Issue | December 2017
No. 6 | Special Issue: The Reform of French Contract Law

Montesquieu Law Review

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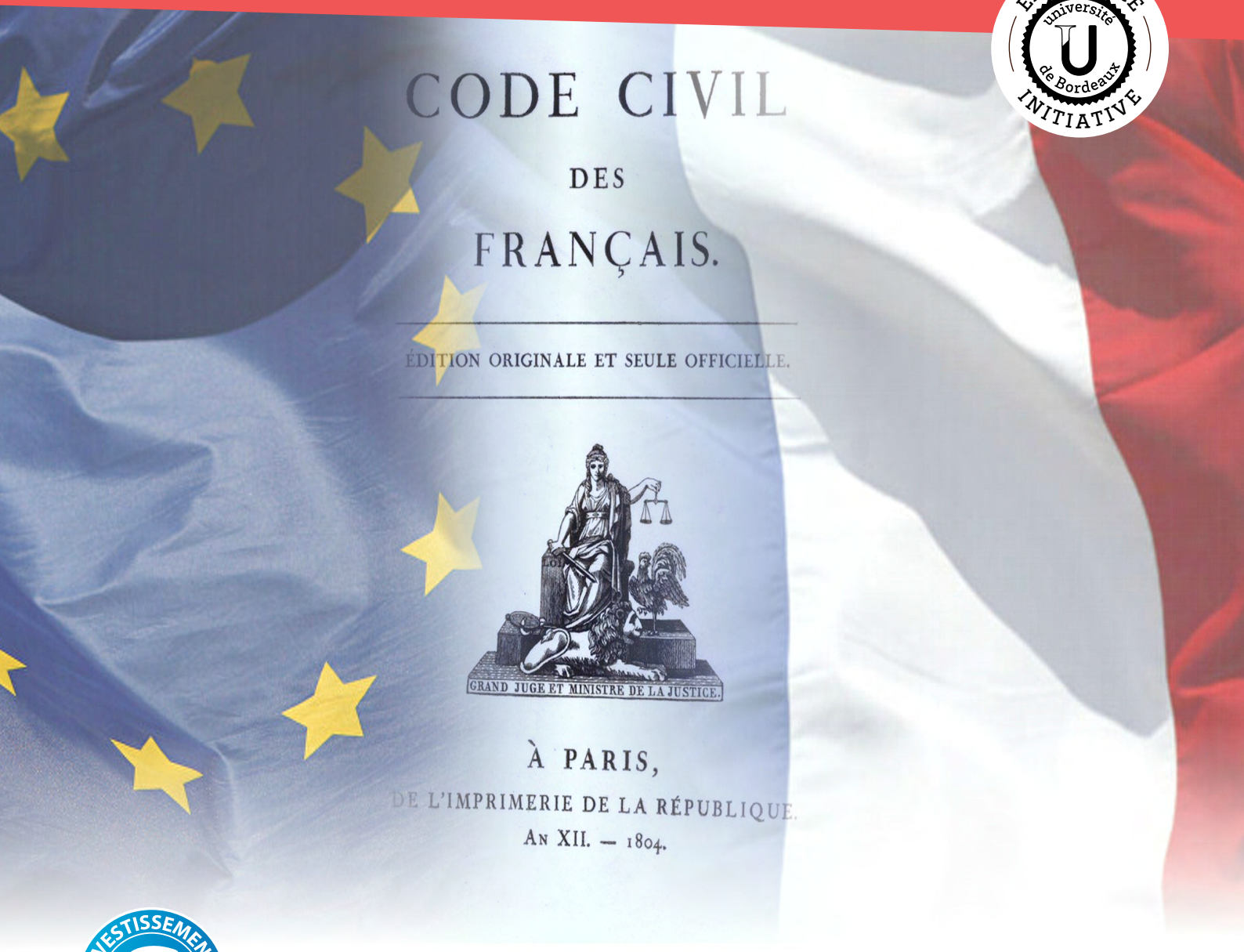

Program supported by the ANR
n°ANR-10-IDEX-03-02

Faculté de droit et science politique

International Perspectives on the French Reform

The Romanian Perspective on the New French Contract Law

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The Napoleonic wars intensified the emancipation of the Balkan peoples in relation to Ottoman domination and the influence of Tsarist Russia. In the Romanian principalities of Moldavia and Wallachia, this favoured the influence of French culture. The "Latinist" revival of the 1848 Revolution, and the decisive support of Napoleon III for the unification of the principalities during the 1857 Paris Congress, consolidated Romania's opening to the French model of modernisation.

The first *Domintor* of the Romanian Principalities, Alexandru Ioan Cuza, a former student of the Sorbonne, carried out extensive reforms to endow the new state with modern and functional institutions. The first Romanian Civil Code of 1864 is one of the many fruits of those reforms. Its main source was the Napoleonic Code, viewed through the prism of Marcadé's comments, with additions inspired by the Italian Civil Code, the old Romanian laws, the French law of 1855 on transcripts and the Belgian law of 1857 on mortgages. French influence presided over the interpretation of this Code during its 146 years' existence, despite the discretion imposed by the Communist dictatorship (1945-1989) in citing Western sources. Following the fall of the latter, Romanian authors have been able to absorb the contributions of French jurisprudence and case law since the second half of the twentieth century. The Napoleonic Code once again served in the modernisation of Romania.

After several attempts at recodification since the 1930s, a new Civil Code was adopted in 2009, coming into force in 2011. Its main model is the 1994 Civil Code of Québec. Far from wishing to break with the tradition of French inspiration, this time it was sought as it stands in contrast with the Anglo-American model, showing its ability to shape a developed market economy. Compared to 1864, the relationship to the model was more creative in 2009. This is explained by the advances in Romanian law and the plurality of secondary models, such as the Codes of continental Europe (Italy, Switzerland, Spain, Germany or the Netherlands) or the United States and unifying instruments (Vienna Convention, Unidroit and Landö Principles). For France, successive reforms of the Code, case-law *acquis* and jurisprudence were taken into account, including the Catala project -and to a lesser extent the Terré project, which appeared at the end of the preparatory works.

What is the relationship between the history of Romanian law and a Romanian view of the new French contract law? This history testifies to a particular vocation of French law, to serve in orientating the evolution of national laws which, around the world, are related to its legal culture. To this end, we will examine how this French vocation transcends the time of recodifications of contract law, comparing the French reform with the Romanian reform that preceded it by several years. The conclusion is conflicted. These reforms emerge from a common tradition and face similar challenges, such as new technologies or competition from the Anglo-American model. These reforms sometimes provide very similar solutions, sometimes take opposite stances on points of resistance or receptivity. We will therefore consider the convergence (I) and then the divergence (II) of the French and Romanian reforms of contract law (2).

I. The convergence of the reforms

French jurisprudence is often surprised at the closeness of our laws. Romanian jurisprudence knows that this is no accident, it being responsible for conveying French developments. On the other hand, it is fortuitous that these achievements in case law and jurisprudence were first codified in Romania: coming later, the French reform was outstripped by a recodification which it inspired (A). Another factor of convergence is the contribution of comparative law to the respective reforms (B).

A. The contributions of the French reform anticipated by the Romanian reform

For the Romanian legislature, anticipating the solutions of the French legislature by several years has confirmed its choices. Reciprocally for the French legislature, the coincidence of the positions already adopted by a parent code may have confirmed its own. This is illustrated by the provisions relating to the formation of the contract (1) and its effects (2).

1) The formation of the contract

In the formation of the contract, the French Ordinance distinguishes between its conclusion and its validity. The Codes now contain an explicit regime for the conclusion of the contract and a general regime for its invalidity.

a) An explicit regime for the conclusion of the contract

The Codes go beyond the contractual termination process and contain provisions for pre-contractual negotiations, as well as for the meeting of offer and acceptance. Simply put, the Romanian Code seems to see an alternative therein (Article 1182); whereas in the French Code such talks are only *possible*, while the meeting of offer and acceptance is essential to the conclusion of the contract. The French Code is more respectful of contractual freedom, and thus less protective of the legitimate expectations of the contractual partner, in the event of the untimely revocation of the offer declared irrevocable by the offeror for a certain period. In Romanian Article 1191, revocation prior to the expiry of this period is ineffective; thus, acceptance is effective and the contract concluded despite the revocation of the offer. In French Article 1116, the revocation of the offer before the expiry of the period is always effective and prevents the formation of the contract; only the offeror's extra-contractual liability is incurred and, as for the wrongful breach of negotiations, only the negative interest can be offset.

The solutions converge on freedom to negotiate, the duty of good faith and the protection of confidential information. The traces of the decision in *Manoukian* are clearer in Article 1112 of the French Civil Code, which states that "*the reparation of the resulting loss is not calculated so as to compensate the loss of benefits which were expected from the contract that was not concluded*". The solution only arises by way of interpretation of the Romanian Article 1184 and is therefore not shared by all commentators (3).

We must welcome the place given by the French Article 1112-1 to the pre-contractual obligation to provide information. The Romanian Code omitted this, hoping to reach the same solutions through the sanction of fraudulent non-disclosure (4). Moreover, the French definition of the purpose of this obligation refers to "*information which is of decisive importance for the consent of the other*" who is legitimately unaware of said information or relies on his contractual partner. The Romanian wording is more vague, referring to "*certain circumstances which the other party must disclose*" (Romanian Code, Article 1214).

b) General regime of nullity of the contract

Both Codes introduce a general nullity of the contract. The *summa divisio* of nullities is enshrined depending on the interest protected: nullity is relative if the rule the violation of which is sanctioned protects a private interest (French Article 1248, Romanian Article 1179) and absolute if it protects a public interest (Articles 1247 and 1179). One issue is a more restrictive implementation of relative nullity in light of the quality or standing to invoke it (Articles 1248 and 1181), or the possibility of affirmation (Articles 1248, 1262, and 1181). One shared innovation lies in the contractual finding of nullity (Articles 1246 and 1178). Another, intended to dispel uncertainty as to the outcome of the contract, is the creation of an enquiry procedure: the contracting partner of the party who could invoke relative nullity may ask the latter either to affirm the contract, or to proceed with an action for nullity within a period of six months, on pain of losing the right to do so (Articles 1183 and 1263). The imperative of legal certainty had previously led the 2008 French reform of prescription to make absolute nullity subject thereto (Articles 1304 and 2234), which remains imprescriptible under Romanian law (Article 1249).

2) The effects of the contract

Convergence is manifest here in the Romanian reception of the French theory of the enforceability of the contract in relations with third parties, and by the common reception of the revision of the contract on grounds of unforeseen events in the relations between the parties.

a) Romanian reception of the enforceability of the contract *à la française*

The concept of the enforceability of the contract and its effects, including proprietary effect, was forged in particular in response to the "occult" nature of these effects, linked to the advent of consensus in the Napoleonic Code. This French specificity is therefore viewed with reservations by other traditions. The French theory of the enforceability of the contract – the origins of which lie in jurisprudence and case law – was favourably received in Romania (5), and the two Codes conceive it in a similar way. Mentioned in the Romanian Article 1280, contrary to Articles 1199 et seq. of the French Civil Code, the enforceability of the effects of the contract against third parties varies in relation to the relativity of its binding force between the parties. Prudently, the texts do not literally render the enforceability of the contract subject to the third party's knowledge thereof, because of the variety of functions of enforceability, the liability incurred by a third party complicit in the breach of contract to the settlement of disputes between successive purchasers of the same right.

The new legislation has the advantage of laying the foundations of a general theory of unenforceability, including in its role as a sanction. In Romanian law, this would allow the abandonment of the tendency observed under the old Code, to admit absolute nullity on grounds of the unlawful cause of the contract concluded in fraud of third-party rights (6). The excessiveness of such a sanction was manifest, as it allowed anyone to obtain at any time the cancellation of a contract that infringed only the private interest of a third party.

b) Shared acceptance of the revision of contracts on grounds of unforeseen events

From the contrast in French law between civil and administrative jurisprudence concerning the revision of the contract on grounds of unforeseen events, was born the favourable opinion of the same in Romania. Although the Romanian Article 1271 virtually reproduces the Landö Principles, the wording of the French Article 1195 is more condensed but provides for an identical regime. Uncertainties doubtless remain. Thus, one may question the assessment of the excessively

onerous nature of the performance of obligations, either objectively, with regard to correlative obligations only; or subjective, also in consideration of the debtor's assets, or else within the limits of the power to adapt a contract. This only serves to highlight the limits of legislative work, which the judiciary takes over to fine-tune and thus achieve the right balance.

B. Aspects of comparative law shared by the Romanian and French reforms

The Romanian and French Codes have both received several contributions from comparative law, institutions proven in other traditions. It illustrates the enshrinement of an ordinary law of representation and the dejudicialisation of certain remedies for contractual non-performance.

a) The ordinary law of representation

Neither the Napoleonic Code nor the Alexandru Ioan Code gave an overview of representation; the mandate model was the point of reference for legal or judicial representation (7). On the other hand, the German and Swiss codes have, since the beginning of the 20th century, conceived a general regime of representation, and the Landö Principles followed suit. Following these models and in contrast to the Quebec Code, the Romanian and French codes introduce provisions common to representation in general. Article 1295 et seq. of the Romanian Code apply almost entirely to the mandate with representation, and may conflict with other provisions, such as the administration of the property of others inspired by the Quebec Code (8). Articles 1153 et seq. of the French Code are more streamlined but also rich.

In some respects, these new ordinary laws diverge. Thus, the French Code is marked by the modern conception of representation of interests and covers direct and indirect representation (Article 1154). Without specifying the nature of the representative's authority, the Romanian Code makes room for imperfect representation in special matters such as the administration of the property of others (Article 813) or the mandate without representation (Article 2039). The French Article 1159 contrasts contractual representation with legal or judicial representation by the non-divestment of the powers of the represented party; and the consequences, while they are also admitted in Romania, have no legislative basis. Article 1156 foresees the fate of the act performed without sufficient authority, unenforceability against the represented party and nullity at the request of the third contracting party who did not know that the relevant authority had been exceeded. From the Romanian point of view, the nature of the flawed contract, neither ratified by the representative nor cancelled at the request of the third party, remains a mystery. Lastly, contrary to Romanian Article 1309, this Article 1156 codifying the theory of appearance does not restrict it to the scenario whereby legitimate ignorance on the part of the third party is caused by the represented party himself.

b) Dejudicialisation of remedies for contractual non-performance

The time is past where state justice was designed to overcome the survival of the fittest, including in contractual matters. Economically, in a context of shortage, judicial interventionism contributes to the waste of public resources and slows the outcome of litigation; while sociologically, the reluctance of the parties to apply to the courts perpetuates pathological contracts, in theory effective but in practice unfulfilled. Thus, based on the model of German law and the instruments of unification, recent recodifications have tended gradually to dejudicialise remedies for contractual non-fulfilment. Instead of judicial sanctions against the debtor's blameworthy behaviour, emphasis is placed on extrajudicial remedies aimed at restoring the situation of the dissatisfied creditor or drawing out the consequences of his dissatisfaction. As far as possible,

recourse to the courts is no longer *a priori*, at the request of the creditor, but *a posteriori*, at the request of the debtor challenging the measures taken by the latter. This trend also dominates the Romanian and French codes, especially for contractual performance by a third party at the expense of the debtor without the prior authorisation of the court (articles 1528 and 1222), the cancellation of the contract (Articles 1552 and 1226) or the reduction of the price for an incomplete act of performance (Articles 1551 and 1223) by unilateral declaration, not to mention the generalisation of the exception of non-performance (Articles 1555 and 1219 et seq).In Romanian law there has also been an increase in the number of enforceable obligations which can be enforced by a bailiff without a prior judicial decision (Articles 1798, 1809, 1816, 1845, 2157 and 2165).

When the French and Romanian reforms converge, the consensus of the legislatures can be regarded as a mutual confirmation of the relevance of their choice. On the contrary, when the Codes diverge or even oppose one another diametrically, the dissension between the legislatures raises more critical questions and reflections. This comparison is as fruitful as the preceding one.

II. The divergence of reforms

The divergences result, sometimes from the fact that the Romanian Code refuses to imitate the developments in jurisprudence and case law that the French reform ratifies (A), sometimes that the Romanian Code remains more faithful to the French tradition than the French Code itself (B).

A. The anticipated opposition of the Romanian reform to the contributions of the French reform

This resistance of the Romanian legislature to the new achievements in jurisprudence and case law, which have become contributions of the French reform, is illustrated by the outline of an ordinary law on the unilateral promise to contract and the lapse of the contract.

a) The ordinary law on the unilateral promise to contract

This divergence is explained by the Romanian tradition. Indeed, the Code of 1864 did not reproduce Article 1589 of the Napoleonic Code according to which the promise of sale has the effect of a sale. Special provisions have consistently made contracts assigning property rights solemn contracts, requiring the authentic form. No promise made by private deed could have the effect of a sale. However, these promises retained a practical interest for sales of unregistered buildings, which could not be concluded by authentic act. Thus the new Code receives the jurisprudential and case law acquis, admitting that any promise to contract, whether unilateral or synallagmatic, is in principle not to be established by authentic act. It creates the obligation to consent to the promised contract, in the form required by law for the validity of this contract. In the event of refusal, and regardless of the form of the promise, a court decision may be substituted for the promisor's consent to the contract if the other conditions of validity are satisfied (Articles 1279 and 1669) (9).

Article 1124 of the French Code enshrines the unilateral promise to contract for the sole purpose of settling the dispute between the Court of Cassation and the majority case law on the sanction of its violation by the promisor. The ineffectiveness of the revocation of an undertaking by the promisor and the correlative effectiveness of the exercise of the option, as set out in paragraph 2, is approved by Romanian commentators. In Romania, however, in order for this solution to be valid for solemn contracts, the consent of the promisor to the contract must already have been solemnly expressed. Also based on the model of the Italian Code, a separate model was created:

the option agreement, which is not limited to compelling the promisor to contract, but already includes his consent to the future contract, formed by the acceptance of the same on the part of the beneficiary of the agreement (Articles 1278 and 1668).

The rules governing the unilateral promise to contract thus constitute a point of divergence between the reforms, which is also explained by the Romanian peculiarities of property contracts, including the formalism and incompleteness of the national land register.

b) General regime governing the lapse of the contract

Since lapse is the least studies cause of ineffectiveness of the contract in Romania, no doubt the institution's theoretical immaturity convinced the legislature not to codify it. This choice may be regretted by comparison with that of the French Code, at Article 1186. While the former cause of predicted lapse modulates the effect of the disappearance of the cause, the latter marks an advance in the system of groups of contracts, which would be equally necessary in Romanian law (10). Despite this progress, uncertainties remain; for example, regarding the judicial or non-retroactive nature of the lapse, and its relation to full termination at Article 1218 in the event of inability to perform.

B. The unshared loyalty of the Romanian reform to the French tradition

The divergence of the reforms here is the result of a paradox. Concepts born in France have influenced Romania amongst others and, while the French Code has now abandoned them (at least literally), they remain in the Romanian Code the reform of which was structured by those same concepts. The Romanian legislature is more faithful to the French tradition than the French legislature, claiming a concern to free the Code of concepts misunderstood abroad. This is illustrated by the French deconstruction of the cause and classifications of obligations according to their purpose or intensity.

a) The French deconstruction of the concept of cause

The Alexandru Ioan I Code imitated the Napoleonic Code; then the French mutations of the cause were echoed in Romanian case law. The recodification was an opportunity for (re)systematisation. While the legislation (Article 1235 et seq) focuses on the mediate cause of the contract, and leave the immediate cause of obligations in the shadows, most commentators apply to them the same analytical grid as before. Some observers, however, have stated that the immediate cause no longer exists as a concept of positive law (11) and that its functions are ensured by other conditions for the validity of the contract, including the purpose and consent (12).

The French legislature, on the other hand, makes a clean sweep of the concept of cause, which is absent from the conditions of validity of the contract. However, it is careful to attribute its functions to specific rules that avoid indicating their basis. So it is with the demand for a lawful and certain content of the contract (Article 1162), which absorbs both the cause and the purpose, and includes both the stipulations of the contract and its purpose. The same applies to the nullity of onerous contracts in the event of illusory or derisory consideration (Article 1169); the prohibition of unfair terms in standard-form contracts (Article 1171); or that depriving the essential obligation of its substance (Article 1143), not to mention the lapse of the contract or its termination for sufficiently serious non-performance, etc. The very same thing in all but name? Doubtless the French legislature has thus attempted to prevent the hypertrophy of the cause leading to its evanescence; the Romanian experience shows that retaining the name can multiply

the thing. Nevertheless, the abandonment of the concept of cause does not protect against this risk, as it is still necessary, and the French legislature's attempt to carry out a complete inventory of the functions of the cause runs the risk of disappointment. In this sense, its categorical function as a criterion for qualifying contracts, for example of donations, would appear to have been neglected by the reform. It is therefore not certain that its formal abolition by the Code will suffice to extinguish the prodigious tradition of the cause.

b) The French deconstruction of the classification of obligations

Contrary to the Romanian Code, the position adopted by the French Code, inspired by the Terré project, is to erase the classifications of obligations because they all have as their purpose an act of performance. Yet it is not certain that this indifference will stand up to interpretation by the Court of Cassation. On the one hand, jurisprudential controversies concerning the obligation to give have produced contrasting effects in France and Romania (13). In view of Articles 1650 et seq. of the Romanian Code, this category remains the basis of the effects of contracts for the transfer of ownership. The French Article 1196 tends to abolish the obligation to give by substituting a non-obligatory effect of the contract, but this is already controversial. On the other hand, despite its shortcomings and the difficulty of its implementation, the division of the obligations regarding means and result systematised by Demogue wields an influence quite beyond beyond French law. Article 1481 of the Romanian Code, like the Unidroit Principles, enshrines it, while the French Code tends to ignore it, like the proposed reform of civil liability. However, apart from the fact that the difficulty of reconciling the former Articles 1137 and 1147 remains with the new Articles 1197 and 1231-1, the division of the obligations regarding means and results also has an operative and structuring function and it is not certain that the courts will give that up with good grace.

This last observation shows that our Romanian view of the new French law of contracts necessarily has a limited perspective. The convergence and divergence of the two codes cannot be measured accurately until the reforms have been completed, when the jurisprudence and case law on both sides have given meaning to the legislation.

Notes

(1) The author wishes to thank Dr. H. Boucard, Professor and Co-Director of the Private Law Research Team of the Faculty of Law and Social Sciences of the University of Poitiers for her continued support, without which this contribution would not have been possible. The author refers for references to the bilingual publication of the *Société de legislation comparée*. See specifically *Nouveau Code Civil Roumain. Traduction commentée. Noul Cod civil,* par D. Borcan, M. Ciuruc, (dir.) M.-É. Laporte-Legeais, M. Moreau, Juriscope-Dalloz, Paris, 2013; F. A. Baias et R. Dinca (éd.), *Le nouveau code civil roumain : vu de l'intérieur - vu de l'extérieur*, Univ. Bucarest, 2014, 2 vol.; M. Behar-Touchais (dir.), *Comparaison de la réforme du droit français des contrats et du régime de l'obligation avec le nouveau Code roumain. vol. 1 Droit des contrats*, IRJS Editions, Paris, 2016, and *vol. 2 Régime général des obligations*, IRJS Editions, Paris, 2017.

(2) The new definitions of the contract differ. If the Codes were to abandon the academic distinction between the contract and the agreement, the Romanian extension of the concept of contract would fall within the French concept of a *convention* (an agreement of wills intended to produce legal effects, Article 1166) while the French Art. 1101 limits it to the agreement of wills intended to produce legal effects on a relationship of obligation. One of the issues is the perpetuation of the very controversial obligation to give, abolished in favour of the proprietary effect of the contract in the Ordinance (Article 1196 et seq. French Civil Code) - see below.

(3) See A. Almășan, *Les pourparlers – rapport roumain,* in M. Behar-Touchais, *op. cit.,* p. 5 s. ; M. Hanțig, *Cauzele răspunderii delictuale în negocierile precontractuale,* Curierul Judiciar, no. 2/2014, p. 85

(4) See A. Almășan, *Noțiunea, fundamentarea și sfera de aplicație a obligației de informare la încheierea contractelor,* AUB-D, no. II/2013, p. 194 s.

(5) See I. Deleanu, *Părțile și terții. Relativitatea și opozabilitatea efectelor juridice,* Ed. Rosetti, București, 2002 ; P. Vasilescu, *Relativitatea actului juridic civil. Repere pentru o nouă teorie generală a actului de drept privat,* Ed. Rosetti, București, 2003 ; R. Dincă, *Protecția juridică a intereselor private. Încercare de tipologie,* RRDP, no. 1/2007, p. 110 s ; L. Pop, *Tratat de drept civil. Obligațiile.* Vol. II. *Contractul,* Universul Juridic, București, 2009, p. 575 et seq ; M. Nicolae, *Tratat de publicitate imobiliară.* Vol. I. *Introducere în publicitatea imobiliară,* Ed. a II-a, Universul Juridic, București, 2011, p. 156 et seq ; F. A. Baias, B. Vișinoiu, *L'opposabilité du contrat aux tiers et pour les tiers. Considérations sur la réglementation dans le Code civil roumain,* in M. Behar-Touchais, *op. cit.,* p. 311 s.

(6) See F. Deak, *Tratat de drept civil. Contracte speciale,* Universul Juridic, București, 2001, p. 57 and references.

(7) E.g., five years after the new Civil Code comes into force, company law no. 31/1990 (Article 72) renders the rights and obligations of the directors, legal representatives of the company, subject to the ordinary law on mandates.

(8) See M. Cumyn, *L'administration des biens d'autrui dans les codes civils roumain et québécois,* in F. A. Baias et R. Dincă, *op. cit.,* p. 393 s.

(9) See I. F. Popa, *Promisiunile unilaterale și bilaterale de contract. Promisiunile unilaterale și sinalagmatice de înstrăinare imobiliară,* RRDP no. 5/2013, p. 151 s. ; R. Dincă, *Promisiunea de a vinde un teren agricol situat în extravilan*, RRDP no. 3/2015, p. 46 s. ; I. Popa, *Promisiunea de vânzare-cumpărare și executarea silită a acesteia în concepția Codului civil în vigoare,* Dreptul, no. 5/2014, p. 61 s. ; R. Dincă, *Les avant-contrats dans le nouveau Code civil roumain,* in M. Behar-Touchais, *op. cit.,* p. 45 s. *;* C. Constit. Rom., dec. n°. 755/2014, M. Of. no. 101/9 févr. 2015 ; C. Cass. Rom., dec. no. 23/2017, M. Of. no. 365/17 May 2017.

(10) See, e.g., Cass. Roum., 2 nd Sect. Civ . no. 3799/2013, available at www.scj.ro.

(11) See M. Nicolae, *Codex iuris civilis, op. cit*, p. 327. *Adde* O. Ungureanu, C. Munteanu, *Drept civil. Partea generală,* Ed. Hamangiu, București, 2013, p. 249 ; G. Boroi, *Curs de drept civil. Partea generală,* Ed. Hamangiu, 2012, p. 172.

(12) See G. A. Ilie, *La cause, entre survie et disparition. Rapport roumain,* in M. Behar-Touchais, *op. cit.* p. 87 s.

(13) See H. Boucard & R. Dincă « Le transfert conventionnel de propriété, confluence franco-roumaine ? », *Les confluences des droits, regards franco-roumains* dir. B. Vincent, Bruylant-Larcier 2015 p. 59 s.