

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

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In *Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175 (2010), the Supreme Court held that a service station franchisee pursuing a claim of constructive termination against the franchisor must, under the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2841 (1978), abandon the franchise. This decision makes the doctrine of constructive termination the functional equivalent of actual termination for these types of franchises. Actual termination usually involves catastrophic injuries to franchisees, which can destroy their economic and business livelihood. In a society so dependent upon the franchise system of business, this imposes secondary harms on the American economy.

Related fields of American law and other nations' franchise law, specifically that of France, show that a more refined view of constructive termination—embracing the franchisees' possible continued operations under the franchise network's trademark—presents a fairer, more efficient standard. This paradigm reflects the particular parties' expectations and, more generally, the norms for most franchised enterprises.

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INTRODUCTION

Just as the key moments in a flight are the takeoff and the landing, so for business franchises the key points are their formation and conclusion. Between these two end points is the franchise relationship, usually intended to be long-term and renewable.¹ Once the parties have entered that relationship, however, an overarching issue is when and how it may end. Termination before full completion of the franchise 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 and it could 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.² In *Mac’s Shell Services Inc. v. Shell Oil Products*,³ 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.⁴ The case arose from the franchisor, Shell Oil,

1. Robert W. Emerson, *Franchise Contract Interpretation: A Two-Part Standard*, 2013 MICH. ST. L. REV. 641, 646.

2. See 62B AM. JUR. 2D *Private Franchise Contracts* § 319 (noting that economic duress may serve as the basis for a claim of constructive termination); see also BLACK’S LAW DICTIONARY 380 (10th ed. 2014) (noting that “constructive” means “[l]egally imputed” and is a “legal fiction” that courts usually grant “for equitable reasons”).

3. *Mac’s Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175 (2010).

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., *Mac’s Shell*, 559 U.S. at 187 n.8 (“[W]e 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.* (“[W]e observe that the Court of Appeals’ unwillingness or inability to establish a more concrete standard underscores the

assigning its rights under multiple, pre-existing franchise agreements to a third party.⁵ The franchisees, Mac's Shell and additional gas station owners, brought suit against Shell Oil for a claim of relief under the PMPA on the ground that the franchisor's assignment of lease rights constituted constructive termination.⁶

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.⁷ The Court articulated that the PMPA 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."⁸ In effect, the Court decided abandonment is required because allowing the franchisee to do anything less would produce untenable, even impalpable, standards.⁹ The *Mac's Shell* decision has had many pro-franchisor aftereffects in that it limits franchisees' relief only to situations where actual termination is found. This provides franchisees that are faced with wrongful non-renewal of the franchise relationship or *Mac's Shell*-like franchisor conduct with no recourse under the PMPA.

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 PMPA.¹⁰ Under the PMPA, Congress only gave franchisors the ability to deny renewal of a franchise under very specific requirements.¹¹ Franchisors must provide written notice and a specific reason for termination.¹² The PMPA created a specific cause of action for franchisees that fell victim to improper treatment by franchisors.¹³ While the PMPA

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. *Id.* at 187. In this regard, the Court adopts Shell's argument. See Reply Brief for Respondent at 10, *Mac's Shell*, 559 U.S. 175 (Nos. 08-240 and 08-372) (noting that the assignment-based theory that courts rely on in allowing constructive termination claims does not make sense). Such strong language probably hurts any chance of lower courts looking at *Mac's Shell* as particularly narrow or fact-driven.

9. 559 U.S. at 175.

10. 15 U.S.C. §§ 2801-2841 (2006).

11. *Id.* § 2802(a).

12. *Id.* § 2802(b).

13. *Id.* § 2805.

might not explicitly allow a claim of constructive termination,¹⁴ Congress did not necessarily intend the PMPA to be an all-encompassing, four-corners-only type of document.¹⁵

Congress enacted the PMPA for the purpose of “protect[ing] franchisees from arbitrary or discriminatory termination or non renewal of their franchisees.”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 use of 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.¹⁷

This Article opens with an examination of why the Supreme Court’s proposed solution of requiring abandonment is an economically unsound choice.¹⁸ Next, the Article looks at how other courts handle this issue; it explores possible solutions from other nations, particularly France.¹⁹ The Article explores how the French courts have authority to police the fairness of franchise contracts and the effects of contract breaches, and to impose heightened requirements for termination clause enforcement. Through this model analysis, the Author demonstrates why the French franchising model is the preferable approach to these common franchise issues, or at least it instills a sense of the types of solutions that could remedy our American system. The Article also explores other “constructive” doctrines in

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 either “(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 or 2803 of this title.” *Id.* §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* 15 U.S.C. § 2805(b) (delineating the parameters of when the courts can use their equitable powers).

16. Mark J. Burzych & Emily L. Matthews, *Selective Enforcement of Franchise Agreement Terms and System Standards*, 23 *FRANCHISE L.J.* 110, 110 (2003) (quoting *Massey v. Exxon Corp.*, 942 F.2d 340, 342 (6th Cir. 1991)).

17. *Id.*

18. *See infra*, Part I.

19. *See infra*, Part II.

American law and how they compare to constructive termination. Then, the Article evaluates why constructive termination works, by looking at the difficulties of proving actual termination,²⁰ where the *Mac's Shell* analysis went adrift.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."²² The legal requirements for franchises vary between the two countries, as do the definitions of officially recognized franchise systems.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

20. See *infra*, Part III-A.

21. See *infra*, Part III-B.

22. Robert W. Emerson, *Franchise Territories: A Community Standard*, 45 WAKE FOREST L. REV. 779, 780 (2010) [hereinafter, "*A Community Standard*"]; Robert W. Emerson, *Franchise Contracts and Territoriality: A French Comparison*, 3 ENTREPRENEURIAL BUS. L.J. 315, 319-22 (2009) [hereinafter, "*A French Comparison*"].

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, services, or 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* 62, 63 (Philip F. Zeidman ed., 2014).

the same reasons.²⁴ The motivations for franchising include expansion of capital for the franchisor and a greater chance of business success for the franchisee, who gets to take advantage of the franchisor's tested business plan, training programs, educational programs, and advertising.²⁵

In all business, there is risk. For franchised businesses, a monumental risk is the termination of the franchise relationship. 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. The impact of a terminated franchise relationship is also felt differently by franchisees and franchisors, as franchisors typically have "deep pockets" and many other franchise relationships. Most franchisees only operate one franchise.

Every franchise agreement created goes through a life cycle. After the franchisee fills out a franchise application and all due diligence is performed, 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 that is 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 case arose from a franchise arrangement, where the franchisee, Mac's Shell Service, was required to pay Shell Oil Company monthly rent for use of the premises where it operated its service station. Shell offered its franchisees, including Plaintiff, a rent subsidy, which reduced the monthly rent owed by a set amount for every gallon of motor fuel a franchisee sold above a

24. Emerson, *A French Comparison*, *supra* note 22, 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. W. MICHAEL GARNER, *FRANCHISE AND DISTRIBUTION LAW AND PRACTICE* § 10:50 (2013); Jonathan Klick et al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 *ENTREPRENEURIAL BUS. L.J.* 355, 359 (2009).

certain predetermined quantity. This subsidy arrangement was renewed on a yearly basis, until Shell's predecessor did not renew the rent subsidy arrangement with Mac's Shell. Mac's Shell brought suit, alleging that the discontinuation of the rent subsidy constituted a constructive termination of the franchise relationship.

While this seemed to be a strong argument for constructive termination, the Court barred the application of this doctrine to any PMPA-related lawsuits and issued an opinion that fell short. The Court's analysis fails to address the flaws of compelling actual abandonment,²⁷ as discussed in newsletters and other popular media 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

Even though the Supreme Court failed to acknowledge or weigh the merits of the arguments, 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, which 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 upon which they established their franchise system, and they are usually designed to force the franchisee out of the relationship. New terms typically force franchisees out either by forcing them to terminate the relationship themselves or to violate the franchise agreement so that the franchisor can claim a breach of contract. Franchisee-plaintiffs in *Marcoux* described the hardships they endured as going into personal

27. See BLACK'S LAW DICTIONARY 2 (10th ed. 2014) (defining "abandonment").

28. See W. Michael Garner, *Fraud, Breach and Wrongful Termination*, BLUE MAUMAU (Oct. 13, 2010, 4:49 PM), http://www.bluemaumau.org/fraud_breach_and_wrongful_termination, archived at <http://perma.cc/V7JY-K4AT> ("[F]ranchisees 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, 78 (2011) (discussing the exceptionally high costs of franchise abandonment).

30. See generally *Marcoux v. Shell Oil Prods. Co.*, 524 F.3d 33, 46 (1st Cir. 2008) (holding that "[t]o require an actual abandonment of years of work and investment before . . . recogniz[ing] a right of action [for constructive termination] . . . would be unreasonable.").

debt, filing for bankruptcy, *et cetera*.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 These “constructive” acts are supposed to be what separates the doctrine of constructive termination from actual termination, but *Mac’s Shell* obliterated that differentiation. In *Mac’s Shell*, the Supreme Court severely underestimated 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 which abandonment would require.³⁶ These investments – known as idiosyncratic investments – hold little to no value if a franchisor-franchisee relationship goes sour, as these

31. *Id.*

32. *Id.* See also *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (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 Benoiel, *supra* note 29, at 77 (discussing how franchisee abandonment costs “include loss of significant relationship-specific investments, lack of available attractive alternatives, significant switching costs, and severe legal uncertainty.”).

34. “[I]nstead of closing its doors, a franchisee might feel compelled to sell the 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 (2011); see also Benoiel, *supra* note 29, at 78 (questioning the Court’s assumption regarding franchisee abandonment costs).

35. New Burger King franchisees must pay \$50,000, while McDonalds and KFC franchisees must pay \$45,000. See *New Franchisee FAQ’s*, BURGER KING CORP., <http://www.bk.com/franchising/FAQ> (last visited Nov 22, 2015), *achieved at* <http://perma.cc/5SRJ-JE5Q>; *McDonald’s Franchise Information*, ENTREPRENEUR, <http://www.entrepreneur.com/franchises/mcdonalds/282570-0.html> (last visited Dec. 2, 2014), *archived at* <http://perma.cc/R2SD-3FCA>; *KFC Corp. Franchise Information*, ENTREPRENEUR, <http://www.entrepreneur.com/franchises/kfccorp/282495-0.html> (last visited Nov. 22, 2015), *archived at* <http://perma.cc/H24L-2REJ>. Abandonment of the franchisee-franchisor relationship results in a forfeiture of this fee. Benoiel, *supra* note 29, at 87 (citing Benjamin Klein, *Transaction Cost Determinants of “Unfair” Contractual Arrangements*, 70 *AM. ECON. REV.* 356, 359 (1980); Warren S. Grimes, *Market Definition in Franchise Antitrust Claims: Relational Market Power and the Franchisor’s Conflict of Interest*, 67 *ANTITRUST L.J.* 243, 250 (1999); Warren S. Grimes, *Making Sense of State Oil Co. v. Khan: Vertical Maximum Price Fixing Under a Rule of Reason*, 66 *ANTITRUST L.J.* 567, 586 (1997)).

36. Benoiel, *supra* note 29, at 83.

investments typically have a specific nature tailored to the individual franchise.³⁷

One example of such an investment is property improvements. Franchisees often have to make improvements to their location, including walls, doors, cabinets, light fixtures, and floor coverings that are required to be common to the franchise's image.³⁸ Potential franchisees face large investments in property improvements – at least \$100,000 for a Subway franchise,³⁹ or \$175,000 for a Jimmy John's franchise.⁴⁰ Businessmen interested in potentially opening a Subway franchise could face anywhere from \$59,000 to more than \$134,000 in leasehold improvements. Continual use of a franchise system's "shop setup" after the franchise termination may even lead to a copyright infringement lawsuit; the legal fees will be extensive whether or not the claim is actually valid. The crux for franchisees, however, stems from the fact that franchisees usually are forced to rent the property from the franchisor, like the Plaintiff was required to do in *Mac's Shell*.⁴¹ Thus, franchisees face a large sunk cost for improvements to property they do not own. Even worse, this setup gives the franchisor additional leverage, as franchisees try to ensure they are not found to have abandoned the enterprise.⁴² Franchisees are also generally prohibited from selling property improvements to a third party, such that they will see no financial recovery for their improvements.⁴³

Another cost unlikely to be recovered after abandonment is the time and money spent on training. Measuring these efforts quantitatively is difficult and does not factor into any damages reward. Most franchisees will have to attend training held by the franchisor.⁴⁴ 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 McDonald's learning the ropes, completely on the new franchisee's dime.⁴⁵ In addition, training is often

37. Benoliel, *supra* note 29, at 83.

38. Benoliel, *supra* note 29, at 83.

39. Subway Franchise Information, FRANCHISE DIRECT, <http://www.franchisedirect.com/directory/subway/915/> (last visited Nov. 22, 2015), archived at <http://perma.cc/Z2L8-7MJM>.

40. *Jimmy John's Franchise Cost and Fees*, FRANCHISE DIRECT, <http://www.franchisedirect.com/directory/jimmyjohns/ufoc/5713/> (last visited Nov. 22, 2015), archived at <http://perma.cc/JMZA-26KK>.

41. Benoliel, *supra* note 29, at 79-80.

42. Abandonment or even failing to meet every one of the franchisor's terms could lead to eviction from the property. Benoliel, *supra* note 29, at 80.

43. Benoliel, *supra* note 29, at 84.

44. Emerson, *supra* note 1, at 652; Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 941 (1990).

45. See Benoliel, *supra* note 29, at 84-85 ("McDonald's total training generally takes over two years to complete, with the franchisee working approximately 2,000

very specific to the franchisor's business type, which makes the skills learned in training nontransferable upon franchise termination.⁴⁶

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.⁴⁷ 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. Thus, the franchisee's continuous self-monitoring increases the contribution that the franchisee makes to the franchise relationship.

Certainly, the potential financial losses leave franchisees skittish about abandonment, which according to *Mac's Shell* is 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.⁴⁸ 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

uncompensated hours in a McDonald's restaurant.") (citing Patrick J. Kaufmann & Francine Lafontaine, *Costs of Control: The Source of Economic Rents for McDonald's Franchisees*, 37 J.L. & ECON. 417, 426 (1994); D. L. Noren, *The Economics of the Golden Arches: A Case Study of the McDonald's System*, 34 THE AM. ECONOMIST 60, 60 (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. See Benoliel, *supra* note 29, at 85 ("For example, the KFC franchise provides a course covering the specific basic skills necessary to operate a KFC restaurant, including product preparation, equipment maintenance, inventory control, and personnel training.") (citing Robert T. Justis & Peng S. Chan, *Training for Franchise Management*, 29 J. SMALL BUS. MGMT. 87, 90 (1991); James A. Brickley et al., *Contract Duration: Evidence from Franchising*, 49 J.L. ECON. 173, 177 (2006)).

47. The franchisee is responsible for most of the duties arising out of a standard form franchise agreement. See Jennifer Dolman, *There's No Cure for Breaking the Trust in Your Franchise Agreement*, FINANCIAL POST (Sept. 9, 2013, 4:21 PM), <http://business.financialpost.com/2013/09/09/theres-no-cure-for-breaking-the-trust-in-your-franchise-agreement/>, archived at <http://perma.cc/U4H4-W6BB> ("In consideration for the use of the franchisor's system, goodwill, reputation and brand, a franchisee usually pays the franchisor an initial fee plus a percentage of gross revenues toward royalty and advertising fees. Further, the franchisee is restricted in its use of the franchisor's trademarks, and must comply with its confidential operating manual.").

48. Robert A. Ping Jr., *Unexplored Antecedents of Exiting in a Marketing Channel*, 75 J. RETAILING 218, 227 (1999).

relationship even when they are unsatisfied.⁴⁹ 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.⁵⁰ Indeed, even if a franchise's exit costs are not as high as Ping and others conclude that they are, these costs are dynamic. That is, they are subject to variation over time. This highly changeable state actually should make a judge's ability to monitor the franchise system and the terminations within that system - the French, more active overview - more efficient and fair than the restrained, even distant failure to oversee often found in the American system.

Unless the franchisee contracts otherwise, the franchise agreement is typically 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.⁵¹ Finally, Professors Hibbard, Kumar, and Stern surveyed suppliers and dealers of consumer durables.⁵² The 626 questionnaires showed that as a dealer becomes more economically dependent on its supplier, the dealer is less likely to abandon the relationship, even after destructive acts by a franchisor.⁵³

49. See *id.* at 234 ("In addition, cost-of-exit increased loyal behavior at lower levels of satisfaction . . .").

50. See Benoliel, *supra* note 29, at 92 ("The analysis of 288 questionnaires shows that lack of available attractive alternatives for hardware retailers is negatively associated with their propensity to abandon their relationships with their suppliers in the face of relationship problems.") (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. See Robert E. Braun & Catherine D. Holmes, *Brand Franchise Issues in Hotel Purchase and Sale Transactions*, LEXOLOGY (Aug. 1, 2012) <http://www.lexology.com/library/detail.aspx?g=e9dca86d-7ecc-4d00-a5d7-b7d256df9959>, achieved at <http://perma.cc/BG45-DKUM> ("Buying or selling a hotel operating under a brand name requires special attention. Typically, the existing franchise agreement will be assumed, terminated or modified in some way . . .").

52. Benoliel, *supra* note 29, at 92 (citing Jonathan D. Hibbard et al., *Examining the Impact of Destructive Acts in Marketing Channel Relationship*, 38 J. MKTG. RES. 45 (2001)).

53. See Benoliel, *supra* note 29, at 93 ("According to an examination of the 626 questionnaires completed by dealers, as the level of a dealer's economic dependence in the relationship increases, she is less likely to respond by abandoning the relationship even in the face of destructive acts by the 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.⁵⁴ Indeed, the growth of French franchising has been tremendous. In 1971, just thirty-four domestic franchisors operated in France;⁵⁵ within six years, the number had tripled to approximately 108 networks (with about 7500 stores or sites).⁵⁶ In the fifteen years following (ending in 1992), the number had grown to 430 networks and 21,300 franchises.⁵⁷ Steady growth continued throughout the 1990s and the following decade,⁵⁸ with the franchisor numbers ultimately tripling, and the number of franchisees increasing 250% by the start of 2010.⁵⁹ Finally, by 2014, there were 1,796 franchise networks, with 68,171 franchisees,⁶⁰ continuing a steady increase of about 6% annually in each category (franchisors and total number of franchises) for each of the past five years.⁶¹ International growth has also been

54. See Emerson, *A French Comparison*, *supra* note 22, at 316-17 (“In France, just a few decades into the 20th Century, the ancestor of the modern franchise system appeared. In the 1930s, a company called “La Lainière Roubaix” developed the new type of distribution under a trade name still famous in France to this day, Pingouin.”).

55. FEDERATION FRANÇAISE DE LA FRANCHISE, *TOUTE LA FRANCHISE: LES TEXTES, LES CHIFFRES, LES RESEAUX* [FRENCH FRANCHISING FEDERATION, *ALL ABOUT FRANCHISING: THE TEXTS, THE FIGURES, THE NETWORKS*] 55 (2010) [hereinafter *FRENCH FRANCHISING FEDERATION, ALL ABOUT FRANCHISING*]; FEDERATION FRANÇAISE DE LA FRANCHISE, *Les chiffres-cles en France*, <http://www.franchise-fff.com/franchise/chiffres-cles/les-chiffres-cles-en-france.html> (last visited Nov. 22, 2015), *archived at* <http://perma.cc/HL29-TBZY>.

56. FEDERATION FRANÇAISE DE LA FRANCHISE, *Les Chiffres de la Franchise en 2007, Tableau 1: La Franchise en France Depuis 1971* [Franchise Figures in 2007, Table 1: the Franchise in France Since 1971] [hereinafter *Franchise Figures in 2007*] (on file with author).

57. *Id.*

58. FRENCH FRANCHISING FEDERATION, *ALL ABOUT FRANCHISING*, *supra*, note 55, at 55 (recording that by 1997, 2001, and 2005, the franchisor and franchisee numbers had increased, respectively, to 517 and 28,851, 653 and 32,240; and 929 and 39,510); *see also* Press Release, Fédération Française de la Franchise, *Résultats de la 8e Enquête Annuelle sur la Franchise* [Results of the 8th Annual Survey on Franchising], <http://www.groupebpce.fr/Journaliste/Actus-et-Communiquees-de-Presses/Autres/BP-Resultats-de-la-8e-enquete-annuelle-sur-la-franchise> (indicating that in 2011 the number of franchisors in France was 1477 by September 2011, with the number of franchisees pegged at 58,351).

59. *See Franchise Figures in 2007*, *supra* note 56 (recording the number of French franchisors in 2009 as 1369); FRENCH FRANCHISING FEDERATION, *ALL ABOUT FRANCHISING*, *supra*, note 55, at 55; FÉDÉRATION FRANÇAISE DE LA FRANCHISE, *Les chiffres-cles en France*, *supra* note 55.

60. *See* FEDERATION FRANÇAISE DE LA FRANCHISE, *Les chiffres-cles en France*, *supra* note 55 (indicating there were 1,796 franchisors and 68,171 franchisees in France in 2014).

61. *See* FRENCH FRANCHISING FEDERATION, *ALL ABOUT FRANCHISING*, *supra*, note 55,

exponential; for example, in 2009 over 310 French networks exported their concepts abroad, placing their product or service expertise in over 10,000 stores throughout the world, and the percentage of franchisors with units outside of France continued to grow in the past five years, rising to nearly 600 (from under 23% in 2009 to over 30% five years later).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 any other European nation, and only five countries in the world have more franchisors than France: Brazil, China, India, South Korea, and the United States.⁶³ Per capita, the French degree of franchising is far higher than any of these nations except South Korea.⁶⁴ Moreover, while the United States continues to lead the world in numbers of franchisors (about 3000 as of 2008) and franchisees (about 900,000),⁶⁵ its growth rate has slowed compared to most other nations;⁶⁶ larger, older American franchised

at 55 (indicating that there were 1369 franchise networks with 51,619 franchisees at the start of 2010); FÉDÉRATION FRANÇAISE DE LA FRANCHISE, *Les chiffres-cles en France*, *supra* note 55.

62. See FRENCH FRANCHISING FEDERATION, ALL ABOUT FRANCHISING, *supra*, note 55, at 54 (indicating that there were 313 French franchisors operating franchises outside of France by the start of 2010).

63. Compared to France's 1369 franchised networks, the second and third highest European nations were Spain (960) and Germany (910), with the five leading countries being United States (3000), China (2600), South Korea (2426), India (1800), and Brazil (1379). *Id.* at 57. 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 INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), GUIDE TO INT'L MASTER FRANCHISE ARRANGEMENTS, Annex 2 at 272-73 (2d ed. 2007) (putting India's and Brazil's number of franchisors below the French number, and not providing any information about South Korea); see also CIA, THE WORLD FACTBOOK, FIELD LISTING: GDP (OFFICIAL EXCHANGE RATE) (2012) (listing the top 15 nations in order of the size of their gross domestic product for 2012 as (1) United States, (2) China, (3) Japan, (4) Germany, (5) France, (6) United Kingdom, (7) Brazil, (8) Italy, (9) Russia, (10) India, (11) Canada, (12) Australia, (13) Spain, (14) Mexico, and (15) South Korea.)

64. 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/ctypopls.htm#.UnXgSOLAHZQ> (last visited Nov. 22, 2015), archived at <http://perma.cc/9HKH-EZFB> (listing 2012 figures of national populations).

65. FÉDÉRATION FRANÇAISE DE LA FRANCHISE, LES CHIFFRES-CLÉS À L'INTERNATIONAL, <http://www.franchise-fff.com/franchise/chiffres-cles/les-chiffres-cles-a-l-international.html>, 4,000 franchise networks operating in China, 3,000 in United States, 2,426 in Brazil, 1,796 in France, the largest number in Europe, 1,200 in Canada, and 1,180 in Australia); Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191, 196-97 & n.24.

66. IFA EDUC. FOUND., INC., THE PROFILE OF FRANCHISING, VOLUME II: A STATISTICAL PROFILE OF THE 1997 UNIFORM FRANCHISE OFFERING CIRCULAR (UFOC) DATA 46 (1999)

systems now grow principally via foreign expansion,⁶⁷ and some foreign nations' franchising grows much faster than does the U.S. system.⁶⁸

If the growth and scale of the French franchising market is not convincing enough, the gaps and imperfections of American franchise law provide reasons for adopting differing models. As will be explored below, the French system does not make actual and constructive terminations synonymous, like the Supreme Court's decision in *Mac's Shell*.

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

Generally, French judges have power to ensure that franchise contracts are fair.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 the franchisor and franchisee.⁷⁰ In the end, those duties and the qualities arising therefrom may give the franchise network an "identity" and a "reputation."⁷¹ Mandatory provisions, such as confidentiality and non-competition, provide each party the opportunity to protect its own interests before, during, and after the contract.⁷²

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

(stating that in 1996 the United States had 1170 franchisors).

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

68. Emerson, *supra* note 65, at 196 & n.23.

69. 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 NO. 5, Feb. 4, 2010, 1110 (indicating that the terms legitimacy, necessity, and proportionality, serve as testers in assessing contracts).

70. FRANÇOIS-LUC SIMON, *THEORIE ET PRATIQUE DU DROIT DE LA FRANCHISE [THEORY AND PRACTICE OF FRANCHISE LAW]* 359-73 (2009).

71. *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).

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

73. If a "buying exclusivity" ("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. 330-1. If Community Law is applicable, the buying exclusivity cannot 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 O.J. (C 291) 1, 10 (EC).

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.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.⁷⁵ While these methodologies are similar in the American franchise system, differences begin to appear in the other doctrines of termination.

Other methods of termination include annulment or rescission when circumstances vitiate consent.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).⁷⁷ The typical grounds for annulment or rescission include duress,⁷⁸ misrepresentation (fraud),⁷⁹ impracticability, and, in some cases, mistake.⁸⁰ A contract is also deemed void due to illegality, undue influence, economic duress, or the franchisor having lied during its provision of pre-contractual information.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

74. VERONIQUE SELINSKY, DROIT ECONOMIQUE: CONCURRENCE-DISTRIBUTION-CONSUMMATION, FORMULES DES CONTRATS, CONTRAT DE FRANCHISE DE DISTRIBUTION (2002) (“*Le contrat est conclu pour une durée de cinq ans à compter de sa signature. Il pourra se renouveler ensuite tacitement dans les mêmes conditions pour une durée de < >, à défaut de l’envoi par une des parties d’une notification par lettre recommandée avec avis de réception de résiliation du présent contrat, six mois au moins avant l’échéance.*”) (trans. by Robert W. Emerson).

75. Dictionnaire Permanent Droit des Affaires 1372-73 n.85 (May 2006).

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

77. *Id.* art. 1108.

78. *Id.* art. 1111-15.

79. *Id.* art. 1116.

80. Mistake only invalidates consent when the mistake rests on the very substance of the thing which is the object of the contract. *Id.* art. 1110.

81. Dictionnaire Permanent Droit des Affaires, *supra* note 75, at 1372-73 n.85. The nonperformance 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. CODE DE COMMERCE [C. COM.] art. 330-3. *See also* Cour de cassation [Cass.] [supreme court for judicial matters] com., Feb. 12, 2008, Bull. civ IV, No. 07-10.462, <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000018132619>. *See also* Daniel Mainguy, Jean-Louis Respaud, & Stéphane Destours, *Droit de la Distribution*, LA SEMAINE JURIDIQUE ENTREPRISE ET AFFAIRES NO. 19, May 7, 2009, 1479, *archive at* <http://perma.cc/YL45-MNH3> (discussing contract voidability in greater detail).

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 can also choose to force the performance of the contract. Tremendous judicial discretion gives 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 light of the circumstances;⁸⁶ however, this

82. See SIMON, *supra* note 70, at 338 (stating that when a party breaches its duty to carry out the contract, then, per the French Civil Code, a termination is in order). 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 (Fr.).

83. SIMON, *supra* note 70, at 339; CODE CIVIL [C. CIV.], *supra* note 82, art. 1184 (Fr.). 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.

84. Cour de cassation [Cass.] [supreme court for judicial matters] 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 [C. CIV.] art. 1612 (Fr.) (“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.”) (trans. by Robert W. Emerson).

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 Cour d’Appel decision and put the parties back in the situation they were in before the court of appeal decision.

85. BÉNABENT, *supra* note 84, at 264.

86. 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.

extension cannot be renewed indefinitely,⁸⁷ with even *force majeure*⁸⁸ leading only to a brief suspension of deadlines, nothing more.⁸⁹

While ruling on a termination request due to non-performance of the contract's terms, a French judge may note that non-performance has occurred⁹⁰; he or she 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 non-performing party had not met the one-year deadline it had been granted to perform its obligations.⁹² In cases of total non-

87. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 19, 1984, Bull. civ. I, No. 343 (denying a renewal of the deadline, the French Supreme Court overturned a lower appeals court decision, stating that the court could only suspend a deadline, not set a second definite extension).

88. A French term literally meaning "superior force," this legal concept concerns an "event or effect that can neither be anticipated nor controlled," which could excuse a party from contractual obligation, and includes both acts of nature, such as floods, and acts of people, such as riots or strikes. BLACK'S LAW DICTIONARY 761 (10th ed. 2014). 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. JOHN BELL, ET AL., PRINCIPLES OF FRENCH LAW 342-345 (2d ed. 2008).

89. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 19, 1984, Bull. civ. I, No. 343.

90. The nonbreaching party raises the issue and the judge is asked to raise his power of appreciation to deem the franchise contract void.

91. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 19, 1984, Bull. civ. I, No. 343 ("[L]orsque le juge, saisi d'une demande de révocation d'une donation pour cause d'inexécution des conditions, a constaté cette inexécution, il peut accorder au donataire un délai qui doit emprunter sa mesure aux circonstances pour exécuter ces charges . . . [C]e délai, qui peut être suspendu en cas de force majeure, ne peut être renouvelé."). Once the deadline passes, the judge must decide if the breaching party cured; if the judge finds in the negative, he must terminate the contract. Cour de cassation [Cass.] [supreme court for judicial matters] com., June 16, 1987, Bull. civ. IV, No. 145.

92. 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. Cour de cassation [Cass.] [supreme court for judicial matters] com., June 16, 1987, Bull. civ. IV, No. 145 ("[L]es juges du fond qui, par une appréciation souveraine, estiment que les manquements d'une partie à ses obligations contractuelles ne sont pas d'une gravité suffisante pour motiver la résolution ou la résiliation de la convention ne modifient pas l'objet de la demande tendant à l'une de ces fins lorsqu'ils prescrivent l'exécution, dans les conditions et délai qu'ils déterminent, eu égard aux circonstances de la cause.") (trans. by Robert W. Emerson). See also CODE CIVIL [C. CIV.] art. 1184 (Fr.) ("The resolution must be requested in court, and the defendant may be granted a period in the circumstances.") (trans.

performance, however, a judicial termination will be made 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 entire 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, 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 *mise en demeure* ("a notice") 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 the obligation.⁹⁸ Courts may consider the document

by Google); Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., June 10, 1970, Bull. civ. II (holding that trial judges have sovereign authority to decide whether the time limits set by Article 1244 of the French Civil Code may be granted to the debtor).

93. Cour de cassation [Cass.] [supreme court for judicial matters] com., June 16, 1987, Bull. civ. IV, No. 145.

94. Cour de cassation [Cass.] [supreme court for judicial matters] com., July 2, 1996, Bull. civ. IV, No. 198.

95. *Id.*

96. The court wrote, "*en réservant la résolution d'un contrat synallagmatique aux seuls cas d'inexécution totale par l'une des parties de ses obligations, alors qu'une telle résolution peut être prononcée par le juge en cas d'inexécution partielle dès lors qu'elle porte sur une obligation déterminante de la conclusion du contrat, la cour d'appel, qui a méconnu l'étendue de ses pouvoirs, a violé le texte susvisé par refus d'application.*" *Id.* The English interpretation of this holding is as follows: A judge can decide whether there is (or 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. *Id.* Note that the court faulted the lower court for not understanding its own powers in termination cases. *Id.* (trans. by Robert W. Emerson).

97. Because consideration is not required for a valid, enforceable contract under Civil Law, 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). The term 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 391 (10th ed. 2014) (defining a bilateral contract as one involving reciprocal obligations, where the obligations of one party correlate to those of the other).

98. That is, 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

instituting the proceedings, *l'acte introductif d'instance* (“the originating process”), to be sufficient notice.⁹⁹

At times, judges may also interpret the contract terms and the parties' past and subsequent actions as implying the retroactive termination of the franchise agreement as if the franchise agreement had never existed.¹⁰⁰ In that case, 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 that party's injury.¹⁰² The judge might also find *both* parties 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 contract 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

judicial matters] 3e civ., Oct. 25, 1968, JurisData 1968-000414.

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, JurisData 2001-007872.

100. Cour de cassation [Cass.] [supreme court for judicial matters] #e civ., May 4, 1898, No. #. 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 (Fr.) (“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.”) (trans. by Robert W. Emerson).

101. Article 1183 of the French Civil Code states: “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.” CODE CIVIL [C.CIV.] art. 1183 (Fr.) (trans. by Robert W. Emerson).

102. Article 1147 of the French 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 (Fr.) (trans. By Robert W. Emerson).

103. Cour de cassation [Cass.] [supreme court for judicial matters] com., Jan. 3, 1978, Bull. civ. IV, No. 76-13.919.

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. These include non-payment of royalties, wrongful disclosure of sales and organization methods, bad management, failure to pay for goods delivered by the franchisor,¹⁰⁵ refusal to implement controls, and noncompliance with non-compete provisions.¹⁰⁶ This *clause résolutoire* is

104. Dictionnaire Permanent, Droit des Affaires, Contrat de Franchise (Nov. 2005), 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 franchiseur vient à devoir au franchisé 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. There is no jurisprudence to illustrate these cases. This might be explained by the fact that these cases never went to court, and that we know about them simply through the contract itself.

106. Cour d’appel [CA] [regional court of appeals] Douai, 2e ch., Dec. 5, 1991, No.

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 can only "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

3605/91; Olivier Gast, *Note*, LES PETITES AFFICHES, July 1, 1992, at 66 (indicating that noncompliance for non-compete provisions are less likely to be in a contract clause because the franchisor 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 the franchisee or to give assistance, or when the franchisor does not have enough advertisement for his franchise network). See also Cour de cassation [Cass.] [supreme court for judicial matters] com., July 12, 1993, Bull. civ. IV No. 91-20540 (finding insufficient advertising); Cour de cassation [Cass.] [supreme court for judicial matters] com., Feb. 19, 1991, Bull. civ. IV, No. 88-19809 (finding no supplies or assistance).

107. BÉNABENT, *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; SIMON, *supra* note 70, at 347.

108. BENABENT, *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).

109. 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. I, No. 279 ("*Attendu que la clause résolutoire de plein droit, qui permet aux parties 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.*") (trans. by Robert W. Emerson).

110. Cour de cassation [Cass.] [supreme court for judicial matters] Bull. civ. I, 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:

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, because this requirement was not an expressly stipulated duty, use of the termination provision was 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

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. (“*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 défallants la résolution de la vente, nonobstant l’offre postérieure d’exécution.*”) (trans. by Robert W. Emerson). This provision was deemed to be equivocal, allowing the court to use its power of appreciation and set its own terms for termination.

111. Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., May 18, 1988, Bull. civ. III, No. 94.

112. *Id.* (“*La clause résolutoire ne peut être mise en œuvre que pour un manquement à une stipulation expresse du bail.*”) (trans. by Robert W. Emerson). 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, Defrénois 1986, art. 33700 spéc. No. 32, p.458, note Vermelle; Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., June 11, 1986, Bull. civ. III., No. 92 (applying this rule in another context). Also, the termination provision could only be triggered by the infringement of an express provision, but not by 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 No. 92, at 73 (finding that sub-leases are forbidden by Article 21 of the Decree 53-960 of September 30, 1953, which rules the relationship between lessors and lessees regarding the renewal of residential leases, or of leases for commercial, industrial, or craftsman premises, and also ruling that the lessor could not trigger the termination contract because neither sub-lease was forbidden by an express provision nor was an express provision referring to the Decree).

113. Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., May 18, 1988, Bull. civ., III, No. 94.

114. *Id.*

115. *Id.*

116. French law distinguishes “*clause résolutoire*” contracts that may not need a “*mise en demeure*” from others which do. The former are said to be “*de plein droit*,” meaning that nonperformance automatically terminates the contract. See Henri-Xavier Ortoli, INTERNATIONAL FRANCHISE SALES LAW Fra-24 (eds. Andrew P. Loewinger & Michael K. Lindsey, 2006) (noting that, unless the franchise contract specifically expresses that a

the breaches, the reasons for the anticipated termination, and the 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 poorly advised about the nature and scope of the offenses that it was ordered to stop.¹¹⁸ The court held that he was not at fault for failing to satisfy, within the one-month deadline, the action to which he was subjected.¹¹⁹

Numerous commentators wish that judges had the power to modify the termination provision in the same manner that they can modify penalty provisions.¹²⁰ The terminology here is somewhat confusing. French law distinguishes *résolution* and *résiliation*. The main distinction is the effect of each regime upon 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, thus returning everything to the *status quo ante*.¹²¹

For the *contrats à exécution successive*, that is, successively executed contracts, such as franchise contracts or lease agreements, there is no need for past events to be “destroyed.” That form of termination, called *résiliation*,¹²² only applies prospectively.¹²³ For example, a franchisee

particular default or instance of poor performance is a type of complete breach for which no notice need be afforded to the breaching party, then the non-breaching party must first provide the breaching party with notice and a chance to cure). See also, 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 required by French law).

117. Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Nov. 28, 1968, Bull. civ. III, No. 498.

118. *Id.*

119. *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 have increasingly tended to suspend the effect of that provision. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 31, 1995, Bull. civ. I, No. 203; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 16, 1999, Bull. civ. I, No. 96-21.997; CODE CIVIL [C. CIV.] art. 1134 (“The resolution must be requested in court, and the defendant may be granted a period in the circumstances.”) (trans. by Google).

120. Jacques Mestre, *Nouvelles limites à la mise en œuvre des clauses résolutoires* [New Limits to the Establishment of Termination Provisions], 316 RTD civ., (1989); F. Osman, *Le pouvoir modérateur du juge dans la mise en œuvre de la clause résolutoire de plein droit* [The Judge’s Power to Moderate in the Establishment of the Automatic Termination Provision], *Répertoire Defrenois*, 65 (1993).

121. BÉNABENT, *supra* note 84, at 268.

122. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 1, 1996, Bull. civ. I, No. 332. Successive execution of a contract – something akin to a continuing or

could not request the reimbursement of royalties paid to the franchisor for the period of time not actually challenged by the franchisee, such as when the franchise agreement functioned well. In effect, the situation is similar to the difference in common law remedies between a breached executory contract and a breached executed contract.¹²⁴ For the former, a “*clause résolutoire*” may make more sense, as the contractual relationship has just begun and performance issues have already arisen. As time passes and the contractual relationship becomes more stable and long-term, then, when there is a breach in performance, the *résiliation* regime applies more effectively than the *resolution* regime.

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 obligations because the other party did not perform its duties. While this exception is a temporary device, its effect is an immediate suspension of the contract. Built into this is a public order mechanism, *relève de l'ordre public*, which follows from the structure of the contract itself. Therefore, as a matter of public policy,¹²⁵ a prohibition of non-performance exceptions cannot be drafted into a contract provision.

Unfortunately, no article in the French Civil Code defines the non-performance exception, and Article 1612 approaches it solely within the context of the sale of goods.¹²⁶ However, French case law, as a common law doctrine, has acknowledged the 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 exception to be valid. First, it must be a *contrat synallagmatique*, that is, a contract where there is consideration given by both of the parties.¹²⁷ Second, the breach must be so grave as to justify the other party's lack of performance (*inexécution*); this would be a factual inquiry for the court. When there is

relational contract in the United States – might be termed “*résolu*” meaning resolution but with the effects of a “*résiliation*.” See Robert W. Emerson, *Franchising and the Parol Evidence Rule*, 50 AM. BUS. L.J. 720-25 (2013) (discussing franchise agreements as relational pacts).

123. This prospective termination (“*résiliation*”) is distinguished from one which even has a retroactive effect (“*résolution*”).

124. See BLACK'S LAW DICTIONARY 393 (10th ed. 2014) (defining “executed contract” and “executory contract”).

125. I.e., public policy concerns about the nature of that type of contract.

126. BÉNABENT, *supra* note 84, at 500.

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

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.¹²⁸

Another limited approach is unilateral termination. Under French law, this is strictly an emergency measure, and one for which a notice period, *délai de préavis*, or a notice to perform, *mise en demeure*, is not required.¹²⁹ French contract law considers termination by judicial proclamation to be the norm. An exception to this principle, the extrajudicial unilateral termination, is recognized only in cases of emergency where there are, either currently or potentially, severely harmful consequences¹³⁰ resulting from one of the contractual parties' behavior. The present or possible injury justifies the other party's unilateral termination of the contract,¹³¹ but is done at the party's own risk and expense.¹³² Continuing or threatening to unlawfully display a trademark, or violating public safety laws,¹³³ surely constitutes an emergency for invoking this exception. Refusal to pay royalties may fall short, however, as the non-performing party's acts have to be "serious"¹³⁴ and urgent.¹³⁵ Even if the contract has a termination

128. BENABENT, *supra* note 84, at 229.

129. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 13, 1998, Bull. civ. I, No. 96-21.485.

130. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 28, 2003, Bull. civ. I, No. 01-03.662 ("*[L]a gravité du comportement.*").

131. This only applies to fixed-term contracts. Contracts with an indefinite period do not raise the question of the existence of the right to unilaterally terminate the contract. Those contracts can be terminated unilaterally. The issue is different for fixed-term contracts, such as franchise contracts or commercial leases.

132. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 28, 2003, Bull. civ. I, No. 01-03.662 ("*Attendu que la gravité du comportement d'une partie à un contrat peut justifier que l'autre partie y mette fin de façon unilatérale à ses risques et périls, peu important que le contrat soit à durée déterminée ou non.*").

133. Such laws include health code regulations for food preparation or safety standards for workers.

134. The "seriousness" is not defined by the jurisprudence. In Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 28, 2003, Bull. civ. I, No. 01-03.662 as in Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 13, 1998, Bull. civ. I, No. 96-21.485, "seriousness" was characterized by the contractual breach committed by one of the parties. In the first case, a company did not respect the contract during two months, putting the other party in a difficult financial situation. In the second case, an anesthesiologist breached his contract with an hospital, which forbade him to conduct visits outside of the hospital. There, the behavior of the anesthesiologist created a dangerous situation for the hospital and its patients, and made planning difficult.

135. An emergency can be characterized as "urgent" if the contractual infringement creates financial difficulties that are too heavy for the non-infringing party to bear or if it constitutes a dangerous situation for the party bearing the contractual infringement. See Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 28, 2003, Bull. civ. I, No. 01-03.662 (one year into an 18-month consulting contract that a company, Barep,

clause, a unilateral termination can be successfully challenged if a breach is not severe, or if the situation is not an emergency.¹³⁶

D. *Constructive Termination in French Franchise Law*

Now that the general constructs of the French franchise laws have been detailed, the Author will turn to how the doctrine of constructive termination differs 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.¹³⁷ Without this continual aid or know-how, the contract can be terminated.¹³⁸ However, the doctrine of constructive termination arises differently 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. This differs from the Americanized concept of constructive termination, in which there is no reclassification of the franchise relationship as some other contractual relationship.

The concept of constructive termination is recognized in French law,

S.A., had awarded to a financial services company, “SFL,” the latter company failed to perform the contract for two months; Barep was justified in unilaterally terminating the contract before its fixed term had expired – that would not be an “abusive rupture” of the contract on Barep’s part if SFL’s breach was grave (in effect, harmful to Barep)); *see also* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 13, 1998, Bull. civ. I, No. 96-21.485 (M.X., an anesthesiologist partner in a private medical clinic partnership called Clinique des Ormeaux, had a contract with Clinique providing for thirty years of his exclusive services in return for M.X.’s obtaining ownership of Clinique shares, and Clinique terminated M.X. after nine years due to M.X.’s numerous, serious professional failings, including jeopardizing the health of patients; the high court recognized the gravity of M.X.’s misconduct and thus rejected his appeal from the lower appellate court’s upholding of Clinique’s unilateral termination of M.X.).

136. Cour de cassation [Cass.] [supreme court for judicial matters] com., Feb. 10, 2009, Bull. civ. IV, No. 08-12.415; Laurent Leveneur, *Où la Résiliation aux Risques et Périls du Créancier Sert à éviter les Formalités Prévues par une Clause Résolutoire!*, CONTRATS CONCURRENCE CONSOMMATION NO. 5, May 2009.

137. Robert W. Emerson, *Franchise Savoir-Faire*, 90 TUL. L. REV. ___ (forthcoming 2016).

138. This duty extends both ways. The franchisor must supply aid, but the franchisee must do what is necessary to accept and use the know-how that the franchisor endeavors to transmit to the franchisee. Cour d’appel [CA] [regional court of appeals] Paris, 1e ch., Sept. 15, 2000, No. 978Q/00; Cour d’appel [CA] [regional court of appeals] Paris, 1e ch., June 11, 1992 (Dalloz 1992 Somm. p. 391, obs. Didier Ferrier). Also, Article 1134 alinéa 3 of the French Civil Code requires the franchisee to perform its contractual obligations in good faith and to cooperate with the franchisor. CODE CIVIL [C. CIV.] art. 1134 (Fr.).

but mostly in the employment arena. The law is similar to the American law of constructive discharge, which occurs when an employer's conduct towards an employee is so severe that the employee in effect dismisses herself. When a claim for constructive discharge is brought in the United States, courts evaluate the events surrounding the employee's departure from employment.¹³⁹ There is no requirement that the employee object to the employers' actions towards the employee.

Under French law, judges are not bound by the classification of the business relationship chosen by the parties under their contract, and can reclassify the contract as something else;¹⁴⁰ so, if a judge determines that the matter at hand is actually employment in nature, the franchisee could receive protection.¹⁴¹ Ordinarily, this 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.¹⁴² The constructive termination doctrine can then apply to a franchise agreement that has been reclassified as an employment contract; considering the franchisor's behavior, the franchisee may then be entitled to damages.¹⁴³

French law is more likely to treat a franchisee as an employee or consumer. This permits the implementation of constructive termination or

139. 33 AM. JUR. 3D *Proof of Facts* 235 § 8 (1995). See also *Holton v. Hart Mill Co.*, 166 P.2d 186 (Wash. 1946) (applying the constructive discharge doctrine).

140. See DIDIER FERRIER, INTERNATIONAL DISTRIBUTION INSTITUTE, *Country Report France: Franchising* (2012) (describing how judicial approval is needed to cancel a contract for breach of contract).

141. Judges look for a "subordination link" between supposed franchise parties. This link is defined as "the execution of work under the authority of the employer who has the power to give orders and directives and to control the execution and to sanction the failures of the subordinated party." Thibaut Khadir & Thomas Corre, *Are Franchises Subject to Labor Law?*, ASSOCIATION OF CORPORATE COUNSEL (Dec. 3 2013), <http://www.acc.com/legalresources/quickcounsel/qcafsl.cfm?makepdf=1>, archived at <http://perma.cc/EA4N-G8Q6> (internal citation omitted) (establishing the interconnection of franchises and labor law within the European Union, and France in particular). Where a "subordination link" is found, the judge will reclassify the contract as an employment contract and hold the franchisor to its managerial responsibilities under the contract. *Id.* For more on franchisee associations and franchise collective bargaining, see Robert W. Emerson & Uri Benoliel, *Can Franchisee Associations Serve as a Substitute for Franchisee Protection Laws?*, 118 PENN. ST. L. REV. 99 (2013) (providing additional information on franchisee associations and franchise collective bargaining); see also Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503 (1990) (providing additional information on franchisee associations and franchise collective bargaining).

142. If these three elements are met, the franchisee can benefit from provisions in the French employment code. CODE DU TRAVAIL [C. TRAV.] art. 7321-1 (Fr.).

143. See Khadir & Corre, *supra* note 141 (discussing how labor law may be applicable when the franchisor treats the franchisee as a subordinate).

similar remedies.¹⁴⁴ Such interpretations and reclassifications are not prominent in American law. Thus, the *Mac's Shell* reasoning, if applied beyond the PMPA, to business format franchising generally, could prove damaging to American franchises by withdrawing the claim for constructive termination for all franchisees, both PMPA-regulated and non-PMPA-regulated businesses alike. The franchisee-as-employee model is controversial, and likely unworkable except in extreme cases.¹⁴⁵ Moreover,

144. The most pro-franchisee nation in terms of overtly declaring franchisees to be consumers is South Africa. Recently enacted consumer protection laws in South Africa treat franchisees as just another class of protected persons, similar to consumers. Consumer Protection Act 68 of 2008 (S. Afr.). See Robert W. Emerson, *Franchisees as Consumers: The South African Example*, 37 *FORDHAM INT'L L.J.* 455 (2014) (discussing how South Africa's Consumer Protection Act treats franchisees as consumers); Dani Cohen & Natasha Smuts, *Consumer Protection Act Regulations an Urgent Wakeup Call for Franchisors*, WEBBER WENTZEL (July 18, 2011), <http://www.webberwentzel.com/wwb/content/en/ww/ww-in-the-news?oid=31619&sn=Detail-2011&pid=32749>, archived at <http://perma.cc/2SZ4-QPUH> (noting that, in South Africa, regulations cover all franchise contracts entered into or renewed after March 31, 2011, and provide franchisees "almost all of the same consumer rights in their relationship with the franchisor, as any other consumer has"); Lucinde Rhoadie & Belinda Scriba, *Franchise Agreements and the Consumer Protection Act*, POLITY, (April 8, 2011), <http://www.polity.org.za/article/franchise-agreements-and-the-consumer-protection-act-2011-04-08>, archived at <http://perma.cc/N2FT-SRV6> (describing South Africa's Consumer Protection Act's effects on franchising).

145. See *Awuah v. Coverall N. Am., Inc.*, 707 F. Supp. 2d 80 (D. Mass. 2010) (finding a franchisee qualified as an employee). Coverall is a franchised janitorial service, and the *Awuah* holding in favor of employment status for Coverall's Massachusetts franchisees entitles the franchisees to significant protections under federal, state, and local employment laws, minimum wage laws, and overtime wage laws. The *Awuah* holding led Coverall to cease its franchising operations in Massachusetts. Alisa Harrison, *Ruling Threatens Viability of Franchise Business in Massachusetts*, INTL FRANCHISE ASS'N (March 29, 2010), <http://www.franchise.org/Franchise-News-Detail.aspx?id=50412>, archived at <http://perma.cc/ZR6Z-69Y9>. More importantly, for purposes of the franchising community, *Awuah*'s implications instantly became highly controversial and far-reaching. Julie Bennett, *Pandora's Law: When Franchisees Are Ruled Employees, All Bets Are Off*, FRANCHISE TIMES (May 2010), <http://www.franchisetimes.com/May-2010/Pandoras-Law/>, archived at <http://perma.cc/P68V-FRHW>; see also Robert W. Emerson, *Assessing Awuah v. Coverall North America, Inc.: The Franchisee as a Dependent Contractor*, 19 *STAN. J.L. BUS. & FIN.* 203 (2014) [hereinafter *Assessing Awuah*] (analyzing *Awuah* and its aftermath, and concluding that franchisees need additional protections including the right to form associations and to enter into collective bargaining agreements); Sheri Qualters, *Judge Certifies Class of Cleaning Workers Misclassified as 'Franchisees'*, NAT'L L.J., Feb. 13, 2012, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202542173592>, archived at <http://perma.cc/PH4P-MUH6> ("[P]laintiffs contend that the company is liable for minimum wage, overtime and wage law violations."); Janet Sparks, *Coverall Ruling Sends Shiver Through Franchising*, BLUE MAU MAU (May 14, 2010, 6:07 PM), http://www.blumaumau.org/8907/awuah_decision_sends_shiver_through_franchising, archived at <http://perma.cc/8ZPB-7RFP> ("[T]his is not a case ultimately that is limited to Coverall or commercial cleaning business.").

constructive termination – at least in its general sense – is not easily applied under French law. Thus, guidance from afar, such as from France, may have to come to areas as discussed above: performance suspensions, resolution clauses, unilateral termination principles, and other doctrines and processes. These areas are undeveloped or less structured in America's franchise system and, because of this, an integration of only parts of the French franchise laws would result in gaps and incongruity.

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.¹⁴⁶ Shell Oil's argument proved persuasive, and the Court held that for behavior to be prohibited by the PMPA, it must cause actual termination of the franchise.¹⁴⁷ It is nearly impossible to prove actual termination, but if actual termination occurs, the franchisee is left in a precarious financial state that constructive termination aims to prevent.

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;¹⁴⁸ however, proving intent is invariably a difficult task. While, generally, termination can take many forms,¹⁴⁹ the *Mac's Shell* Court casts aside constructive termination, despite the fact that it may be just as harmful to a contractual relationship as actual termination.¹⁵⁰

Franchisees "should not have to wait until the end of the relationship to defend themselves from predatory practices by a franchisor."¹⁵¹ The

146. Reply Brief for Respondent, *supra* note 8, at 11-12.

147. *Mac's Shell*, 559 U.S. at 190. The Court's reasoning is misguided; drastically raising the rent essentially does force an end to the franchise.

148. *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).

149. The ABA Handbook references three of many possibilities for such termination: a letter declaring the contract to be over, a refusal to pass along supplies, or a franchisee closing its doors. *Id.*

150. 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.*

151. W. Michael Garner, *Fraud, Breach and Wrongful Termination*, BLUE MAUMAU (Dec. 13, 2010, 4:49 PM), http://www.blumaumau.org/fraud_breach_and_wrongful_termination, archived at <http://perma.cc/7HQP-Y3Y3>

Mac's Shell Court tried to advance the notion that franchisees need not go out of business to receive relief, pointing to the possibility of injunctive relief where a court could enjoin the franchisor from taking certain actions.¹⁵² Indeed, in terms of state franchise law, “most franchise statutes provide for both an award of damages and injunctive relief.”¹⁵³ Still, in spite of Chief Justice Roberts’s confidence that franchisees have remedial flexibility,¹⁵⁴ leading long-time franchise attorney and former International Franchise Association general counsel Philip F. Zeidman cautions that “court[s] may require a terminated franchisee to elect one or the other remedy [a damages award or a permanent injunction] prior to trial.”¹⁵⁵ Moreover, in oral argument, Chief Justice Roberts noted that some decisions by franchisors could lead to franchisees “los[ing] the right to operate.”¹⁵⁶

Franchisees have lost a number of the reported cases in which they sought to obtain a temporary restraining order (TRO) that prevented the franchisor from terminating their agreement.¹⁵⁷ Even if it is possible for the

152. Franchisees are permitted to seek injunctive relief as soon as the franchisee receives “notice of impending termination.” *Mac's Shell*, 559 U.S. at 189; *see also* PMPA, §2802(a) (stating that franchisors may not terminate a franchise before the end of the term). However, the government, which was not a party to the case, read the PMPA slightly differently and argued in its amicus brief for an interpretation of the PMPA that would allow 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 189 n.9.

153. Philip F. Zeidman, *Legal Aspects of Selling and Buying* § 9:74 at 802 (3d ed. 2014).

154. *See Mac's Shell*, 559 U.S. at 189 (noting that a franchisee may request a preliminary injunction after receiving notice of impending termination from the franchisor).

155. Zeidman, *supra* note 153, at 802 n.6 (citing *Lakefield Tel. Co. v. N. Telecom, Inc.*, 679 F. Supp. 881 (E.D. Wis. 1988), in which the court required a franchisee suing under the Wisconsin Fair Dealership Law to choose between seeking the equitable remedy of an injunction versus a damages award). Zeidman comments, “Otherwise, the court reasoned, the franchisor would be placed in the position of arguing both the adequacy of monetary damages (to defeat the injunction) and the lack of compensable injury (to defeat a future damages claim).” Zeidman, *supra* note 153, at 802 n.6.

156. Transcript of Oral Argument at 8, *Mac's Shell*, 559 U.S. 175 (2010) (Nos. 08-240, 08-372). Justice Ginsburg seemed to recognize this point as well, raising the notion that franchisors can essentially make unilateral changes to the franchise agreement. *Id.* at 12.

157. Courts have found no likelihood of franchisee success on the merits of their challenges to a termination, and thus denied a TRO for terminated dealers or franchisees. *See J.P.T. Auto., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 659 F. Supp. 2d 350 (E.D.N.Y. 2009) (finding no grounds for TRO because the auto dealership agreement provided for immediate termination if a dealer became insolvent, the dealer lost its floor plan financing, the dealer’s liabilities significantly outweighed its assets, the dealer could not pay any of its outstanding debts, the dealer had voluntarily filed for bankruptcy protection, or the dealer had engaged in dishonest acts towards its customers); *Frank Martin Sons, Inc. v. John Deere Const. & Forestry Co.*, 542 F. Supp. 2d 101 (D. Me. 2008) (claiming that the franchisor had

franchisees to win a TRO,¹⁵⁸ injunctive relief will not work for all franchisees, especially when the franchisor's actions have effects that cannot be undone. That is, once the franchisee has been compelled to stop running a franchise (which involves using the trademark, operating at an established location, etc.), the franchisee cannot easily resume operations and pick up where it left off. This is the case even were the franchisee successfully obtains a court order that enjoins, thereby theoretically undoes, a franchisor's actions that terminated the franchise.

Not only do franchise contracts often require arbitration,¹⁵⁹ but it is common practice for the franchisor, in drafting the franchise agreement,¹⁶⁰

not terminated similarly situated franchisees for discrepancies related to warranty service, finding that the Maine Franchise Act permitted termination for due cause without showing other franchises were terminated on terms then equally available to all franchisees); *Am. Standard, Inc. v. Meehan*, 517 F. Supp. 2d 976 (N.D. Ohio 2007) (denying the franchisee's claims that the parties orally modified a termination clause from allowing either party to terminate on 30 days notice to one permitting termination only for cause and that the franchisor was equitably estopped from terminating the contract without cause based on the franchisor representative's statements about its termination policy). Likewise, in *Huang v. Holiday Inns, Inc.*, although termination would likely cause hotel franchisees to lose their business, there was no probable finding of arbitrary and capricious termination because the franchisees had been told many times that their hotel did not meet franchise standards and, despite receiving notice of deficiencies, franchisees consistently failed to maintain acceptable quality standards. 594 F. Supp. 352 (C.D. Cal. 1984).

158. Two cases in which courts issued a TRO against a franchisor were *Grosso Enterprises, Inc. v. Domino's Pizza LLC*, Civil Action No. 11-1484, 2011 WL 816620 (E.D. Pa. Mar. 9, 2011) and *Progressive Restaurant Systems, Inc. v. Wendy's International, Inc.*, No. 90-CV-791, 1990 WL 106719 (N.D.N.Y. July 20, 1990). In *Grosso Enterprises*, the court considered whether (1) the franchisee would suffer irreparable harm if the TRO were denied and (2) the harm to the franchisee without a TRO outweighed the harm to the franchisor if there were a TRO. 2011 WL 816620 at *5. The court noted that, having spent his entire adult life operating a Domino's franchise through Grosso Enterprises, the franchisee would suffer more than just monetary harm if he lost a 14-year franchise. *Id.* at *6. By contrast, if Grosso Enterprises continued to operate a franchise until the court ruled on the merits of the plaintiff's claim, Domino's harm would be *de minimis*. *Id.* The Court thus concluded that the factors for granting a TRO weighed in the franchisee's favor. *Id.*

Likewise, in *Progressive Restaurants*, the court granted a TRO on the ground that termination of Wendy's franchise rights would result in an immediate and irreparable loss to the franchisees by forcing them into bankruptcy and leading to the loss of their businesses. 1990 WL 106719, at *2. While relying on the franchisor's representations, the franchisees spent thousands of dollars renovating the buildings leased and mortgaged from third parties in order to operate Wendy's franchises. *Id.* The court found that the balance of hardships tipped toward the franchisees, as the franchisor would be unable to show any prejudice or undue hardship if the franchise agreements continued pending the outcome of the litigation. *Id.*

159. See Emerson, *Franchise Contract Interpretation: A Two-Part Standard*, *supra* note 1, at 695 (describing a survey of 100 franchise agreements in 2013, which found that 70% of them had an arbitration clause).

160. The franchisor's position, in drafting the terms of the franchise agreement, is in fact

to ensure that arbitration, rather than litigation, does not undermine “the franchisor’s ability to get a temporary restraining order when necessary to protect the franchise system.”¹⁶¹ This is because most franchise agreements have come to have an “injunctive relief provision” with words to the effect that “[n]otwithstanding anything in [the arbitration clause] to the contrary, Franchisor may bring an action for injunctive relief in any court having jurisdiction to enforce the Franchisor’s noncompetition, trademark, and/or proprietary rights, in order to avoid irreparable harm to the Franchisor, its Affiliates, or the Franchise System as a whole.”¹⁶²

Returning to *Mac’s Shell*, the court’s holding therefore seems to be both an inadequate reading of the law and a flawed understanding of the facts of franchising. The Court, in effect, does not deny that franchisees may face unfair treatment, but it still overlooks or even outright rejects any remedies for the franchisee when faced with this treatment.

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.¹⁶³ The constructive discharge doctrine grew out of courts’ need for a way to protect workers who have been forced out of their jobs but were not actually fired.¹⁶⁴ The standard for constructive discharge claims is whether “a reasonable person would have felt compelled to resign” based on the working conditions.¹⁶⁵ A claim of constructive discharge carries a heavy burden of proof.¹⁶⁶ In fact, the genesis of the constructive

just one of the factors often giving the franchisor a remarkable advantage over its franchisees. Emerson, *Assessing Awuah*, *supra* note 145, at 208 n.22 (offering much commentary and case law for the contention that franchisors control the process of making the contract and that “franchisees usually do not—and perhaps cannot—bargain at arm’s length when buying into a franchise agreement.”).

161. Timothy J. Bryant & Matthew E. Lane, *Companion Dispute Resolution: Three-Dimensional Thinking and the Effective Use of Mediation with Traditional Litigation of Franchise Disputes*, 33 *Franchise L.J.* 261, 271 (2013).

162. *Id.* at 271-72 (quoting the model clause as an example of how an injunctive relief provision is phrased).

163. *Mac’s Shell*, 559 U.S. at 184.

164. 33 *AM. JUR. 3D Proof of Facts* 235 § 1 (1995).

165. *Id.* Courts have admitted there is no “mathematically precise test” for what is intolerable. *Bragg v. Office of the Dist. Atty., Thirteenth Judicial Dist.*, 704 F. Supp. 2d 1032, 1059 (D. Colo. 2009) (quoting *Hogue v. MQS Inspection, Inc.*, 875 F. Supp. 714, 723 (D. Colo. 1995)). Courts consider the totality of the circumstances in their analysis. *Bragg*, 704 F. Supp. 2d at 1059.

166. 33 *AM. JUR. 3D Proof of Facts* 235 § 1. This article does not suggest that these claims are easy but, rather, that the remedy should still be available to those who need it. The standard for finding a constructive termination, similar to constructive discharge,

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 but nonetheless engage in pretense and remain – at least ostensibly – on the job, waiting to be fired. Without constructive termination, this sham may be necessary because an “honest” resignation would leave the employee without any remedy at all.¹⁶⁷

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 to address their employer’s behavior.¹⁶⁸ Constructive termination, however, is designed to allow franchisees to pursue claims *without* “leaving the job.”¹⁶⁹ In a sense, these two doctrines are opposite in nature; one protects legal recourse once the

should be high, but far from unattainable.

167. *Id.*

168. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 147 n.8 (2004) (“[A] prevailing constructive discharge plaintiff is entitled to all damages available for formal discharge. The plaintiff may recover postresignation damages, including both backpay and, in fitting circumstances, frontpay.”).

169. An employee subject to terms constituting a constructive termination may continue to work under protest while he looks for a new job. *Jones v F Sirl & Son (Furnishers Ltd.)* [1997] EAT 49 (Eng.), much as a franchisee ought to be able to explore his options while voicing his discontent to the franchisor and – at least temporarily – maintaining the franchise operations. In U.S. law, there are a number of cases analyzing the length of time an employee stays on a job *after* the employee was allegedly constructively terminated. In practice that time period may be considerable. *See Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1031 (Cal. 1994) (while not finding constructive termination on the facts of that case, noting that “an ‘outer limit’ beyond which an employee cannot remain on the job after intolerable conditions arise and still claim constructive discharge” can be beyond a statute of limitations period - “The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person. Neither logic nor precedent suggests it should always be dispositive.”). In *Mullins v. Rockwell Int'l Corp.*, 936 P.2d 1246, 1251 (Cal. 1997), the California Supreme Court articulated why constructive discharge law must not punish parties for engaging in engaging in objectively reasonable behavior, such as trying to resolve matters amicably:

As a practical matter, a rule requiring a lawsuit to be filed as soon as intolerable conditions begin would interfere with informal conciliation in the workplace. The filing of a lawsuit not only would stifle the parties' efforts to resolve differences informally; it would in most cases prompt the employee to resign at the earliest date to avoid the awkwardness of maintaining employment while pursuing litigation against his or her employer.

Id. at 1251. This reasoning for employment contracts applies to franchise contracts as well.

offensive situation ends and the other guarantees legal recourse without having to leave the situation. While the Court may appear to have a persuasive comparison on the surface, these simply are not parallel fields. The differences become even more apparent when comparing the setup of these doctrines in the United States to the setup in France, where constructive termination is applied more similarly to an employment discharge, in reclassifying the franchise relationship as an employment context. Indeed, in many circumstances, it is far easier to find another job than to start anew after abandoning a franchise (and likely absorbing a large monetary loss in the process).¹⁷⁰

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. These costs might include hiring and training costs, purchasing supplies and goods, renovations, among others. 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.¹⁷¹ Here, again, the Court fails to step back and look at the entire landscape. While the Court's descriptions of the doctrine of constructive eviction are correct,¹⁷² a tenant must leave the property before pursuing such a claim,¹⁷³ 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 departure from the premises, or find a new place to live.¹⁷⁴ A franchisee is left with fewer alternatives and given fewer protections under the law than a harmed tenant. There are extensive legislative structures at the federal and state law levels devoted solely to tenant protection (for example, the existence of the U.S. Department of Housing and Urban Development; fair

170. For discussion of the costs involved, *see supra* Part I. On sunk costs for franchisees, *see* Robert W. Emerson, *Franchise Goodwill: Take a Sad Song and Make It Better*, 46 U. MICH. J.L. REFORM 349, 367-68 (2013).

171. *Mac's Shell*, 559 U.S. at 184.

172. *See id.* (noting that constructive eviction requires a tenant to "actually move out in order to claim constructive eviction").

173. DEF. AGAINST A PRIMA FACIE CASE § 7.4 (Thompson Reuters ed., rev ed.).

174. *Id.*

housing laws and councils; and advocacy programs, such as tenants unions; etc.). Additionally, landlords may violate the implied warranty of habitability when they do not uphold their end of a leasehold agreement – a finding that can be made irrespective of the tenant leaving the leased premises – 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.¹⁷⁵ In this situation, a party having a present duty of performance may violate a contract under the doctrine of breach by anticipatory repudiation.¹⁷⁶ Here, for example, a party's words or actions before a substantive breach occurs can constitute a refusal to perform at the time they were made or done. For anticipatory breaches, the 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 fears¹⁷⁷ about setting a particular standard for constructive termination, as it will not be paving new ground after all. This doctrine also allows the injured party to measure damages,¹⁷⁸ which a franchisee in a constructive termination situation is likely in great need of, as evidenced by the vast losses described above. Drawing from this doctrine would also be beneficial in providing recourse for an injured party before the final and full injury has occurred.

Judges and commentators have voiced their concern over whether constructive termination claims are better resolved through other causes of action.¹⁷⁹ The Supreme Court reasoned that the availability of state law claims allows other avenues for franchisees to recover.¹⁸⁰ The Court's

175. See generally Brief for Petitioner, *Mac's Shell*, 559 U.S. 175 (2009) (Nos. 08-240, 08-372), 2009 WL 3391431 (failing to mention anticipatory repudiation); see also Supplemental Brief for Petitioner, *Mac's Shell*, 559 U.S. 175 (2009) (Nos. 08-240, 08-372), 2009 WL 462411 (failing to mention anticipatory repudiation).

176. See generally 22 STEVEN W. FELDMAN, TENNESSEE PRACTICE: CONTRACT LAW AND PRACTICE § 11:16 (2006) (explaining the doctrine of anticipatory repudiation).

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

178. See, e.g., U.C.C. § 2-713 (describing the computation of a buyer's damages for repudiation by the seller).

179. See Robert K. Kry, *Mac's Shell and the Future of Constructive Termination*, 30 FRANCHISE L.J. 67, 70 (2010) (suggesting that constructive termination is a workable standard even when the franchisee continues to operate).

180. See *Mac's Shell*, 559 U.S. at 188 (describing that a jury verdict in favor of the

analysis accepted Shell Oil's argument that federal constructive termination claims were, to be expressed colloquially, "piling on."¹⁸¹ Thus, the Court reasoned that breach of contract claims might provide a reasonable enough avenue of recourse for franchisees.¹⁸² However, both Justices Roberts and Stevens pointed out that contract law and constructive termination need not be mutually exclusive.¹⁸³ The goal of the United States' legal system is not to limit an injured party to just one cause of action or method of obtaining redress. While laws must be narrowly tailored enough to target specific behaviors, they cannot serve as a netting function to prohibit legitimate lawsuits. 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.¹⁸⁴

Mac's Shell simply may not have been the best test case for constructive termination proponents.¹⁸⁵ Those franchisees that sued on non-renewal claims, despite later agreeing to renewal contracts, bolstered Shell's argument against recognizing constructive termination claims.¹⁸⁶ Also, the *Mac's Shell* attorney faced extensive questioning by the Justices with few strong answers¹⁸⁷; 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).

dealers' state law claims demonstrated meaningful protection).

181. See Brief for Respondent at 12, *Mac's Shell*, 559 U.S. 175 (2009) (Nos. 08-240, 08-372) ("[T]he government's proposed [constructive termination] standard . . . would exponentially expand liability.").

182. See *Mac's Shell*, 559 U.S. at 182, 188 (finding that a necessary element of constructive termination is a franchisor's effectively forcing an end to the relationship; but franchisees can usually rely on state-law remedies).

183. See Transcript of Oral Argument, *supra* note 156, at *17 (statement of Chief Justice Roberts) (suggesting that a franchisor's actions may give rise to both breach of contract and constructive termination claims); *id.* at *55 (statement of Justice Stevens) (pointing out that contract law's insufficient nature led to Congress' decision to enact the PMPA); *but see id.* (statement of Shell Oil attorney) (countering that the PMPA only steps in on narrow grounds).

184. See, 15 U.S.C. § 2805(b), *supra* note 15, and accompanying text (providing that Congress left at least some presence of judicial discretion in related decisions).

185. 559 U.S. 175.

186. *Id.*; Brief for Respondent, *supra* note 181, at 10.

187. See generally Transcript of Oral Argument, *supra* note 156, at *34 (statement by Justice Kennedy) (reflecting incredulity at *Mac's Shell* attorney's failure to suggest a test for constructive termination to the Justices).

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 binding authority,¹⁸⁸ has reasoning that remains accessible to future litigants for persuasive arguments. The First Circuit held that the claim of constructive non-renewal of the lease under PMPA was not available for the franchisees because of the fact that they signed a lease renewal, instead of ruling out the claim of constructive termination as a whole for franchise relationships under the PMPA.¹⁸⁹ The Court'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.¹⁹⁰ An annulment of this behavior would also be violative of freedom of contract principles. 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 Court, instead, should have limited its analysis to whether the lower court's holding that constructive termination could not apply to a signed renewal agreement was erroneous under the proper standard of review.

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.¹⁹¹ In *Petereit v. S.B. Thomas*,

188. It was overturned, after all.

189. *Marcoux*, *supra* note 30.

190. *Id.*

191. See *American Motors Sales Corp. v. Semke*, 384 F.2d 192, 198-200 (10th Cir. 1967) (ruling in favor of dealer when manufacturer refused to honor warranty arrangements of franchise agreement and to supply automobiles); *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 362-63 (4th Cir. 1986) (finding against franchisor oil company that sold interest in franchise to third party and leased premises to third party, even if authorized by state law); *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (9th Cir. 1986) (finding for franchisee who invoked rights under PMPA and only signed successor contract under protest); *Petereit v.*

Inc., the Second Circuit found that “total abrogation” was not needed for a franchise to be effectively terminated.¹⁹² While that court also cautioned that not every negative impact would be considered a constructive termination,¹⁹³ it put forth the very argument supported in this article: requiring abandonment would deal a near-fatal blow to the doctrine of constructive termination.¹⁹⁴ 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.”¹⁹⁵

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 their marketing policies.¹⁹⁶ 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.¹⁹⁷ Similarly, in *Pro Sales, Inc. v. Texaco, U.S.A.*, the Ninth Circuit looked to the PMPA’s legislative history when deciding in a franchisee’s favor.¹⁹⁸ The Ninth Circuit went even further, however, by allowing a cause of action when a renewal contract was signed under protest.¹⁹⁹ Finally, in *American Motors*

S.B. Thomas, Inc., 63 F.3d 1169, 1181-83 (2d Cir. 1995) (finding for franchisee after alteration of his sales territory).

192. *Petereit*, 63 F.3d at 1181-82.

193. *Id.* at 1182. There must be “something 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.

194. *Id.* (concluding that “[i]f the protections the Connecticut legislature afforded to franchisees were brought into play only by a formal termination, those protections would quickly become illusory.”).

195. *Id.*

196. *Barnes*, 795 F.2d 358, 360 (4th Cir. 1986).

197. *Id.* at 359.

198. *Pro Sales*, 792 F.2d 1394, 1399 (9th Cir. 1986) (concluding “that this congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA.”).

199. *Id.* at 1396. Texaco had threatened non-renewal if Pro Sales did not agree to a four-year agreement reducing the volume of gasoline Pro Sales could buy. *Id.* Only after Texaco sent notice of non-renewal did Pro Sales sign the new agreement, and it did so under protest. *Id.* The signing of renewal agreements was, in retrospect, an error, perhaps the fatal mistake of the dealers in *Mac’s Shell*. Even in the more franchisee-friendly law of France, the *Mac’s Shell* holding on renewal is the easy answer, absent strong indications of bad faith, to the question: “Can a franchisee renew the franchise relationship, despite strong dissatisfaction and even a loud protest while signing the renewal form, and then proceed on a claim of constructive termination?”

Sales Corp. v. Semke, the Tenth Circuit made an analogy to good faith dealing.²⁰⁰ The court stated that a franchisor could not pressure a franchisee to take supplies the franchisee did not want or could not use.²⁰¹ The Tenth Circuit found it reasonable to interpret the Act as allowing a cause of action based on coercive or intimidating acts.²⁰²

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. There are many doctrines within the American legal system that deal with the concept of “constructively” implying an action, such as constructive eviction, constructive notice, and constructive discharge. 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 if actual termination is the real standard.

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. The event of an actual

Under French case law, 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, Bull. civ. IV; Cour de cassation [Cass.] [supreme court for judicial matters] com., June 6, 2001, Bull. civ. IV, No. 99-20831. 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, the French Civil Code provides that, when signing an agreement, a party that was acting with consent fully undertakes to perform the contract, according to the doctrine of individual autonomy. See EVA STEINER, FRENCH LAW: A COMPARATIVE APPROACH 299 (2010) (concluding, “At the heart of French contract law lies the central doctrine of *autonomie de la volonté*”).

200. *American Motors*, 384 F.2d at 195 (10th Cir. 1967).

201. *Id.*

202. *Id.* (holding that “[i]f coercion or intimidation does compel the dealer to terminate his franchise then clearly ‘it relates’ to the termination and would thus appear to be actionable by the dealer.”).

termination of a franchise relationship, as required in *Mac's Shell*, can be the "nail in the coffin" for franchisees. The franchisee's investments into the enterprise, facility improvements, and training will be lost, and often, irrecoverable and nontransferable. Additionally, the franchisee may be left without capital to pursue other business opportunities. The dependency of the American economy upon franchising makes it clear that the *Mac's Shell* decision should not be extended to other, non-PMPA franchises or to the PMPA franchises similar to *Mac's Shell*.

The United States does not have many of the other pro-franchisee aspects that French law possesses, such as *savoir-faire*,²⁰³ territorial protections,²⁰⁴ goodwill,²⁰⁵ and indemnity,²⁰⁶ among others. Thus, constructive termination might not be as necessary a concept in France as in the United States, 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 fosters a hostile environment for franchisees through its treatment of constructive termination, has remedied that with other considerations not available in the United States that serve as contractual and judicial protections of franchisees. 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 of 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 on a franchisor's actions. Thus, no matter what actions a franchisor takes against its franchisee, courts very likely 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 and mentality 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.

203. Emerson, *supra* note 137.

204. Emerson, *A French Comparison*, *supra* note 22.

205. Emerson, *supra* note 170.

206. DIDIER FERRIER & NICOLAS FERRIER, *DROIT DE LA DISTRIBUTION* 64-65, 91, 115-17 (7th ed. 2014).