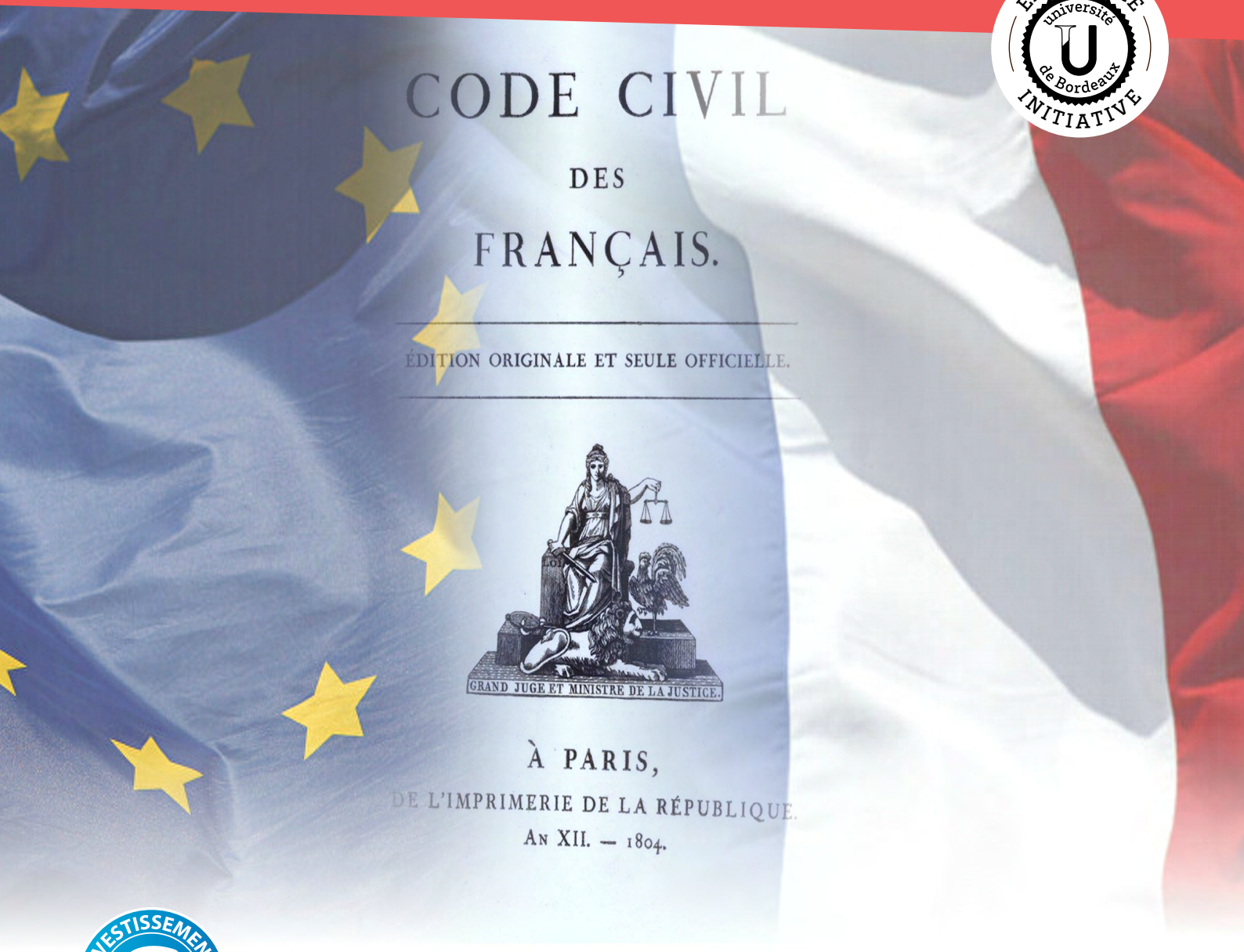
Issue | December 2017
No. 6 | Special Issue: The Reform of French Contract Law

Montesquieu Law Review

The Franco-Quebecois paradox of the cause
Benoît Moore



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

Faculté de droit et science politique

International Perspectives on the French Reform

The Franco-Quebecois Paradox of the Cause

Honourable Benoît Moore, Justice of the Superior Court of Québec

The fate of the cause in the context of the reform of French contract law has been the subject of lively debate which has attracted the attention of Quebec jurists: not so much, like some, out of concern to see a sacred beast vanish from the legal culture of the civil tradition; but rather out of astonishment at seeing so much emotion surrounding what for us is generally viewed as a notion without much practical interest.

We now know the result: the cause, both of contracts and of obligations, has formally been removed from the French Civil Code. However, the functions which this notion fulfilled, owing to developments in the case law of the Court of Cassation, are (in theory, at least) preserved by the new version of the Code.

Thus, in the subjective sense, the cause served first of all in reviewing the legality or morality of the aim pursued by one or other of the parties. Then, understood in its objective sense, the cause served not to ensure the review of the balance between acts of performance – this being the role of the lesion described as the non-equivalence of acts of performance and not as a defect of consent – but rather to intervene in the most glaring cases, where the derisory nature of the consideration amounts to a total lack of cause. It was, in fact, a refusal that the cause should play only a formal role and that it could really ensure the existence of a genuine interdependence (even unequal) of the acts of performance concerned. In the context of synallagmatic contracts, this function was thus articulated around the notion of the interdependence of obligations.

The cause also allowed for intervention to neutralise various types of contractual clause, including the limitation of insurance coverage to claims received by insurers prior to the expiry of the policy (1) or the much more famous limitation of liability clause in *Chronopost* (2).

These functions are preserved, at least formally, in the new French contract law. In the sub-section on the content of the contract, four provisions combine to cover what the now-defunct cause made possible. Thus the contract cannot derogate from public policy, in particular by its *purpose* (Article 1162); the lack of equivalence, viewed from the objective angle of the content alone, is not in principle a cause of nullity (Article 1168) unless the consideration proves to be illusory or derisory (Article 1169); and lastly, a clause which deprives the debtor's essential obligation of its substance is deemed to be unwritten (Article 1170).

Some might say "the cause is dead; long live the cause!". It may have been sacrificed, at the same time, because of its plasticity (dangerous for some, although praised by others) and its opacity, rendering it unattractive on the legal market. There intention was therefore to limit the scope of the cause whilst retaining the conquered terrain. Of course, the explicit crystallization of the functions developed in case law will protect them from any potential backlash. These functions may also, by the formalisation inherent in the codification, allow greater density or diversification

to take place. Conversely, there is no guarantee that this solution will lift the opacity first because, without the structural key of the cause, Articles 1168-1169-1170 are not self-evident. Then, nature abhorring a vacuum, the conquest of new territories by the courts will be done by means of other notions as soft as the cause.

Quebec law lies at the other end of the spectrum. It should be noted that the Quebec legislature proceeded with a complete recodification of its civil law in the early nineties (3). This recodification put an end to work that had begun in the 1950s, notably by setting up the Civil Code Revision Office (ORCC) chaired by Professor Paul-André Crépeau. The ORCC filed its report in 1977. In this report, the Commission proposed that the cause should no longer be considered. Here is how the Commissioners explained it (4):

It should be noted that, in the context of chapter 1, title 1, on the contract, it was considered appropriate, after studying the positive law of Quebec and foreign legislations, to eliminate the cause as a necessary condition for the formation of the contract.

Indeed, the limited use that the positive law of Quebec has made of the so-called objective cause in practice seemed to justify this measure and it was thought that this notion was sufficiently recovered by other provisions relating to the purpose of obligations, consent, the purpose of contracts, formality, the review on grounds of unforeseen events, unfair terms, non-performance, termination, inability to perform and indivisibility to fulfil the objectives traditionally assigned to the cause.

As to the subjective cause, this seems to be more of a notion which determines the framework within which contractual freedom may be exercised than an element peculiar to the formation of the contract and which, as such, is not on the same footing as consent, purpose, capacity and form when it is required on pain of nullity.

This proposal by the ORCC did not hold. Successive draft reforms of the law of obligations and the legislation finally adopted all retain the notion of cause in its two senses, objective and subjective. Article 1371 CCQ first raises the concept of the cause of obligations as a constituent element of an obligation arising from a legal act. Then the cause of the contract (or subjective cause) is set down at Article 1385 CCQ alongside the purpose, as being the essence of the contract. Two pieces of legislation are devoted to this notion. Article 1410 CCQ defines the cause of the contract as "*the reason that determines each of the parties to enter into the contract*" and Article 1411 CCQ which provides that "*a contract whose cause is prohibited by law or contrary to public order is null*".

Unlike the choice made by the French legislature, the Quebec Code enshrines the dual conception of the cause and circumscribes it within a precise meaning and function: the former must exist, the latter must be lawful. The cause in French law was disregarded on the grounds that it served the courts far too much; before it was finally rescued, the Quebec cause was destined to be condemned because it was not useful... So what is it possible to draw from the use of the notion of cause in Quebec law, more than 20 years after the adoption of these texts?

The achievements are minimal. While the concept of the cause of the contract is called upon - admittedly rarely but nevertheless on occasion - "*to prevent the contract from being used as an instrument for carrying out an illegal or immoral undertaking*" (5), the cause of the obligation

remains, as under the old Civil Code, ignored by the courts. Thus, the functions assumed by the objective cause in French law as protection, not for equivalence between acts of performance but rather of a minimum contractual equity, do not feature in Quebec law. While it is possible, in some cases, to cancel a contract in which the cause can be said to be derisory, this will be by other means. The same applies to those terms which deprive the debtor's essential obligation of its substance. Let us look more closely.

a) The illusory or derisory cause

On this first point, one decision – which has since become well-known – allows us to establish that not only have the courts disregarded the application of the objective cause (although the latter has been argued before them), but they have done so by attributing to it a purely technical, formal consideration, even if it is negligible (6). This case involved a contract by which a lady had sold her baking business to her cleaning lady for $50,000. The business consisted of a domestic-type stove, a few cake moulds, a few recipes and a list of 12 customers, all worth a few hundred dollars. The buyer did not read English and spoke it only with difficulty. It was only when when her son became aware of the contract that she understood what she had consented to. Despite her requests, the vendor never wanted to cancel the contract and sued the buyer for payment. The court annulled the contract, but on the grounds of the buyer's error, which was questionable in the circumstances as, if indeed there was such a mistake, it was in fact as to the price. What is interesting, however, is that counsel for the defendant argued that there was no cause. Rather than uphold this argument by associating the derisory cause with the non-existent cause, the court refused, finding instead in a completely mechanical manner, that there were reciprocal benefits and therefore a cause.

For the court, counsel's submissions amounted to invoking, in a roundabout way, the lesion between adults, ruled out in principle by the Civil Code of Quebec. It is also useful to point out that the CCQ links the lesion to the quality of consent rather than merely as a matter of imbalance of contractual content. Similarly, the legislature takes the logic of the intangibility of the contract very far, insofar as it defines the lesion as the exploitation of a party to the contract, but only allows penalties in exceptional cases (7). There may be an explanation for the lack of interest in the cause as a means of ensuring a minimum equity in the contract; everything is seen only through a prism of the quality of consent, and in principle it precludes any review of the balance of the rights and obligations in the contract, even when it is such that it amounts to exploitation (8). It is therefore difficult to find a viable place for the cause.

b) Clauses depriving the essential obligation of the contract of its substance

The same can be said about contractual clauses which deprive the essential obligation of the contract of its substance. Once again, the courts (when they do intervene) do so through other mechanisms. Let us take two examples.

The first is that of protection against unfair terms. This mechanism in Quebec law is provided at Article 1437 CCQ and allows the courts to cancel or reduce an abusive clause included in "*a consumer contract or contract of adhesion*". Paragraph 2 of that provision, after defining the concept of an abusive clause, specifies that "*in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause*". This provision made it possible to disregard in

particular an exclusion of liability clause which allowed a debtor to disregard his liability for failure to perform his essential obligation (9).

An earlier decision, prior to the Civil Code of Quebec and therefore the review of unfair terms, was simply based on the rules governing the interpretation of contracts and the search for common intention in order to disregard a written clause that directly contradicted the ends pursued by the parties. In this case, it was the insurance of a cargo of sugar, temporarily stored outside the port of Quebec until the end of the winter. As a result of wind damage, the insurer had refused coverage because a clause in the insurance contract provided for an exclusion when cargo was left outside. The court refused to apply this contractual provision on the grounds that it would have the effect of nullifying the purpose sought by the parties (10).

These arguments do not benefit from a structuring and unifying theory that the notion of cause would otherwise allow. They require special circumstances or restrict legal action to certain contracts (in particular standard-form contracts with regard to unfair terms). The ends enshrined in the French Civil Code, in the ordinary law of contracts, and inherited from the cause, are therefore still fragile in Quebec law.

As we can see, there is an interesting paradox. French law, while maintaining its functions, has decided to abandon the notion of cause on the grounds, *inter alia*, that it was a dangerous tool enabling the courts to intercede in the contract; Quebec law has retained the notion but it is, for all practical purposes, devoid of any function other than purely formal. It will be interesting to see the evolution of our respective laws. Will the explicit enshrinement of the current functions of the cause in French law allow them to be deepened? Will the restriction to these functions only lead to the courts gravitating towards other notions in order to intervene in contracts? Conversely, will the Quebec courts now, when explicitly enshrined in legislation, admit the principles of minimum consideration and essential obligation? Once again, comparative Franco-Quebec law will bring us rich developments.

Notes

(1) Civ. 1ere, 19 December 1990, J.C.P. 1991 I. 3778, obs. Bigot.
(2) Com. 22 October 1996, J.C.P. 1997. I. 4002, obs. Fabre-Magnan, Dalloz 1997. Jurisp. 121, obs. Sériaux.
(3) The Civil Code of Québec was adopted in 1991 and came into force on 1 January 1994.
(4) OFFICE DE RÉVISION DU CODE CIVIL, *Rapport sur le Code civil du Québec*, vol. II, Commentaires, t. 2, p. 564.
(5) Jean-Louis BAUDOUIN, Pierre-Gabriel JOBIN & Nathalie VÉZINA, *Les obligations* , 7e éd., Cowansville, Yvon Blais, 2013, no. 367, p. 450.
(6) *Yoskovich* v. *Tabor* (1995) RJQ 1397.
(7) Articles 1405 and 1406 CCQ.
(8) There will always be the possibility of invoking the abuse of the state of necessity at Article 1404 CCQ, but it still has to apply.
(9) *Hériault* v *Dumas* , JE 2000-1961 (CQ) (this decision would appear to recognise a more general principle than Article 1437 CCQ, according to which a debtor cannot absolve himself from the non-performance of the principal obligation; this principle is, however, never founded on the notion of cause). On the scope of this decision and on the general principle of the essential

obligation in Quebec law, see Didier LLUELLES and Benoît MOORE, *Droit des obligations*, 2e ed., Montreal, Thémis, 2012, no. 2979, p. 1857-1858.

(10) *Hadley Shipping Co. v Eagle Star Insurance Co,* JE 80-566 (CS).