Issue No.3 | October 2015

Montesquieu Law Review

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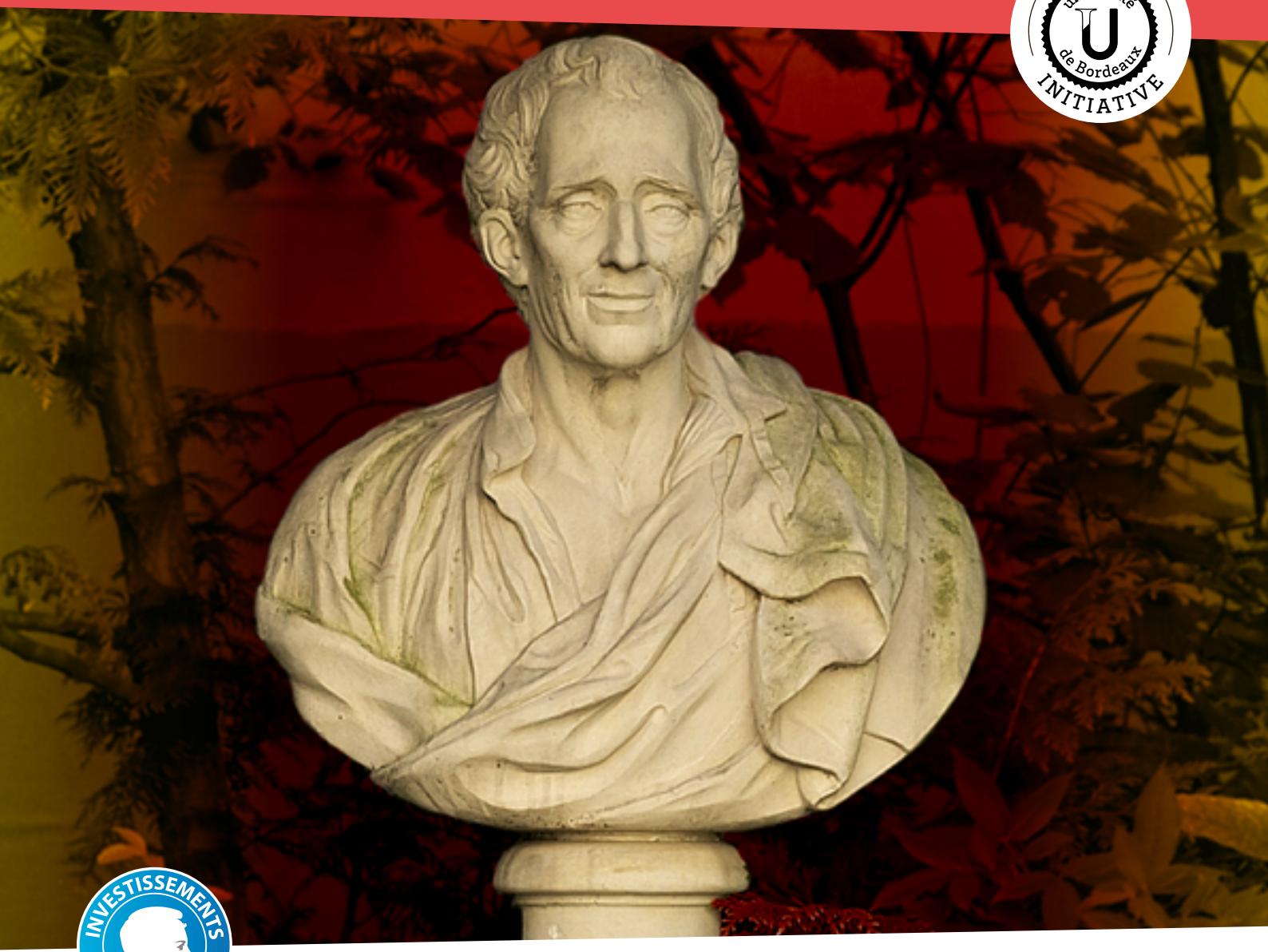

Program supported by the ANR n°ANR-10-IDEX-03-02

Forum Montesquieu
Faculté de droit et science politique
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Towards an important reform of the French Civil Code (1)

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A comprehensive reform of the French law of obligations and evidence – the first one since the Civil Code of 1804 – was launched by the Minister of Justice Christiane Taubira in February 2015. The *projet d'ordonnance* (hereinafter referred to as "the Bill") reforms French contract law, as well as the general regime of obligations (a systematic presentation of the general principles of obligations and how they relate to each other) and the provisions on the proof of obligations. The reform of extracontractual liability is not included in this Bill but it is in preparation.

The aim is to simplify the law and, to some extent, make it consistent with European and international standards. It also seeks to modernise the language which is used and present, to France and to the world, a modern version of this part of French law, a particularly important objective for a country where legislation – and more specifically codification rather than case-law – is the primary source of law. French law belongs to the civil-law tradition and continental law (2). General contract law belongs to the core of private law in any domestic legal system. Notwithstanding the fact that its practical importance should not be overestimated (3), contract law is one of the main and most classic subjects of comparative and European law.

For more than two centuries, Title III of Book III of the French Civil Code, "*Des contrats ou des obligations conventionnelles en général*", had remained practically unaltered. Yet French contract law has evolved considerably since the Civil Code was introduced in 1804. These changes started as soon as 1807 with the *Code de commerce* (Commercial Code) which took "commercial transactions" away from the Civil Code. In 1904, on the centenary of the Civil Code, the Minister of Justice established a Commission composed of 61 members (with politicians, practitioners and academics), to revise the Code. In June 1945, a *Commission de réforme du Code civil* (Commission for the reform of the Civil Code) was set up by the Ministry of Justice, further to a suggestion from the *Association Henri Capitant des Amis de la culture juridique française* (an association created in 1935 which gathers French speaking academics, judges, practitioners from all over the world). It was composed of twelve lawyers, and divided into four sub-commissions (General Part, Persons and Family, Obligations, Property). It began to prepare a new draft of the Civil Code but the text was never put before the French Parliament (4).

Over recent decades, many important legislative reforms have been introduced in the French Civil Code notably in the field of family law, inheritance, securities, and prescription (5). However, the evolution of contract and tort law mainly took place outside the Civil Code and was largely the result of the creativity of French judges. The Court of Cassation created new rules (e.g. for precontractual negotiations), modernised others and sometimes even changed their meaning. It also gave a practical application to some academic concepts (e.g.: *obligation de moyens* and *obligation de résultat*). The *Code de la consommation* (or Consumer Code, promulgated in 1993) contains the rules for consumers.

As regards contracts, the reasons for the durability of almost all of Title III of the Civil Code have changed over time. In the Sixties, reformers were divided between capitalism and socialism (6). In the Seventies, the legislature began to wait for European unification of contract law (7). Meanwhile, some Western European countries began huge recodification projects. The Netherlands adopted a new Civil Code in 1992. Germany introduced its *Schuldrechtsreform* of 2001. After their accession to the EU, several Central and East European countries re-codified their civil law or are currently engaged in such a process (8).

In France, the recodification process had to overcome several obstacles. Firstly, modifying rules which date from 1804 is a symbolic enterprise which, for this simple reason, gives rise to much criticism. Secondly, the underlying principles of contract law have changed. In 1804, the Civil Code reflected the spirit of the Enlightenment and of the newly-gained freedom and equality. At that time, the rules on contracts were inspired by the ideas of individualism and liberalism. The new Bill introduces more *solidarité* (solidarity) and contractual fairness through good faith, whilst granting greater powers to the courts. It also pays more attention to the public interest and to fundamental rights.

This paper will present the genesis of the reform (section I) and examine parts of its content (section II). The process is still ongoing and a revised Bill is currently being examined by the French *Conseil d'Etat*. Some of the provisions which are presented in the second section of this paper may therefore be amended in the final version.

I. The genesis of the reform

The recodification of French contract law was launched by a number of French academics. In September 2005, an *Avant-projet de réforme du droit des obligations et de la prescription* (Draft Bill reforming the law of obligations and of prescription) was submitted to the French Minister of Justice (9). The *Avant-projet Catala* was drafted from early 2003 to October 2005 by thirty-four civil lawyers. -Intellectual (or institutional?) support for this work was providedby the *Association Capitant des amis de la culture juridique française*. Great attention was paid to this *Avant-projet*, not only in France but all over Europe. Despite growing awareness of the ongoing Europeanisation of the law (this was indeed the main motto for the project), many provisions remained unchanged; particular care was taken to avoid renumbering the most famous ones (for instance Article 1134 or Article 1135 para. 1) (10) and the French concept of *cause* was retained (11), etc. The influence of the surrounding international and European legal environment was limited in the *Avant-projet Catala* (12). The other academic project, prepared under the chairmanship of Professor Francois Terré, drew much more inspiration from the various European and international models (13). When the Ministry of Justice (*Direction des affaires civiles et du Sceau*) started work on its own proposals, it worked in close collaboration with that group.

The first governmental draft (July 2008) took much inspiration from instruments which form part of European private law, and particularly from the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR) and also the Unidroit Principles of International Commercial Contracts (Unidroit Principles) (14). As early as 2008, various professional organisations such as the Barreau de Paris (the Paris Bar Association), the Medef (the French employers' organisation), the Chamber of Commerce of Paris and the notaries launched their own working groups and made critical observations to the Ministry of Justice. In 2010-2011, the Ministry of Justice consulted on issues related to the *régime général des obligations* and torts.

Meanwhile, the law of prescription was reformed (June 2008; see Book III, Title XX, Articles 2219 to 2254) (15).

The best way forward for the French reform of the law of obligations would have been a comprehensive and coherent text on contract, tort, quasi-contracts and evidence, adopted through the parliamentary procedure. However, realistically, this would have endangered the whole process. This is the reason why the Government decided to reform the law by way of *ordonnance* (decree), a procedure which significantly reduces the role of Parliament, and to leave out tort law (although a bill on tort law is ready, it has not been included) (15a).

The Government issued a Bill on 27 November 2013 on the modernisation and simplification of law and procedures in the areas of justice and home affairs (the *Projet de loi du 27 novembre 2013 relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures*). Article 3 of this draft Bill is titled *Simplification du droit des contrats, du régime et de la preuve des obligations* ("Simplifying contract law, and the *régime* and proof of obligations). The purpose of this Article was to enable the Government to reform French contract law by way of *ordonnance*. The *exposé des motifs* or explanatory statement gave a long and detailed explanation of the reasons for and the principal objectives of such a reform. It emphasised the constitutional goal of "intelligibility of the law", the need to reinforce legal certainty and the influence and attractiveness of French law.

On 23 January 2014, the French Senate rejected this text and expressed its strong opposition to the reform of contract law by way of *ordonnance*. However, Article 3 was reinserted in April 2014 by the National Assembly and after the authorisation to proceed in this way was finally voted, the Bill was published (16). A consultation on the Bill was launched on 25 February 2015, on the Ministry's website (it closed on 30 April 2015). The Bill has also been sent to administrative bodies, academics, judges, and practitioners. The Government is currently amending the text on those points that it considers important. From September to December, the *Conseil d'Etat* will scrutinise the new Bill which should then be adopted soon thereafter.

If the reform passes, Title III of the Civil Code will be restructured and it will have three subtitles for the three main sources of obligations: contracts, *responsabilité civile* or civil liability and "other sources of obligations" (quasi-contracts).

The article numbers have been changed. Contrary to the Unidroit Principles or Principles of European Contrat Law (PECL), the draft Bill does not give a title to each and every article. However, it contains many divisions and subdivisions (chapters, sections, subsections) which are meant to make it easy to read and understand.

II. The main features of the French contract law reform

The reform of Title III of the Civil Code ("Of sources of obligations") follows the order shown below.

- Subtitle I is on *Le contrat*.

- Subtitle II is dedicated to *la responsabilité extracontractuelle* (non-contractual liability), but it is not included in the Bill.

•Subtitle III is on *Les autres sources des obligations* "The other sources of obligations" and includes *gestion d'affaires* (management of another's affairs); *paiement de l'indu* (undue payment); and *enrichissement injustifié* (unjustified enrichment).

Title IV deals with the *régime général des obligations* (a systematic presentation of the general principles of obligations and how they relate to each other). It contains, for instance, texts on conditional obligations, plural obligations, extinction of obligations (by satisfaction, set-off, impossibility of performance, release of debts, merger) as well as provisions on assignment of rights, debts and contracts, on novation and delegation, on restitution.

Title IV *bis, De la preuve des obligations*, is on the proof of obligations (Articles 265 -307).

This paper focuses on Title III, Subtitle I, "*Le contrat*" which has attracted considerable attention. Indeed, this subtitle contains many of the best-known and sometimes controversial provisions of this reform.

Chapter 1 of Subtitle I contains some "*Dispositions préliminaires*" ("Preliminary Provisions" (17)). Article 1101 provides a definition of the term contract (the word "contract" replaces "*convention*"): "A contract is the concordance of wills of two or more persons with a view to creating legal consequences".

Article 1102 affirms the principle of freedom of contract and specifies its limits: parties are not allowed to derogate from rules of public policy or infringe the fundamental rights and freedoms envisaged by this Article.

Article 1103 enshrines a general principle of good faith, both for the formation (this is new in the Code) and the performance of the contract. It is possible to see here some inspiration from the main European and international projects: PECL, Art. 1:201; Draft Common Frame of Reference, Art. 1-1:102 and III-1:103; Unidroit Principles (articles 1.7 and 1.8) (18). However, this addition is actually not profoundly innovative: good faith in the formation of contracts already plays a significant role in French case law and though not ultimately included in the Code civil of 1804, this requirement was a feature of the preliminary drafts.

Articles 1104-1110 contain definitions. In particular, Article 1108 provides that "a bespoke contract is one whose terms are freely negotiated by the parties" (*contrat "de gré à gré"*).

Chapter 2 is on the formation of contract

Section 1 is titled "*Conclusion du contrat*" *(Conclusion of the Contract)*. It fills an important legislative gap and contains provisions on the precontractual period. This period had not been envisaged by the drafters of the Civil Code as, in 1804, most contracts were concluded instantaneously. Over the years, the Court of Cassation created various rules which are now codified in the four sub-sections of this section.

Sub-Section 1, titled "negotiations", states that:

•"The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must satisfy the requirements of good faith" (Art. 1111 para. 1).

•"A person who without permission makes use of confidential information obtained in the course of negotiations incurs extra-contractual liability" (Art. 1112) (19).

Sub-Section 2 contains rules on offer and acceptance, exchange of consents and promises to contract (20). Generally, these rules enshrine existing case law. There is one important deviation as regards unilateral promises. Some controversial cases had held that a promisor could withdraw his promise when it had been accepted but not yet acted upon- and thus pay damages only. Article 1124 para. 2 takes the opposite view: "Revocation of the promise during the period allowed to the beneficiary to exercise the option does not prevent the formation of the contract which was promised".

This provision aims to reinforce legal certainty. It concords with the basic principle of French law according to which enforced performance in kind - *"l'exécution forcée en nature",* also often described as specific performance - is the main remedy for breach of contract (21).

Section 2 of Chapter II deals with the validity of a contract

Section 2 begins with Article 1127, according to which:
"The following are necessary for the validity of a contract:
1. The consent of the parties;
2. Their capacity to contract;
3. Content which is lawful and certain."

The French concept of *cause* has disappeared. Many leading French academics are profoundly attached to the concept of *cause* (22) but others are strong opponents (23). The academic debate was lively. In the explanatory statement of the *projet de loi* of November 2014, the Government explained that although the concept of *cause* had disappeared, its main functions were maintained, in particular through the concept of illegality and through various provisions aimed at maintaining a certain balance in the contract (24). This clarification of the law should introduce more legal certainty. Indeed, the judicial creativity surrounding the concept of *cause* is precisely why the concept became so controversial and led to so much uncertainty.

Sub-section 1 of Section 2 relates to "consent"

The first paragraph is on the existence of consent: one must be "*sain d'esprit*" - of sound mind. The second paragraph relates to the duty to inform. This provision, which is concise compared to EU law on this point, states that a party who does not fulfil this duty to inform incurs extra-contractual liability. It also specifies that when this failure gives rise to a defect in consent, the contract may be annulled. Nullity is indeed the core remedy for defects of consent which are dealt with in paragraph 3. Mistake, fraud and duress are the traditional defects of consent. The applicable rules are very detailed with many particular requirements and qualifications, making this part of the reform look more like a treatise than like a concise legislative framework.

Article 1142 introduces a new rule in the Civil Code: *"There is also duress where one party exploits the other's state of necessity or dependence in order to obtain an undertaking to which the latter would not have agreed if he had not been in that situation of weakness"*. This provision enables the judge to address contractual imbalances at the time of the formation of the contract; nullity is the sanction. French case law has already developed its own concept of *violence économique* or economic duress, but apart from business-to-consumer relationships, its use is still very limited

(25). Some countries, such as Portugal and the Netherlands, have created similar tools. The Unidroit Principles contain this rule (Art. 3.2.7) as do the PECL and the DCFR (Art. II. -7:207).

Sub-section 2 of Section 2 assembles the rules on capacity and representation. It was felt that capacity to contract and power to do so on behalf of others (representation) deserved new rules so as to deal with the multiple situations which can occur and with the development of intermediaries. The provisions on representation are dealt with as part of the validity of the contract (instead of creating a separate Chapter, as in PECL).

Sub-section 3 of Section 2 is dedicated to the *"content of a contract"* and contains many interesting innovations. Article 1161 refers to the content and purpose (*contenu* and *but* respectively) of the contract rather than to the *cause* (in its unlawfulness aspect).

Unlike the French concept of *cause*, that of *objet* ("subject-matter") was retained under Article 1162, which refers to and defines it as a present or future *prestation*. The word *prestation* can be translated by "act of performance". The *prestation* "must be possible and determined or capable of being determined" (Article 1162).

Article 1163 draws inspiration from European contract law. In "framework contracts or contracts whose performance is successive", unilateral determination of the price is permitted, though with some limits. This article also provides that the court may be asked to modify the price when the party who unilaterally fixed the price abused this power. This provision is specific to contracts where it is not possible to set a fixed price once and for all. In determining the price, the court must in particular take into account usual practices, market price or the legitimate expectations of the parties. The court may also be asked to award damages or terminate the contract.

Article 1164 provides a further set of rules for *contrats de prestation de service* or the supply of services. For such contracts, the price may be unilaterally fixed under certain conditions and, if the *débiteur* (debtor) disagrees, he can ask the court "to fix the price taking into account usual practices, the market price or the legitimate expectations of the parties". Some guidelines are thus provided.

Article 1166 is a new provision on the "quality of the act of performance": when this criterion is neither determined nor capable of being determined, "*the debtor must offer an act of performance of a quality which conforms to the legitimate expectations of the parties taking into account its nature, usual practices and the amount of what is agreed in return*".
Articles 1167-1169 allow for the judicial restoration of some substantive fairness within the contract.

Article 1167 provides for the annulment of the contract when, from the very beginning, there was no quid pro quo. This provision codifies one of the major uses of the concept of *cause*.

Article 1168 codifies another famous use of the concept of *cause* (derived from the well-known *Chronopost* case): "*Any contract term which deprives a debtor's essential obligation of its substance is deemed not written*".

Article 1169 is a highly controversial provision: it introduces the "*regulation of contractual terms which create a significant imbalance in the rights and obligations of the parties to the contract*" (*clauses abusives* or unfair terms) in all contracts (for B to C contracts: see the Consumer Code). It is inspired by the EU directive on unfair terms in consumer transactions, and by PECL which enables the courts to strike out unfair terms in B to B or C to C contracts Unlike PECL (Article 4: 109) no reference is made to good faith in the provision related to unfair terms.

This provision may not be adopted in its current form; an intermediate solution may be to limit its scope to unfair terms which are not individually negotiated (comp. Article 4:110 PECL). If it were to disappear entirely, the general principle of good faith (Article 1103) and the provisions on interpretation of the contract (especially Article 1193) could still come into play.

French law has generally been against the idea of allowing contracts to be annulled or revised on the ground of *lésion* (a lack of equivalence between the parties' undertakings). Article 1170 expressly rejects *lesion*, unless the law states otherwise. At first glance, this seems to be a major difference with most European national laws of contract and non-binding codifications. However, the difference is not really that significant. In most legal systems, *lésion* exists only in a diluted form. Substantive unfairness or imbalance is not enough on its own: the imbalance must be the result of the abuse of a situation where one party depends, in an economic, moral or psychological way, on the other (German law, Swiss law, PECL). The new French provisions on *abus de l'état de nécessité* (abuse - Article 1142) or unfair terms (Art. 1169) could enable French judges to reach similar results.

Section 3 is on the "form of contracts". Article 1171 enshrines the principle of consensualism: "A contract is complete on the mere exchange of the parties' consents"). Article 1171 para. 2 notes the possibility for the parties or the legislature to provide otherwise (e.g. requiring particular formalities, a handing over of the goods). This section has specific provisions governing contracts concluded by electronic means.

Section 4 concerns the "sanctions". The section contains long and detailed provisions on nullity (the distinction between absolute and relative nullity is maintained and explained at length). Judicial nullity is still the general rule, but Article 1178 specifies that the parties may agree on nullity: "*Nullity must be declared by a court, unless the parties take notice of it by mutual agreement. There is no nullity by unilateral notice*".

Article 1185 enshrines partial nullity.
In this section on sanctions, there is a second paragraph dedicated to lapse (*caducité*, Articles 1186 *et seq*) which puts an end to the contract between the parties but, unlike *nullité*, has no retroactive effect. Article 1186, paragraph 2 deals with "contracts which have been concluded with a view to a group operation" (*opération d'ensemble*, a concept which resembles that of *indivisibilité)*.

Chapter III deals with contractual interpretation

Traditionally, in French law, contracts must be interpreted by seeking the common intention of the parties. Article 1188 reiterates this basic rule: a contract is to be interpreted according to the common intention of the parties rather than according to the literal meaning of its terms.

Article 1188 paragraph 2 adds: "*Where the common intention of the parties cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give to it*".

Article 1193 sets out a special rule which was influenced by the Consumer Code (compare this with Article L. 133-2 paragraph 2). This rule is specific to standard form contracts: "*In the case of ambiguity, the terms of a standard form contract are to be interpreted against the party who put them forward*".

Chapter IV sets out the rules governing the "effects of contracts"

Chapter IV has two sections: section 1 deals with the effects between the parties and section 2 with the effects as regards third parties (*les tiers*).

Section 1, Sub section I, titled "*effet obligatoire*", begins with Article 1194.

Article 1194 replaces the famous Article 1134 paras. 1 and 2, which is left unchanged, except that the word "contract" supplants "convention".

Art. 1194 states: "*Contracts which are lawfully formed take the place of legislation for those who have made them. They can be modified or revoked only by the parties' mutual consent or on grounds which legislation authorises*".

Article 1134 para. 3 on good faith is to be replaced by Article 1103, which is wider in scope.

Article 1195 replaces the former Article 1135.

Article 1196 is an interesting new provision on change of circumstances:
"*If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.*

In the case of refusal or failure of renegotiations, the parties may by common agreement ask the court to set about the adaptation of the contract. In the absence of their doing so, either party may ask the court to terminate the contract, as from a date and subject to such conditions as it shall determine."

In Europe, only a few countries (Belgium, Luxembourg, France and England) do not courts to modify or terminate the contract when there has been an exceptional change of circumstances. The European and international projects all have provisions which enshrine this power: PECL (Article 6:111), Unidroit Principles (Articles 6.2.1 to 6.2.3), Draft Common Frame of Reference (Article III.- 3:502) Common European Sales Law (Article 89).

Article 1196 is certainly novel and unique. This provision allows one party to impose on the other a renegotiation of the contract when, due to a change of circumstances, unforeseeable at the time of the conclusion of the contract, its performance is made "*excessively onerous for the party who had not agreed to assume the risk of such a change of circumstances*." Article 1196 then provides

for other solutions when renegotiations fail or are refused. It is important to note that the court may only adapt the contract when the parties asked for this "by common agreement". By contrast, the court may terminate the contract upon request of one of the parties, and may do so "as from a date and subject to such conditions as it shall determine".

The usual explanation for the French reluctance to give the judge the power to adapt the contract is no longer the fear of the severe economic consequences that such a judicial power would entail but the lack of contractual certainty that would result therefrom. However, one might wonder why the French courts would be less suited to this job than the courts of many other countries (26).

The Unidroit Principles, PECL, and CESL have rules on change of circumstances which grant such powers to the judges. These rules are first restating the binding force of contracts and then asking for renegotiations (while in Dutch law, Article 6:258 of the Civil Code,*Burgerlijk Wetboek* or *BW*, on unforeseen circumstances imposes no duty to renegotiate). Finally, these rules are giving the power to the court to end or adapt the contract.

Section 2 is on effects as regards third parties. Article 1200 restates the principle that a contract creates obligations only between the contracting parties. The provisions on "*porte-fort*" (a person standing surety for a third party) and on stipulations for third parties are in this section (Articles 1204-1210).

Section 3 of Chapter IV is new. It is titled *La durée du contrat* ("duration of contract"). These new provisions (Articles 1121 *et seq*) contain some classic rules, such as those governing *engagements perpétuels* (prohibition of perpetual undertakings), and others which are more innovative.

Section 4 of Chapter 4 relates to non-performance of contracts. It is a very important and remarkable section which draws some inspiration from EU law as well as international and national sources contract laws. Article 1217 enumerates all the "remedies" for which a party may apply and specifies that, when not incompatible, they can be combined; damages may also be added to all other remedies. This enunciation of the various "remedies for non-performance" brings greater clarity to this part of contract law. Article1218 defines force majeure and its effects.

Section 4 has five subsections: one for each of the remedies enumerated under Article 1217.

Subsection 1 (Articles 1219-1220) is on *L'exception d'inexécution* ("Defence of Non-performance") which allows one party to refuse to perform his obligation if the other party does not perform his and this non-performance is sufficiently serious; under certain conditions, performance can be suspended when it is clear that the contracting partner will not perform his obligation. Unlike the PECL, CISG and the UP, there is no provision in the French proposal which grants the aggrieved party a right to immediate termination in case of an anticipated fundamental non-performance (see CISG Article 72, PECL Article 9:304, and Unidroit Principles Article 7.3.3).

Subsection 2 (Articles 1221-1222) on *L'exécution forcée en nature* ("Enforced Performance in Kind") states that performance in kind is not a right if it is impossible or "*its cost is manifestly unreasonable*". This new rule, which derives from our the French tradition, is consistent with European trends.

Subsection 3 is on price reduction.

Subsection 4 on termination establishes new and detailed rules. An important development, based on recent French case law and on European trends, is the introduction of termination by way of notice (also called "unilateral termination") "*where the non-performance is sufficiently serious*" (Article 1224). The two other modes of termination are termination by virtue of a termination clause and judicial termination by the court (Article 1124). Termination by notice to the debtor requires compliance with conditions which are set out in Articles 1225 and 1226) (27). For a long time in France the prevailing view was that judicial intervention was indispensable (this was based on an interpretation of Article 1184 of the Civil Code). In recent years this conception has been challenged by the Court of Cassation, which has admitted, in certain circumstances, unilateral and extrajudicial termination of the contract on grounds of non-performance. The Bill remains very cautious. Firstly, termination by notice is enshrined on an equal footing with judicial termination and not as the primary way of terminating the contract if the conditions are met. By contrast, the Unidroit Principles, PECL, CESL and many national laws do not refer to judicial termination for non-performance and contain only provisions on unilateral termination. Besides, termination by notice first requires service of a notice to perform within a reasonable time and, second (i.e.: where the non-performance continues), notice of the termination of the contract and the reasons on which it is based (Article 1226 para. 3) (28). Article 1126 paragraph 4 adds that the debtor "*may at any time bring proceedings before a court to challenge such a termination"* and requires the creditor to *"establish the seriousness of the non-performance*".

Under Article 1228, the court may either confirm the termination of the contract or order its performance, "*with the possibility of allowing the debtor further time to do so*". By contrast, in case of a fundamental non-performance, the PECL enables an aggrieved party to terminate the contract unilaterally and immediately (PECL Article 9:301; see also CISG Article 49, and Unidroit Principles, Article 7:3.1) .

Subsection 5 deals with *La réparation du préjudice causé par l'inexécution contractuelle* ("Reparation of Loss caused by Contractual Non-performance"). Articles 1231 state, as a principle subject to some exceptions, that damages are due only when the debtor has been put on notice to perform (*mise en demeure*). Under French law, penalty clauses are allowed, though, as the result of legislation introduced in 1975, the Civil Code allowed courts to increase or decrease the sum due. This power will now be enshrined in Article 1231-5. It is notable that the new provisions do not introduce an obligation to mitigate the damage.

There are many other interesting provisions in this French reform which also deals, as aforementioned, with quasi-contracts and the "*régime général*" of obligations. It is not possible to discuss them here.

Concluding remarks on the principal features of the new French Bill

An important wave of codifications and recodifications of the law of obligations has taken place all over Europe (29). Over the past decade, European contract law has been a wonderful playing field both for academics and lawmakers. As common general trends, based on international models, which include both international treaties (in particular the Vienna Convention on international sales law, CISG) and soft law instruments (in particular the aforementioned Unidroit Principles on international commercial contracts), are increasingly evident in the modern national laws of

contract, national codifications or recodifications no longer appear as instruments of legal nationalism – quite the contrary. Interest in comparative law is being revived. Moreover, the lawmaking process has undergone great transformations. Openness, effectiveness and quality of the law are objectives both for European institutions and national legislators.

The new French provisions contain unique features but, at the same time, they are in line with European and international models. Within the French legal system, this reform enhances the supremacy of the Civil Code over other French codes, notably over the *Code de commerce* or Commercial Code (in particular Article L 4442-6, which contains provisions on abuse). In practice, the French distinction between "*contrats civils*" and "*contrats commerciaux*" has lost much of its importance and does not reflect the modern conception of the law of contract. The rules of the Civil Code apply to commercial contracts, unless the Commercial Code or commercial usages lead to other solutions and a few general rules specifically apply to commercial contracts. This is all the more true since the reform of the law of prescription in 2008 (see Articles 2219 *et seq* of the Civil Code). In fact, the dividing line is really between business-to-business (B-to-B) and business-to-consumer (B-to-C) contracts. The Civil Code contains the general rules, while the Consumer Code contains the rules for consumer contracts (30).

The principles which traditionally underlie the French law of contract have been strengthened: freedom of contract (mitigated by public order and fundamental rights), consensualism (French law resists the creeping formalism that is to be found in EU consumer law, in the CESL and in many specific contracts. Good faith acts as a general principle, for all the phases of the life of the contract. This goes along the lines of EU law, German, Dutch and US law, PECL and Unidroit Principles. The Bill strengthens two important new ideas: the unilateral power of one party is enshrined (unilateral determination of the price or termination of the contract) and, in some situations, judicial power to intervene is increased (change of circumstances, judicial setting of the price in case of abuse). Greater emphasis could have been put on the distinction between clauses that are individually negotiated and those that are not.

Finally, each time an important recodification of contract law takes place, one very significant question arises: what place is there for party autonomy when it conflicts with public policy and mandatory rules? Most of the time, the provisions do not specify whether or not they are mandatory (with a few exceptions, particularly for penalty clauses). Since general contract rules are usually not mandatory, it could be inferred that this is always the case, unless otherwise provided by the rule itself. However, the new emphasis placed on contractual fairness, coherence and good faith may lead the judges to take a stricter approach. For instance, would it be possible for the parties to exclude the rule on unfair terms (Art. 1169)? Probably not. What is less clear, however, is whether, in an international context, French courts would consider Article 1169 as an international *loi de police* or mandatory rule which is applicable in spite of the parties' choice of a foreign law.

Notes:

(1) Bénédicte Fauvarque-Cosson is Professor of Private Law at the University Panthéon-Assas (Paris II), President of the *Société de législation comparée*, Vice-President of the International Academy on Comparative law.The translations of the French provisions of the Bill (available on www.justice.gouv.fr/publication/j21_projet_ord_reforme_contrats_2015.pdf are taken from the translation which was officially requested by the Director of the *Direction des Affaires Civiles et du Sceau* of the Ministry of Justice, which task was entrusted to John Cartwright and Simon

Whittaker, who had previously translated the *Avant-projet "Catala"*, as well as to the signatory of this paper. John Cartwright is Professor of the Law of Contract, and Simon Whittaker is Professor of European Comparative Law, at the University of Oxford. Both are regularly invited to teach contract law at the University Panthéon-Assas, Paris II. The author would like to express her gratitude to Rachael Singh, lawyer-linguist and editor-in-chief of the Montesquieu Law Review, and to Ciara Kennefick, Career Development Fellow in Law at Queen's College, Oxford, for their most valuable remarks and comments.

(2) Within the countries which belong to this tradition, the expression "civil law" may either designate the whole of private law or, following a more restrictive approach, the various subjects that are dealt with in a Civil Code (the law of persons, of property and successions, the law of obligations etc.).

(3) E.A. Farnsworth, Comparative contract law, *Oxford Handbook of Comparative Law, in* M. Reimann and R. Zimmermann, OUP, 2006, p. 899. In his last contribution, E.A. Farnsworth, one of the leading contract lawyers in the United States and in the world, noted that contract law is relatively unimportant in the market. Even when it can be used, the imperatives of maintaining good business relationships and ensuring that transactions go ahead render the law of contract a rarely used tool for business people.

(4) This new Civil Code had a preliminary book and then dealt with persons, family and successions. The members of the Commission were divided in opinion concerning both the ambit of the changes to be made and the role to be played by the General Part (should it follow the German model or adopt a more limited approach?). L. JULLIOT de la MORANDIERE, « La réforme du Code civil », *D*. 1948. 117; special issue of the *Recueil Dalloz*, published for the Bicentenary of the Civil Code, 2004.14.

(5) The initial division of the Civil Code in 3 books no longer survives: there are five books in the Civil Code, of unequal importance (book 5 is dedicated to rules applicable to Mayotte).

(6) J. Carbonnier, *in* « La codification dans les états de droit : le cas français », *Année canonique* 1996, p. 96 et s. ; quoted *in* F. TERRE, Ph. SIMLER, Y. LEQUETTE, *Droit civil, Les obligations*, Dalloz 2013, 11me éd., n° 46, p. 56.

(7) J. Carbonnier, in *L'évolution contemporaine du droit des contrats ,* Journées R. Savatier, 1985, p. 29, sp. p. 32.

(8) On this process: *The Law of Obligations in Europe : A New Wave of Codifications*, dir. R. SCHULZE et F. ZOLL, Sellier, 2013 *;* E. Hondius, ELTE Law Journal, 2014. vol. 1, 7.

(9) *Avant-projet de réforme du droit des obligations et de la prescription,* P. Catala ed., Ministère de la Justice, Documentation française, 2006. The Catala project was translated into English by J. Cartwright and S. Whittaker: www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf It was also translated into English by A. Levasseur (Louisiana), www.henricapitant.org/sites/default/files/Traduction_definitive_Alain_Levasseur.pdf It is interesting to compare and contrast the two translations. For an English commentary, see B. Fauvarque-Cosson and D. Mazeaud, "L'avant-projet de réforme du droit des obligations et du droit de la prescription", *Uniform Law Review,* 2006, vol. XI, p. 103.

(10) The part on prescription contained in the *Avant-projet*, drafted by Philippe Malaurie, was strongly influenced by the PECL and the German reforms.

(11) This commission was composed of 36 drafters, each of them in charge of a specific part. For a general presentation of the part on contracts, see *Revue des contrats,* 2006/1.

(12) The part of the *Avant-projet Catala* on extra-contractual liability was, by contrast, very innovative in many respects. For instance, it introduced the duty to mitigate and a specific (quite limited) form of punitive damages as well as a controversial text on big companies'

liability for their *filiales* (subsidiaries).

(13) *Pour une réforme du droit des contrats,* Dalloz, 2009.

(14) *Principles of European Contract Law, Parts I and II*, dir. O. LANDO et H. BEALE, Kluwer Law, 2000; *Principles of European Contract Law, Part III*, Kluwer Law, 2003. See also the work done in France : *Projet de cadre commun de référence. Terminologie contractuelle commune, Principes contractuels communs,* Association H. Capitant et Société de législation comparée, coll. Droit privé européen et comparé, 2008 volumes 6 and 7.

(15) *Loi n°2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile.*

(15a) On the political and legal significance of using an *ordonnance*, see *La législation déléguée*, dir. Ph. Lauvaux et J. Massot, Société de législation comparée, coll. Colloques, vol. 24, 2014.

(16) www.textes.justice.gouv.fr/concertation/reforme-du-droit-des-contrats.htm

(17) In a former draft version, it was called "Guiding principles" (*"Principes directeurs*") but this was too controversial.

(18) For reasons of brevity, the main European sources which will serve as a basis for examining the European influence on the provisions of the Project will be the Principles of European Contract Law (PECL) and for international contracts and the Unidroit Principles on international commercial contracts.

(19) Compare PECL (Article 2.302) and Unidroit Principles (Article 2.1.16): both codifications contain a provision on breach of confidentiality.

(20) Besides, sub-section 4, which deals with "Contracts in electronic form", reproduces recent provisions that had been inserted in the Civil Code.

(21) See below.

(22) Jacques Ghestin even advocated the use of *cause* in European contract law "Faut-il conserver la cause en droit européen des contrats ?", *ERCL* 2005, vol. 4, p. 396. The Catala Bill tripled the number of provisions dedicated to the concept of *cause* (J. Ghestin, who drafted these provisions, believed that maintaining and clarifying such a concept would create fewer problems than deleting it and having to find new devices in order to fill the gaps).

(23) See for instance, T. Genicon, "Défense et illustration de la cause en droit des contrats", D. 2015.

(24) For a detailed analysis of the provisions which aim to replace the concept of *cause*, G. Wicker, "La suppression de la cause par le projet d'ordonnace: la chose sans le mot", D. 2015.1557. Some authors doubt that these provisions will compensate for the very many purposes that the concept of *cause* can serve: D. Mazeaud, "Droit des contrats : réforme à l'horizon", D.2014, p. 291.

(25) Compare Articles L. 122-8 and L. 132-1 of the Consumer Code.

(26) For instance, the German, Austrian, Dutch, Greek, Portuguese, Italian, Danish, Finnish and Swedish courts (and these are only examples) have the power to modify the contract.

(27) Compare Germany (Art. 323 of the BGB), Italy (Art. 1454), the Netherlands (Art. 6:267); PECL (Art. 9 :301) ; UNIDROIT Principles (art 7.3.1); the Common Frame of Reference (Art. III-3:503); CESL (Art. 106, 131 and 138).

(28) Compare Germany (Art. 323 of the BGB), Italy (Art. 1454), the Netherlands (Art. 6 :267) ; PECL (art. 9:301); UNIDROIT Principles (Art 7.3.1); the Common Frame of Reference (Art. III-3:503); CESL (Art. 106, 131 and 138).

(29) See above.

(30) The Principles of European Contract Law (PECL) do not draw a distinction between civil and commercial contracts. The Dutch and the Italians have abolished that dualism. Some French authors suggested abolishing it. Some years ago, O. Lando (who was the chairman of the

Commission which drafted the PECL), observed that had this distinction been abolished, it may well have incited those drafting of the *Avant-projet Catala* to propose rules better suited to commercial transactions *Revue des contrats,* 2006/1, p. 167, sp. p. 168.