L.J. 77 (2011) (discussing how franchisee abandonment costs often include loss of significant relationship-specific investments, lack of available attractive alternatives, significant switching costs, and severe legal uncertainty).
“Instead of closing its doors, a franchisee might feel compelled to sell business at a loss to mitigate its damages.” Carmen D. Caruso, Franchisee Claims for Constructive Termination Under the PMPA After Mac’s Shell, 30 FRANCHISE L.J. 139, 141 (Winter 2011); see also Benoliel, supra note 33, at 78 (questioning the Court’s assumption regarding franchisee abandonment costs).


Abandonment or even failing to meet every one of the franchisor’s terms could lead to eviction from the property. Benoliel, supra note 33, at 80.

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44 Emerson, supra note 41, at 652; Gillian K. Hadfield, Problematic Relations: Franchising and the Law of Incomplete Contracts, 42 STAN. L. REV. 927, 941 (1990)).


46 New KFC franchisees learn how to run a KFC restaurant: preparing the food, how to fix the equipment and how to train employees. Benoliel, supra note 33, at 85 (citing Robert T. Justis & Peng S. Chan, Training for Franchise Management, 29 J. SMALL BUS. MGMT. 87, 90 (1991)).


48 Emerson, supra note 41, at 234.

49 Benoliel, supra note 33, at 92 (citing Robert A. Ping Jr., The Effects of Satisfaction and Structural Constraints on Retailer Exiting, Voice, Loyalty, Opportunism, and Neglect, 69 J. RETAILING 320, 327, 329, 340 (1993)).


51 Benoliel, supra note 33, at 92 (citing Jonathan D. Hibbard, Nirmalya Kumar, & Louis W. Stern, Examining the Impact of Destructive Acts in Marketing Channel Relationship, 38 J. MARKETING RES. 45 (2001)).

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FEDERATION FRANÇAISE, supra, note 55, at 50 (2006) (recording that by 1997, 2001, and 2005, the franchisor and franchisee numbers had increased, respectively, to 517/28851, 653/32240, and 929/39510; see also Résultats de la 8e enquête annuelle sur la franchise [Results of the 8th Annual Survey on Franchising], FÉDÉRATION FRANÇAISE DE LA FRANCHISE, http://www.franchise-fff.com/base-documentaire/finish/77/903.html (last visited Oct. 2, 2013) (indicating that in 2011 the number of franchisors in France was 1,477 by September 2011, with the number of franchisees pegged at 58,351).


FRENCH FRANCHISING FEDERATION - 2010, supra note 61, at 55 (313 French franchisors operating franchises outside of France by the start of 2010).

Id. at 57. Compared to France’s 1,369 franchised networks, the second and third highest European nations were Spain (960) and Germany (910), with the five leading countries being United States (3,000), China (2,600), South Korea (2,426), India (1,800), and Brazil (1,379). Id. Still, there is some question whether India’s or South Korea’s number of franchisors is even close to the above number, and whether Brazil has yet overtaken France. See JURIS INT’L, THE UNIDROIT [THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW] GUIDE TO INTERNATIONAL MASTER FRANCHISE ARRANGEMENTS Annex 2 (2d ed. 2007) (putting India’s and Brazil’s number of franchisors below the French number, and not providing any information about South Korea).


That figure is derived by taking the franchise statistics already given and comparing to national populations. For the latter, see WORLD ATLAS, COUNTRIES OF THE WORLD, http://www.worldatlas.com/aatlas/populations/cypopls.html#.UnXgSOLAHZQ (last visited Nov. 2, 2013)) (2012 figures).

Id. (showing that the United States greatly outnumbers every other country, even extremely populous nations such as China and India, in both franchisors and franchisees); Robert W. Emerson, Franchise Encroachment, 47 AM. BUS. L.J. 191, 196-97 & n.24.


Emerson, supra note 65, at 200 & n.43.

Id. at 196 n.23.
Generally, franchise contract provisions have to be “legitimate, necessary and proportionate” regarding the interests of both the contractual parties and, at a broader level, the franchise network. See Gilles Amédée-Manesme, *La vraie nature juridique du fonds de commerce du franchisé et l’impact de l’appartenance à un réseau en cas de cession de ce fonds de commerce*, LA SEMAINE JURIDIQUE – ENTREPRISE ET AFFAIRES, Feb. 4, 2010, Franchise No. 5-1110.


70 *Id.* at 363-65 (discussing the franchisor’s and ex-franchisees’ rights and duties concerning the distinctive signs of the franchise network, such as the trademarks).

71 *Id.* at 362-73; PHILIPPE LE TOURNEAU, *LES CONTRATS DE FRANCHISAGE* 211-16, 297-99 & 302-05 (2nd ed. 2007) (discussing trademarks during the course of the franchise relationship as well as upon termination; also considering post-termination restrictions on competition).

72 If a “buying exclusivity” (i.e., exclusivité d’achat) provision is provided in the contract, French commercial code fixes a maximum duration of 10 years. CODE DE COMMERCE [C. COM.] art. L. 330-1. If Community Law is applicable, the buying exclusivity can’t last more than 5 years, but it should be possible to extend it because of the transmission of the “know-how” Commission Notice: Guidelines on Vertical Restraints, 2000 J.O. (C 291) 40.

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75 DICTIONNAIRE PERMANENT DROIT DES AFFAIRES 1372-73 n.85 (May 2006).

76 *Id.*; CODE CIVIL [C. CIV.] art. 1117.

77 C. civ. art. 1108.


79 CODE CIVIL [C. CIV.], supra note 78, art. 1116.

80 CODE CIVIL [C. CIV.], supra note 78, art. 1110. Mistake only invalidates consent when the mistake rests on the very substance of the thing which is the object of the contract. *Id.*

81 DICTIONNAIRE PERMANENT DROIT DES AFFAIRES, supra note 75, at 1372-73 n.85. The non-performance of the pre-contractual information provision will be qualified as a “dol” (willful deception or deceit). CODE CIVIL [C.civ.] art. 1108. “No cause” and “when territory of franchisee is not determined” are also given as reasons for voidability. Commercial Code Article L.330-3 and/ or Cour de cassation [Cass.] [supreme court for judicial matters] com., Feb. 12, 2008, n°07-10.462, JurisData 2008-042780. Also, an interesting article on this matter: La Semaine Juridique Entreprises et Affaires n°19, May 7, 2009, 1479 (document is attached in my email).

82 FRANÇOIS-LUC SIMON, *THEORY AND PRACTICE OF FRANCHISE LAW* 338 (2009). Under Article 1184 of the Code Civil, the non-breaching party may either force the other party, when possible, to perform its obligation or request termination with damages and interest. CODE CIVIL [C.civ.] art. 1184.

83 SIMON, supra note 82, at 339; CODE CIVIL [C.civ.], supra note 78, art. 1184. The Article declares:

La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l’une des deux parties ne satisfera point à son engagement.

Dans ce cas, le contrat n’est point résolu de plein droit. La partie envers laquelle l’engagement n’a point été exécuté, a le choix ou de forcer l’autre à l’exécution de la convention lorsqu’elle est possible, ou d’en demander la résolution avec dommages et intérêts.

La résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances.

CODE CIVIL [C. CIV.], supra note 78, art. 1184.

84 Cour de cassation [Cass.] [supreme court for judicial matters] 1e, 3e civ., Nov. 22, 1983, Bull. civ. III, No. 239. There are certain cases, however, in which a judicial pronouncement is unnecessary. The most common is the non-performance exception, l’exception d’inexécution, which permits a party to suspend temporarily its performance of the contract while it, in effect, awaits the overdue performance of the other side. ALAIN BÉNABENT, *DROIT CIVIL : LES OBLIGATIONS* 500 (10th ed. 2005). The French courts have recognized the non-performance exception on their own, with the only Civil Code provision directly on point concerning contracts for the sale of goods. CODE CIVIL.
The seller is not obliged to deliver the thing where the buyer does not pay the price of it unless the seller has granted him time for the payment.

Note that in the 1983 Cour de Cassation decision, the French high court held that the court of appeal did not properly analyze the severity of the alleged breach (it was a sales contract), hence the Cour de Cassation reversed the court of appeal decision and put the parties back in the situation they were in before the court of appeal decision.

For example, if the terms of a contract require performance by a particular time, and if the breaching party fails to perform adequately but could correct that failure either before the contractual performance time expires or at least well before the non-breaching party needed that performance (e.g., in order to meet its own duties to others), the court could give the breaching party a set period, within those time constraints, within which it must correct the failed performance.

Denying a renewal of the deadline, the Cour de Cassation (the French Supreme Court) overturned a lower appeals court decision by stating that the court could only suspend a deadline, not set another definite, second extension.

A French term literally meaning “superior force,” this legal concept concerns an outside act which could excuse a party from contractual obligation: “An event or effect that can be neither anticipated nor controlled.” BLACK’S LAW DICTIONARY 718 (9th ed. 2009). Force majeure includes both acts of nature, such as floods, and acts of people, such as riots or strikes.

The term is found in both American and French law. In the French law of obligations, a breach of contract may be excused if the nonperformance of a contractually required result arises from force majeure - an irresistible, unforeseeable event outside the sphere (e.g., activities) for which the obliged party is responsible.

Exercising their sovereign power of assessment, trial judges that deem one party’s failure to meet its contractual obligations not serious enough to have a judicially ordered retroactive or prospective termination of the contract, do not change the object of their inquiry related to these ends [an ordered termination], when they, in accordance with the circumstances of the case, determine the conditions and deadlines of performance.

Exercising their sovereign power of assessment, trial judges that deem one
of this holding is as follows: A judge can decide there is (should be) a termination even in a case of only partial non-performance, as long as the non-performance concerns a substantial obligation of those entering into a contract. Note that the court faulted the lower court for not understanding its own powers in termination cases. *Id.* at ___.

97 In Civil Law, because consideration is not required for a valid, enforceable contract, the term “synallagmatic contract” applies to those arrangements which go beyond the enforceable but quite possibly one-sided Civil Law “deals” lacking reciprocity (e.g., promises to make a gift) and instead reaches those “mutual agreements” (the Greek meaning of *synallagma*) where a genuinely reciprocal obligation exists – where both parties to the contract have, in effect, agreed to correlative obligations, what common law jurisdictions would refer to as a bilateral contract. See *BLACK’S LAW DICTIONARY* 367 (9th ed. 2009).

98 I.e., the infringement of this obligation is done directly by accomplishing the prohibited act(s) stipulated in the contract. *Cour de cassation* [Cass.] [supreme court for judicial matters] 3e civ., Oct. 25, 1968 n° JurisData: 1968-000414 (Fr.).

99 Therefore, a summons or some other writ – e.g., something similar to an injunction - will not be needed. *Cour de cassation* [Cass.] [supreme court for judicial matters] 1e civ., Jan. 23, 2001 n°98-22.760 (Fr.).

100 *Cour de cassation* [Cass.] [supreme court for judicial matters] civ., May 4, 1898 (Fr.). What may make this confusing to English-speaking common law practitioners is the use of the term, “condition subsequent,” for parties’ behavior that, under American law, seems to be as much a breach or a discharge by operation of law, not necessarily something usually more specific. *CODE CIVIL* [C.civ.] art. 1183 al.1 (“A condition subsequent is one which, when it is fulfilled, brings about the revocation of the obligation, and which puts things back in the same condition as if the obligation had not existed”).

101 *CODE CIVIL* [C.civ.] art. 1183 al.2: “It does not suspend the fulfillment of the obligation; it only compels the creditor to return what he has received, in the case where the event contemplated by the condition happens”.

102 Article 1147 of the Civil Code states: “A debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part.” *CODE CIVIL* [C.civ.] art. 1147.


104 *DICTIONNAIRE PERMANENT, DROIT DES AFFAIRES, CONTRAT DE FRANCHISE* (Nov. 2005), p. 5312A, n.27 (*En cas de violation du présent contrat, celui-ci sera résolu de plein droit dans les conditions et formes prévues à l’article 19. De même, en cas de fautes graves ou répétées, le contrat sera résolu de plein droit si aucune régularisation n’intervient dans un délai de 48h ou de trente jours suivant la réception d’un courrier visant la présente clause résolutoire, en en reproduisant expressément les termes.* Les parties conviennent en outre que:

*En application de l’article L.446-6 du code de commerce, les pénalités de retard seront calculées sur la base de 1,5 fois le taux de l’intérêt légal, et majorées des frais éventuels de recouvrement :

-que le présent contrat sera résolu de plein droit si le franchisé vient à devoir au franchiseur une somme supérieure ou égale à......Euros, 15 jours après délivrance d’un commandement de payer visant la présente clause résolutoire ;

-que la totalité de la somme deviendra immédiatement exigible et que le présent contrat sera résolu de plein droit en cas de non-paiement...15 jours après délivrance d’un commandement de payer visant la clause résolutoire) (trans. by Robert W. Emerson).

105 *DICTIONNAIRE PERMANENT DROIT DES AFFAIRES*, *supra* note 75, at 1373 n.86. No jurisprudence to illustrate these cases. It might be explained by the fact that these cases never went to court, and we know about them simply through the contract itself.

106 C.A. Douai, 2e civ., Déc. 1991, Schildt c/ Sté Les Fils de Louis Malliez « Phil dar », *Petites affiches*, July 1, 1992, p.24, note O. Gant). Although less likely to be in a contract clause inasmuch as it is the franchisor who drafts the franchise agreement, the franchisee can also request termination in several situations, including when the franchisor has been competing with the franchisee, directly or indirectly, when the franchisor refuses to supply franchisee or to give assistance, or when the franchisee does not enough advertisement for his franchise network. *Cour de cassation* [Cass.] [supreme court for judicial matters] com., Feb. 19, 1991, n° 88-19.809, Sté Lonaparc c/Hug (no supplies or assistance); *Cour de cassation* [Cass.] [supreme court for judicial matters] com., July 12, 1993, n° 91-20.540, Sté Etienne Aligner France c/Sté Japy (insufficient advertising).

107 *BENABENT*, *supra* note 84, at 272. Other commentators, however, emphasize that the clause must be undertaken in good faith and that its control over judicial prerogatives may be limited. *LE TOURNEAU*, *supra* note 72, at 287.
BÉNABENT, *supra* note 84, at 272. This “record” can be performed through a procedure called *référé*. It is an emergency, oral and simplified procedure, as provided in a number of articles, particularly Articles 145 and 808, of the French Civil Procedure Code. AUGUSTIN AYNES & XAVIER VUITTON, *DROIT DE LA PREUVE : PRINCIPES ET MISE EN ŒUVRE PROCESSUELLE* 252-57 (2013); SERGE GUINCHARD, CECILE CHAINAIS & FREDERIQUE FERRAND, *PROCEDURE CIVILE: DROIT INTERNE ET DROIT DE L’UNION EUROPEENNE* 1362-68 (31st ed. 2012).

BÉNABENT, *supra* note 84, at 273. As stated by the Cour de Cassation in a case issuing the principle (arrêt de principe), “The automatic termination provision, that takes away from the judges the ability to oversee the agreement’s termination, must be expressed in an unequivocal manner, and if not so expressed the judges recover their power to oversee the termination.” Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 25, 1986, Bull. civ. 1, No. 279 (trans. by Robert W. Emerson) (*La clause résolutoire de plein droit, qui permet de soustraire la résolution d’une convention à l’appréciation des juges, doit être exprimée de manière non équivoque, faute de quoi les juges recouvrent leur pouvoir d’appréciation*).

Cour de cassation [Cass.] [supreme court for judicial matters] Bull.civ.1, November 25, 1986, Revue trimestrielle de droit civil 1986. In this case, a woman sold a house to her niece for 30,000 francs, with the buyer paying 5,000 francs in cash and the balance to be paid via the buyer’s payment of the seller’s water, electricity and heating bills for the seller’s own house. The parties inserted a termination provision in the contract:

If the charges are not performed, and 30 days after a simple notice containing a declaration by the seller of her intent to use the benefit of this provision, if the charges remain unpaid, the seller will have the right, if it appears good to her, to let the termination of the sale be decreed against the non-performing purchasers.

*Id.* (trans. by Robert W. Emerson) (*A défaut d’exécution des charges convenues et trente jours après une simple mise en demeure d’exécuter contenant déclaration par la venderesse de son intention de se prévaloir du bénéfice de cette clause et restée sans effet, celle-ci aura le droit, si bon lui semble, de faire prononcer à l’encontre des acquéreurs défaillants la résolution de la vente, nonobstant l’offre postérieure d’exécution*). This provision was deemed to be equivocal, and that allowed the court to use its power of appreciation and set its own terms for termination.

Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., May 18, 1988, Bull. civ., III, No. 94. *Id.* (*La clause résolutoire ne peut être mise en œuvre que pour un manquement à une stipulation expresse du bail*).

In the absence of an express provision, the termination provision cannot be triggered (Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Ap. 29,1985, Drefenois 1986, art.33700 spéc. n°32, p.458, note Vermelle (Fr.). Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., June 11, 1986, Bull. civ. III, n°92 (Fr.) for an application of this rule in another context). Also, the termination provision could only be triggered due to the infringement of an express provision, but not to the infringement of the law (except if there is an express reference to it or them in the contract) Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., June 11, 1986, Bull. civ. III n°92, p.73 (Fr.): in this case, a sub-lease commercial contract was involved. Sub-lease is forbidden by Article 21 of the Decree 53-960 of September 30, 1953 ruling the relationship between lessors and lessees regarding the renewal of residential leases, or of leases for commercial, industrial, or craftsman premises. The Court of Cassation ruled that the lessor could not trigger the termination contract because neither sub-lease was forbidden by an express provision nor an express provision was referring to the Decree.


Rémi Delforge (Henri-Xavier Ortoli, in *INTERNATIONAL FRANCHISE SALES LAW* Fra-1, Fra-24 (eds. Andrew P. Loewinger & Michael K. Lindsey, 2006) (noting that, unless the franchise contract specifically expresses that a particular default or poor performance is a type of complete breach for which no notice need be afforded to the breaching party, then the innocent party must first provide the breacher with notice and a chance to cure). Thus, French law distinguishes a “clause résolutoire” contract that may not need a “mise en demeure” (a notice) from others which do. The former are said to be “de plein droit,” meaning that the nonperformance automatically terminate the contract. See Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Nov. 28, 1968, Bull. civ. III, No. 498 (discussing the content of the notice).

Id. The provision loses its automatic effect if the other party also fails to perform its own obligation. Furthermore, due to the reciprocity of the wrongs, the judges get their power of appreciation back. BÉNABENT, supra note 84, at 472; Cour de cassation [Cass.] [supreme court for judicial matters] com., Mar. 17, 1992, Bull. civ. IV, No. 476. In cases of bad faith, the courts increasingly tend to suspend the effect of that provision. Cour de cassation [Cass.] [supreme court for judicial matters] 1e, Jan. 31, 1995, n°92-20.654; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 16, 1999, n°96-21.997; CODE CIVIL [C.civ] art. 1134 al.3.


BENABENT, supra note 84, at 268.


That distinguishes this prospective termination (résiliation) from one which even has a retroactive effect (résolution).

BLACK’S LAW DICTIONARY 369 (9th ed. 2009) (defining “executed contract” and “executory contract”).

For a discussion of synallagmatic contracts, see infra note 97.

E.g., health code regulations for food preparation, or safety standards for workers.


Brief for Respondent at 11-12, Mac’s Shell Services Inc. v. Shell Oil Prods., 559 U.S. 175 (2010).

Mac’s Shell, 559 U.S. at 175. The Court’s reasoning is misguided. Drastically raising the rent essentially does force an end to the franchise.

Id. This accords with the usual principles for express and constructive termination. ABA Section of Antitrust Law, Franchise and Dealership Termination Handbook 14 (2d ed. 2012).

The ABA Handbook references three of many possibilities for such termination: a letter declaring the contract to be over, refusing to pass along supplies, or a franchisee closing its doors. ABA Section of Antitrust Law, supra note 149, at 14.
If a franchisor was responsible for sending all supplies to the franchisee, and the franchisor cuts that supply chain (or even drastically reduces the flow), the franchisee could very well fail without any express declaration. *Id.*

Another example could be a franchisor infringing on what is supposed to be exclusive selling territory. *Id.*

Franchisees permitted to seek injunctive relief as soon as the franchisee receives “notice of impending termination.” *Mac’s Shell*, 559 U.S. at 189; PMPA, §2802(a). However, the government — not a party to the case — reads the PMPA slightly differently and argued in its amicus brief for an interpretation of the PMPA allowing injunctive relief upon a franchisor’s announcement of “intent to engage in conduct that would leave the franchisee no reasonable alternative but to abandon” any franchise element. (*Mac's Shell*, 559 U.S. at 181, 130 S. Ct. at 1261 n. 9).

Transcript of Oral Argument at *8, Mac’s Shell Service, Inc. v. Shell Oil Prods., 559 U.S. 175 (2010).* Justice Ginsburg seemed to recognize this point at oral argument as well, raising the notion that franchisors can essentially make unilateral changes to the franchise agreement. *Id.* at *12.

*Mac’s Shell*, 559 U.S. at 184.


*Id.* And this article is not supposing to suggest that these claims be easy, but rather, the remedy still be available to those in need of it. The standard for constructive termination, similar to constructive discharge, should not be an easy one to reach.

*Id.*

Cite needed, probably one of the sources above.

Cite needed for constructive termination purpose


See *Mac’s Shell*, 559 U.S. at 184.

See *id.*

Constructive Eviction, Def. Against a Prima Facie Case § 7.4 (Rev ed).


*Mac's Shell*, 559 U.S. at 176.


See *id.* at 1260.

Brief for Respondent at 12, Mac’s Shell Services Inc. v. Shell Oil Prods., 559 U.S. 175 (2010).

See *Mac’s Shell*, 559 U.S. at 180.

See Transcript of Oral Argument at *17, Mac’s Shell*, 559 U.S. 175 (Roberts stating that a franchisor’s actions may give rise to a breach of contract as well as a constructive termination claim); Oral Argument, *55 (Stevens pointing out that contract law’s insufficient nature led to Congress’ decision to pass the PMPA). But see Oral Argument at *55 (Shell Oil attorney countering that the PMPA only steps in on narrow grounds).

See supra note 15 and accompanying text.

See generally 559 U.S. 175.

*Mac’s Shell*, 559 U.S. at 175; Brief for Respondent at 10, Mac’s Shell Services Inc. v. Shell Oil Prods., 559 U.S. 175 (2010).

See Oral Arguments (general cite to Mac’s Shell portion); Oral Argument *34 (Justice Kennedy taken aback by Mac’s Shell attorney’s lack of a test to suggest to the Justices).

It was overturned, after all.

524 F.3d at 48.
There must be greater than a “de minimis loss of revenue.” *Id.* at 1183. But a franchisor does not have to send a franchisee to “near-destruction.” *Id.* at 1182 (emphasis added).

“...If the protections the Connecticut afford to the franchisees were brought into play only by formal termination, those protections would quickly become illusory.” *Id.* at 1182.

There is no provision for the renewal of a franchise relationship in the law of Connecticut. *Id.* at 1182. The Franchisee has no right to renew the franchise contract when the contract does indicate a term (Cour de cassation [Cass.] [supreme court for judicial matters] com., May 23, 2000; Cour de cassation [Cass.] [supreme court for judicial matters] com., June 6, 2001). Nevertheless, if the franchisee continues to perform its obligations after the contract’s termination, an agreement without term is concluded between the parties (*tacite reconduction*). Under the General Theory of Obligations Law, French Civil Code Article 1109 provides that, when signing an agreement, a party fully undertakes through this act, according to the doctrine of individual autonomy.

*See* American Motors v. Semke, 384 F.2d 192, 198-200 (10th Cir. 1967); Barnes v. Gulf Oil Corp, 795 F.2d 358, 362, 363 (4th Cir. 1986); Pro Sales v. Texaco, 792 F.2d 1394, 1399 (9th Cir. 1986); Peteriet v. S.B. Thomas Inc., 63 F.3d 1169, 1181-83 (2nd Cir. 1995).