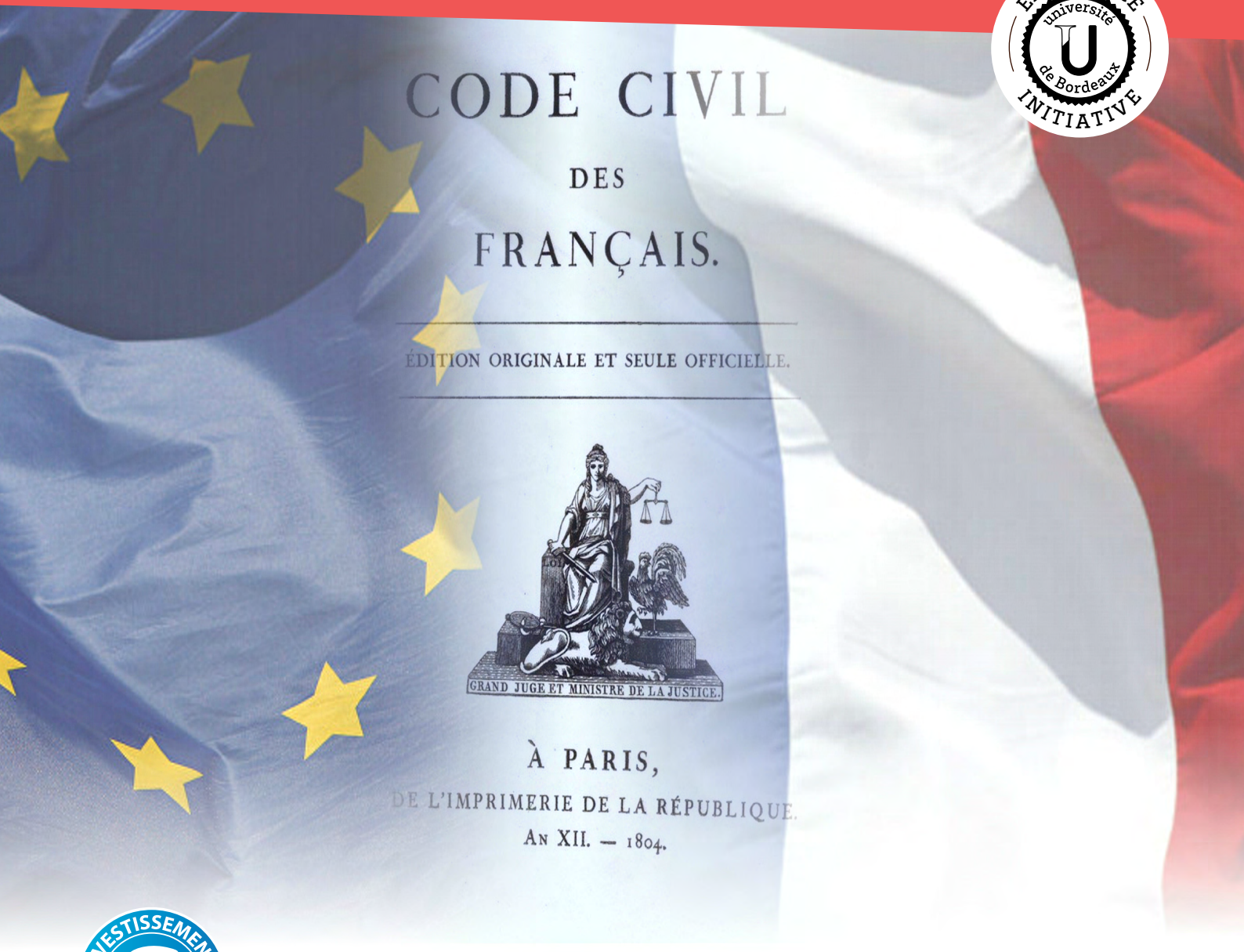
Issue | December 2017
No. 6 | Special Issue: The Reform of French Contract Law

Montesquieu Law Review

The new French contract law in the international sphere
Bénédicte Fauvarque Cosson



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

Faculté de droit et science politique

The Impacts of the Reform

The new French contract law in the international sphere

Bénédicte Fauvarque Cosson, Professor of law, University of Paris II (Panthéon-Assas)

Surprising as it may seem at a time when we are talking about so much globalization of trade, few international conventions unify contract law (1). Above all, the freedom of the parties to choose the law applicable to their contract (law governing freedom of contract) creates more intense competition than in matters where this choice is either prohibited or highly restricted. The powerful upswing of internal public policy bolsters this phenomenon of competition (2). Contract law provides fertile ground for competition between legal systems. The new French contract law will have to find its place in the international sphere.

Ordinance No. 2016-131 of 10 February 2016 on the reform of contract law, the general regime of obligations and proof of obligations presents numerous advantages in terms of "*legal certainty*" and "*economic efficiency*" (3). The Report to the President of the Republic states that "*the international challenge of such a reform of French law is economic*" and explains that "*having a more readable and predictable written contract law, adopting a simple drafting style as well as a clearer and more didactic presentation, is a factor likely to attract foreign investors and operators wishing to link their contract to French law*" (4).

French contract law, the general regime of obligations and proof of obligations has again become clear, readable and accessible. While drawing inspiration from recent European and international trends, it does so in its own original way, without servile copying or subjugation. Some authors and practitioners have denounced its lack of economic attractiveness, highlighting those provisions which leave the courts with broad powers of intervention which are generally feared by the business community. In particular, the new articles of the Civil Code on the duty to provide information, economic violence, adaptation of the contract on grounds of unforeseeable events, and unfair terms in standard form contracts have been the subject of strong criticism. However, they are consistent with the spirit of civil law systems as well as recent European and international codifications (5). There have been developments in order to take account of certain objections. Thus, Article 1169 of the French draft Ordinance, which allowed the courts to sanction unfair terms, including in contracts negotiated between professionals (6), led some commentators to believe that this single text would deter the parties from choosing French law (7) because of the uncertainty that it created. The draft was duly amended and the current Article 1171 on unfair terms limits its scope to standard form contracts.

In French and European private international law, the power of the parties to choose the law applicable to an international contract is the principal rule (I). It nevertheless has its limits, which reason and the sense of justice impose. Just as the Ordinance seeks to reconcile legal certainty and contractual justice, so too will the courts, in a dispute, strike a fair balance between these sometimes contradictory imperatives. They will achieve this by the handling of mandatory provisions and the public policy exception, the outlines of which may be partly redrawn in the light of the reform (II).

I. The parties' choice as to the law applicable to an international contract

A. Competition between state laws

a) The challenges of choosing the applicable law

While the challenges of choosing a law may prove to be a determining factor, the parties do not always pay enough attention to this question. Often the negotiations on the choice of the applicable law come after long discussions on all the other points, when the parties are exhausted after intense negotiations. Indeed, even when they have been negotiated in France and are subject to French law, the contracts (based on Anglo-American contractual techniques) are highly detailed and drafted in English.

In English law, where the idea of non-mandatory rules applicable subsidiarily does not exist to the same extent as it does in France, the contract is a business planning tool. If things go wrong in the course of performance, it must allow the parties to resolve their dispute without going to court. This explains why it is so long and detailed. The costs of negotiating contracts are high, but the parties hope this will help them avoid litigation. As a result, they do not always pay attention to the determination of the applicable law.

b) The European legal framework for choosing the applicable law

The Ordinance does not insert a new rule of conflict of laws into the Civil Code because these rules already exist in the European Regulation of 17 June 2008 (Rome I) (8), as well as in the case law of the Court of Justice of the European Union (CJEU), which has jurisdiction to interpret the Regulation and ensure its uniform application (9). The contractual freedom enshrined in the new Article 1102 of the Civil Code is reflected in Article 3 of the Rome I Regulation.

Under the terms of Article 3 of the Rome I Regulation, the contract "*shall be governed by the law chosen by the parties*". By the choice of the applicable law (or through a choice of law clause), the contracting parties may designate any state law, even if it is not related to the contract. This freedom is a legal certainty tool: the parties know with certainty which law applies. It also allows contracting parties to avoid their own laws, which is sometimes necessary, in particular in contracts concluded between a State and a foreign company which does not wish to depend on the law of that State.

B. From the choice of a national law to the choice of "rules of law"

a) The rise of international soft law

Once criticised as a symptom of or a factor in the weakening of the State and norms, soft law has imposed itself on the French legal and institutional landscape (10). The keys to the success of soft law are the following: an international and comparative perspective; a remarkable ability to be self-limiting in order to comply with the imperatives of state laws; and a high degree of formalisation.

In contract law, the most famous example of soft law is the Unidroit Principles (UPs) relating to international trade contracts (the fourth version was published in 2016). These Principles have inspired courts, practitioners and lawmakers around the world. They have also inspired other international organisations, including the Hague Conference on Private International Law, which adopted the "Hague Principles on Choice of Law in International Commercial Contracts" (11).

Article 3 of the Hague Principles lays down the choice of non-State law in these terms: "*The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise*". The commentary specifies that "*international treaties and conventions may be considered a generally accepted source of "rules of law" when those instruments apply solely as a result of the parties' choice of law*". Thus, for example, the Vienna Convention on the International Sale of Goods may be designated by the parties even where it is not applicable; this choice would be similar to that of the Unidroit Principles or the Principles of European Contract Law. However, in order for such a choice to be valid and binding on the court, its own law (law of the forum) must allow it: in order to comply with the prohibitions laid down by national law, Article 3 states, lastly: "*unless the law of the forum provides otherwise*". This clarification greatly restricts the possibility offered in theory, which may lead the parties to turn to arbitration.

b. International commercial arbitration and choice of rules of law

When the parties resort to arbitration, they may choose "rules of law".

This expression includes all forms of soft law rules, chief among which are the Unidroit Principles as successively supplemented. In order to encourage this practice (and, through it, the choice of its Principles), Unidroit has developed model clauses on the use of the Unidroit Principles of International Trade Contracts (Unidroit, 2013) (12). Several factors combine to create favourable ground for such a choice: the dissemination and evolution of the law governing freedom of contract; the quality of existing codified "rules of law"; and the fact that the choice of "rules of law" is widely accepted in the context of international arbitration (13). Above all, there are mechanisms that limit contractual freedom and allow to enforce internationally mandatory rules. These are mandatory provisions and the public policy exception.

II. Limits to contractual freedom: mandatory provisions and the public policy exception

Article 1102 para. 2 of the Civil Code establishes the principle of freedom of contract and lays down its limits: "*Contractual freedom does not allow derogation from rules which are an expression of public policy*". The reference to "*rules*" (and not to "*laws*" as at Article 6 of the Civil Code) is explained by the will of the legislature to take note of the variety of sources of law. Supranational texts, in particular those relating to fundamental rights, are implicitly covered (even though the text no longer mentions them, contrary to Article 1102 of the draft Ordinance), as well as those of domestic law, even when they do not specify that they are mandatory (such as Article 1171 of the Civil Code on unfair terms in non-negotiated contracts). In domestic law, the existence of a virtual public policy, revealed by the courts, is commonly accepted. The same is true in international law, through the mechanisms of overriding mandatory provisions and the public policy exception.

A. Overriding mandatory provisions(lois de police)

Which articles of the Civil Code can be classified as overriding mandatory provisions or internationally mandatory rules" ? Nothing is specified in this regard, either by the text of the Ordinance itself or in the Report to the President of the Republic (14). Guidelines can be given on the basis of the Rome I Regulation and the case law of the CJEU. Lastly, however, it is a case-by-case assessment (*in concreto*) that will allow the courts to say whether a provision of the Civil Code is an overriding mandatory provision or to rule that a foreign provision breaches French international public policy.

Article 9 of the Rome I Regulation defines overriding mandatory provisions as follows: "*provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation*".

In order to illustrate how this text can be applied by a court, one can take the example of Article 1171 of the Civil Code on unfair terms. There is little doubt that this text is mandatory in domestic law (a clause excluding its application in a non-negotiated contract would be abusive and therefore deemed unwritten). Is that an overriding mandatory provision, within the meaning of Article 9 of the Regulation? It seems to us that the court, in most cases, could decide in the affirmative. Another question arises: could a contract specify that it is subject to French law, excepted to Article 1171 of the Civil Code or to a series of articles (for example, Articles 1162-1171 on the "content of the contract")?

At first glance, this seems to be permitted by the Rome 1 Regulation: "*By their choice the parties can select the law applicable to the whole or to part only of the contract*" (Article 3 (1)) (15). Yet a French court may well not consider itself bound by the choice of the parties to exclude Article 1171 (or Articles 1162 to 1171 of the Civil Code). By means of the public policy exception (if the foreign law chosen to govern the content of the contract is shocking) or, more effectively, by recourse to the overriding mandatory provisions method (which implies ruling that Article 1171 is imperative not only in domestic law but also internationally), it could reintroduce the control of unfair terms, as organised under French law.

B. The public policy exception

The public policy exception is a method for excluding a foreign law which is normally applicable, either because its content results in an unfair result or because it runs counter to fundamental conceptions of the legal order of the forum or to a recently implemented legislative policy.

In principle, exclusion of a foreign law occurs following an *in concreto* appraisal of the result to which the designated foreign law would lead if applied: it is in a given situation, having regard to the aim pursued by the rule and the relationship of the situation with the legal order, that the court subsequently decides whether or not to trigger the mechanism. Public policy is assessed at the time when the court rules.

A foreign law which would allow one of the parties to act with extreme bad faith could thus be excluded. Not only does the new Article 1104 of the Civil Code extend the duty of good faith to the negotiation and formation of the contract: "*Contracts must be negotiated, formed and performed in good faith*" (in this respect, it codifies case law more than it innovates), but it also stipulates that "*this provision is a matter of public policy*", which means that the parties cannot exclude or restrict the duty of good faith. As a result, it may be thought that the public policy exception will come into play more frequently than in the past with regard to the requirement of good faith.

Under the influence of external sources from state, European or international origin, procedural public policy is also developing. It concerns above all the sanction of infringements of the rights of defence and could extend to that of the demands of formal notice of or compliance with a certain

period allowed to the debtor to perform the contract, particularly in the field of unilateral termination.

It is impossible to draw up a list of the articles of the Civil Code which justify triggering the mechanism of the public policy exception. It is not so much the content of French law which triggers the public policy exception as the intolerable result to which the application of the foreign law would lead - which assumes that the situation being heard by the court has a link with France. Thus the strategy of designating a foreign law applicable to all or part of the contractual relationship in order to evade the mandatory rules of the Civil Code (forum shopping) would be fully effective only if the parties removed the jurisdiction of the French courts, either pursuant to a clause conferring jurisdiction, or by submitting their dispute to arbitration (although this must be allowed); however, this could be sanctioned as constituting illegal forum shopping (16).

Conclusion

The question of the attractiveness of French law and of its influence has gained considerable momentum in France, particularly following the bicentenary of the Civil Code (17). The foreign observer is sometimes surprised. As Marcel Fontaine, a Belgian civil law and comparative law scholar, has pointed out, "*It is not commonplace elsewhere in the world to rhapsodise about the international influence of one's own legal system*". The trouble that seized French lawyers following the commemoration of the bicentennial of the Civil Code and the publication of the World Bank's *Doing Business* reports can be compared to the deeper ones affecting the French, who sometimes feel downgraded in the globalised world (18). This reform of the Civil Code should restore confidence, credibility and growth among French lawyers and economic operators and contribute to placing France in a position more in keeping with the image that the French have of their country, and French jurists of their law. While the Ordinance seems in some places to favour the search for balance and contractual justice, it has by no means neglected legal certainty. The necessity of not thwarting the parties' expectations and respecting their legitimate or reasonable expectations is omnipresent, but it is combined with other imperatives (19). This is the originality and attractiveness of this new French law of contract. In the international sphere, the judicial application of the new texts will have to take care to strike a fair balance between contradictory imperatives.

Notes

(1) The Vienna Convention on the International Sale of Goods (CISG) is the best known, but the unification it operates is fragile: only part of the law on the sale of goods is concerned and whole issues (such as the transfer of ownership) have been excluded because there is no agreement between States, which, moreover, may make important reservations (CISG, Article 2).

(2) To gain competitiveness, companies do not just produce and assemble abroad. They choose the law that is most favourable to them, impose their jurisdictions or resort to international commercial arbitration. CCIP, *Droit des affaires : enjeux d'attractivité internationale et de souveraineté*, CCIP, 2015, étude coord. par A. Outin-Adam et F. Arnaud-Faraud, http://www.cci-paris-idf.fr/etudes-et-prises-de-position-etudes, p 119.

(3) M. Fontaine, *Le rayonnement international du droit français des contrats*, Recueil Dalloz 2016, p. 2008.

In a context where international rankings fuel economic competition between the new players in globalisation, it is important to highlight French law's favourable developments, in contract law

and beyond. This is not a nostalgic defence of the greatness of French law, but a legitimate dissemination of the qualities of our law.
In this perspective and beyond the law of contracts, see the in-depth study of the CCI Paris Ile de France, published in 2015. http://cci-paris-idf.fr/sites/default/files/etudes/pdf/documents/droit-des-affaires-etude-1506.pdf. On the law on the sale of goods (the law of contracts is not dealt with in the data sheets), the analysis is as follows: "*It can be seen that French law, resulting from the Civil Code, is not systematically excluded, but is far from being dominant. However, it is not the quality of the law that is at issue, but rather the fact that it is relatively unknown. Hence the need for education and dissemination*" (p. 71).
(4) *Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JORF n°0035, 11 February 2016.
(5) M. Fontaine, cited above, para. 30.
(6) See F. Chénédé, cited above, nº 25.112.
(7) The Law Society did not fail to point out this "weakness" in French law.
(8) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJEU* 4 July 2008
(9) The Law on limitation periods of 17 June 2008 (*Loi No. 2008 - 561, 17 juin 2008 portant réforme de la prescription en matière civile*, *JO* p. 9856) inserted a new article into the Civil Code (Article 2221), which states: "*Extinctive limitation is subject to the statute governing the right that it affects*" (see Rome I Regulation, Art. 12 (d)).
(10) See the annual study published by the *Conseil d'Etat* (*Le droit souple*, La Documentation française, 2013) which lays down a "*doctrine of recourse and use of soft law*".
(11) After considering at length the advantages and disadvantages of the "Principles" method, which is new to this organisation used to drawing up international conventions, the Hague Conference considered that a set of non-binding advisory principles would serve more effectively than an international convention in promoting the acceptance of party autonomyin countries that had not yet enshrined it (especially in Latin America). While these countries would not ratify a treaty which is too far removed from their own law, they could instead reform their rules of law on the basis of principles which would then contribute to the progressive harmonisation of solutions between States. The modelling effect of international soft law was felt even before the adoption of the Hague Principles: Paraguay adopted these Principles in a law passed before the formal approval by the Hague Conference of the work done by the group of experts appointed by the Convention (including a Paraguayan).
(12) The Unidroit Principles do not run up against the same objections as those directed at the *lex mercatoria*, as they are readily available, complemented by each new edition (the 4th edition was published in 2016). Sometimes, contractual practice creates its own legal standards. Thus, for example, adaptation or renegotiation clauses have long been so widespread that there were questions as to whether there was "*no formation of an international custom in which the principle of binding force of the contract would be replaced by the principle of adaptation to contractual situations*".
(13) B. Audit, "Les choix des Principes d'Unidroit comme loi du contrat et le droit international privé", in *Liber amicorum Camille Jauffret-Spinosi*, Dalloz 2013.13.
(14) Article 1.4 of the Unidroit Principles prohibits parties from derogating from internationally mandatory rules. If one wonders how a legal corpus applicable on the basis of an agreement of wills may contain rules from which the parties cannot derogate by agreement, the Civil Code gives us the answer: "*Contracts which are lawfully formed have the binding force of legislation for those*

who have made them" (Article 1103, formerly Article 1134, para. 2). The primary source of the binding force of a contract subject to the Unidroit Principles is the will of the parties. Once the conceptual difficulty raised by Article 1.4 was overcome, mandatory provisions remained to be identified.

(15) This practice is often referred to as *dépeçage*, i.e. different parts of a same contract are ruled by the laws of two ore even more countries.

(16) Forum shopping is illegal when it "*withdraws the dispute from the jurisdiction of its natural court with a view to its artificial attribution, that is to say, forced, disproportionate, unrelated or significantly disregarding more realistic and relevant attachments* ", Daniel COHEN, *Contentieux d'affaires et abus de forum shopping*, Dalloz 2010, p. 97.

(17) See, even before this bicentennial, the study adopted by the *Conseil d'Etat* on *"L'influence internationale du droit français"*, La Documentation française, 2001.

(18) Marcel Gauchet, *Comprendre le malheur français* (avec E. Conan et F. Azouvi, Stock, coll. les essais, 2016). Marcel Gauchet shows how, in the general downgrading of all other European nations, France has suffered the head-on collision of its historical heritage and does not resign itself to a "provincialisation" which is one of the reasons for French pessimism.

(19) F. Chénédé, *Le nouveau droit des obligations et des contrats*, cited above, § 00.08.