(ii) The other party is unaware of the mistake. It is in this case that the legal systems seem to differ considerably. Again, a case considered earlier bears repeating:

Cass com., 15 February 1961[107] **10.22 (FR)**

Wine to Algiers

Where one party intends one price and the other another, the mistakes prevents there being an effective agreement and no contract is formed.

Facts: The parties were negotiating the sale of a large quantity of wine. Originally it was envisaged that the wine would be delivered at Cherchell but the buyers, Orazzi, refused this, and offered to share in the cost of transport to Algiers. The sellers, Tirat, demanded the sum of 60 francs per hectolitre. The buyers were not willing to pay this sum and sent a telegram intending to offer 30 francs per hectolitre but in fact offering 300 francs. The sellers accepted this, delivered the wine and billed the buyers accordingly and the buyers paid, but later they realised the mistake and demanded repayment. The cour d'appel of Montpellier gave judgment for the buyers and the sellers appealed, arguing (1) that the error was one of value not one of substance; (2) that the contract was valid until annulled, so that the buyers could not claim that the payment was invalid; and (3) that when the buyers paid the 300 francs they were accepting an offer from the sellers.

Held: The appeal was dismissed.

Judgment:—Whereas it is apparent from the statement of facts in the contested judgment (Montpellier, 16 October 1957) and from the introductory part thereof, Marius Tirat et Cie ('Tirat') was to deliver 2,000 hectolitres of Algerian wine FOB to the purchaser, Orazzi et Fils ('Orazzi'); as it was envisaged that delivery would take place at Cherchell, but this was refused by Orazzi which offered to share the cost of haulage from Cherchell to Algiers; this offer was set out in a telegram agreeing to pay 300 francs a hectolitre; as after acceptance and delivery by Tirat, Orazzi claimed that the figure of 300 francs was the result of material error and that the true figure was 30 francs; accounts which were drawn up on the basis of the first figure were in the end reduced to 335,162 francs and Orazzi drew a bill of exchange on Tirat for that amount, which was dishonoured and protested.

—Whereas Tirat then sued the purchasers for damages for the loss caused by a bill of exchange improperly presented and then protested, whereupon Orazzi counterclaimed for payment of the bill; as subsequently, the court of first instance in its contested judgment recognised that a mistake had been made and dismissed the claim in the main proceedings and upheld Orazzi's counterclaim.

—Whereas the appellant challenges the judgment inasmuch as it held that the agreement as to haulage charges was invalid by reason of a substantial mistake, on the ground that it incorrectly showed the sum of 300 francs instead of 30 francs, whereas, it argues, first, a mistake as to value is not a material mistake and in any event the court failed to explain its reasoning concerning the claims made by Tirat on that point; as second, a voidable act remains valid until declared void by the court and there was consequently no legal basis for the bill of exchange, which was presented before any annulment and, finally, as it was possible to remedy the curable nullity arising from a mistake, the findings in the judgment establish that Orazzi had

[107] Bull civ III.91.

confirmed the contract by accepting without demur the agreement reached on the offer of 300 francs and the accounts presented.

—Whereas however, it is stated in the judgment that, for the reasons set out, the figure of 300 francs per hectolitre in Orazzi's telegram could only be the result of a material mistake; as Orazzi proposed or believed it was proposing 30 francs, that is to say half of what Tirat had asked for; there was no agreement as to the amount of the consideration; 'that, since the parties' intentions differed as a result of a misunderstanding, it was not possible for an agreement to be formed'; as accordingly the Court, first, did not have to declare a contract void for a mistake as to the properties of its subject-matter and was not required to answer any arguments put forward on that point; as second, having found that no agreement had been concluded concerning the division of haulage costs, it could not find that there was no legal basis for the bill of exchange which was based on market terms and the abovementioned offer of 30 francs.

—Whereas finally, the last part of the plea based on confirmation of the correspondence between the parties, arising from the attitude subsequently adopted by Orazzi, was not raised in the grounds of Tirat's appeal, as inserted in the introductory parts; it is new, and it is a mixture of fact and law and, as such, inadmissible.

—Whereas no branch of the appeal ground can therefore be upheld.

On those grounds, the Court dismisses the appeal against the judgment of the cour d'appel, Montpellier, of 16 October 1957.

Notes

(1) Presumably the sellers should have been aware that the telegram from the buyers contained an error, as the sellers had already made an offer at 60 francs, one-fifth of the price offered in the telegram. However, nothing is made of this point and it seems that the result would have been the same even if the buyers had had no reason at all to suspect a mistake.

(2) This case seems to have been decided on the basis of *erreur-obstacle*, ie that the error prevented the formation of a contract, just as in the cases of *dissensus* discussed earlier. In the traditional analysis, to quote Planiol again, 'it is a misunderstanding, not a contract'.[108] In practice, despite what Rodière wrote in his note of 1975,[109] French courts will often give relief in such cases on the basis of error as to the substance.[110] Thus there will be an *action en nullité relative* and not to an *action en nullité absolue*. The reason for this is that it only private interests are at stake and not the concept of *intérêt general* which justifies and gives rise to the *action en nullité absolue*.

(3) *Erreur-obstacle* is not mentioned in the Code civil, but the Avant-projet Catala includes a text on it, and also adopts the solution of relative nullity:

> Article 1109-1: There is no consent where the parties' wills have not met on the essential elements of the contract.
> Article 1109-2: An absence of consent taints the agreement with relative nullity.

[108] See above, p 56.
[109] See 10.14 (FR) above, p 450.
[110] As to which, see below, p 472.

(4) The principal differences between absolute and relative nullity are:

(i) relative nullity may be invoked only by the other party to the contract, whereas the absolute nullity of a contract may be invoked by a third party also, provided that they have a direct interest connected to the nullity (eg they are claiming property which the defendant claims to have acquired in good faith under a contract with a third person; if the contract is an absolute nullity, for example it has an illegal *cause*, the claimant may invoke the nullity to defeat the defence).

(ii) the party entitled to rely on relative nullity may confirm the contract, whereas a contract that is absolutely null cannot be confirmed; and

(iii) the prescription period for relative nullity is five years, but for claiming absolute nullity used to be 30 years. However, the new French law of prescription (Articles 2219ff Cciv[111]) no longer makes such a distinction and the general period is that of five years. Article 1304 sets a time limit of five years from the date of discovery of the error.

The question whether a defect in the contract renders it absolutely or only relatively null tends to be determined by the interests as stake rather than by classification of the nature of the defect. Thus, while *erreur-obstacle* might be thought to mean simply that there is no contract at all, the courts (and the Avant-projet Catala) apply relative nullity in this case.[112]

(5) French law does not admit unilateral avoidance for relative nullity. This means that, if the parties are not in agreement as regard avoidance of the contract, the party who claims for avoidance must necessarily go to court: nullity is '*judiciaire*'. If the conditions for nullity are established, the court is bound to grant the nullity (compare the case of *résolution* for non-performance[113]). But this means that, in contrast to English law, German law and the system of PECL (and also the DCFR), under which a party entititled to avoid a contract may do so by giving notice of avoidance to the other party, in French law a unilateral notification of nullity has no effect. It means also that it is for the party who claims for nullity to go to the judge; on the contrary, in the other systems, it is for the party who contests the avoidance to go to court and prove that the conditions for conditions were not satisfied.

LG Hanau, 30 June 1978[114] **10.23 (DE)**

Toilet paper

Where in a written statement of offer a technical term is incorrectly used, the declaration of intention may be avoided; a claim for performance of the contract will not be upheld.

Facts: The defendant assistant principal of a girls' secondary school ordered from the plaintiff, as the

[111] Law no 2008 561, 17 June 2008.

[112] See generally B Nicholas, *The French Law of Contract*, 2nd edn (Oxford, Clarendon Press, 1992) 77–79.

[113] See below, pp 920ff.

[114] NJW 1979.721.

school's representative, '25 Gros Rollen' (25 gross rolls) of toilet paper. In that connection, the defendant signed an order form filled out by the plaintiff's representatives, which contained, amongst other detailed provisions, the indication 'Gros = 12 × 12'. When the plaintiff sought to deliver the goods, the girls' school refused to accept the overwhelming majority of them. The plaintiff then claimed against the defendant and served a default summons on her, which she contested. In addition, she gave notice of avoidance of the transaction. She denied having been aware of the meaning of the quantitative term 'Gros'. Instead, she maintained that she had ordered only 25 double packs of toilet paper, which the school had, moreover, accepted and paid for. Admittedly, the term 'Gros' had been specified when the order was placed. However, the representatives had referred to that term in the context of the measurement specification 12 × 12, relating to the manner of packaging.

Held: The plaintiff's claim for payment of the price of the toilet paper was unsuccessful.

Judgment:

Grounds . . .

The plaintiff has no claim against the defendant under § 179 BGB. It is true that the school represented by the defendant did not authorise the greater part of the transaction. However, the defendant is under no obligation to perform the contract, because it was effectively avoided by the defendant. In expressing her intention, the defendant committed an error consisting of what she actually said (§ 119 I BGB). On no account did she wish to buy 25 × 12 × 12 = 3,600 rolls of toilet paper, merely 25 large (*große*) rolls. Although the plaintiff maintains that the defendant had known exactly what meaning was to be attached to her statement, that cannot be assumed as a fact. It runs totally counter to normal experience of life that a person representing a school which can only be described as a small institution should in one fell swoop order 3,600 rolls of toilet paper each containing 1,000 sheets—a quantity which would have met the school's requirements for a period of several years. Quite apart from the fact that this is scarcely conceivable for reasons relating to the budgetary accounts, which are normally compiled annually, the difficulty of storing such a quantity of goods alone necessitates the conclusion that there can be no question of any conscious intention to proceed in that manner. Nor does the argument that the defendant must, as a teacher, have been familiar with the meaning of the unit of quantity used necessarily indicate that she was aware of its meaning. Quite apart from the fact that it has not been established which subjects she taught, the quantitative term 'Gros' is nowadays completely uncommon and obsolete, with the result that it can no longer be regarded as definitely falling within the ambit of the curriculum. Nor does the indication 'Gros = 12 × 12' provide any clarification in that regard, since it does not necessarily enable the number of rolls to be identified but may quite easily be intended to signify other units of measurement, particularly having regard to the spelling mistakes made by the plaintiff's representatives on the order form.

Notes

(1) § 119 I BGB does not require that the recipient of the mistaken declaration knows or has any reason to know of the mistake. Where he does not, the mistaken party who avoids will have to compensate him under § 122 I BGB.[115] Having regard to the findings of the court in the above case it can be assumed that the seller of

[115] See above, p 443.