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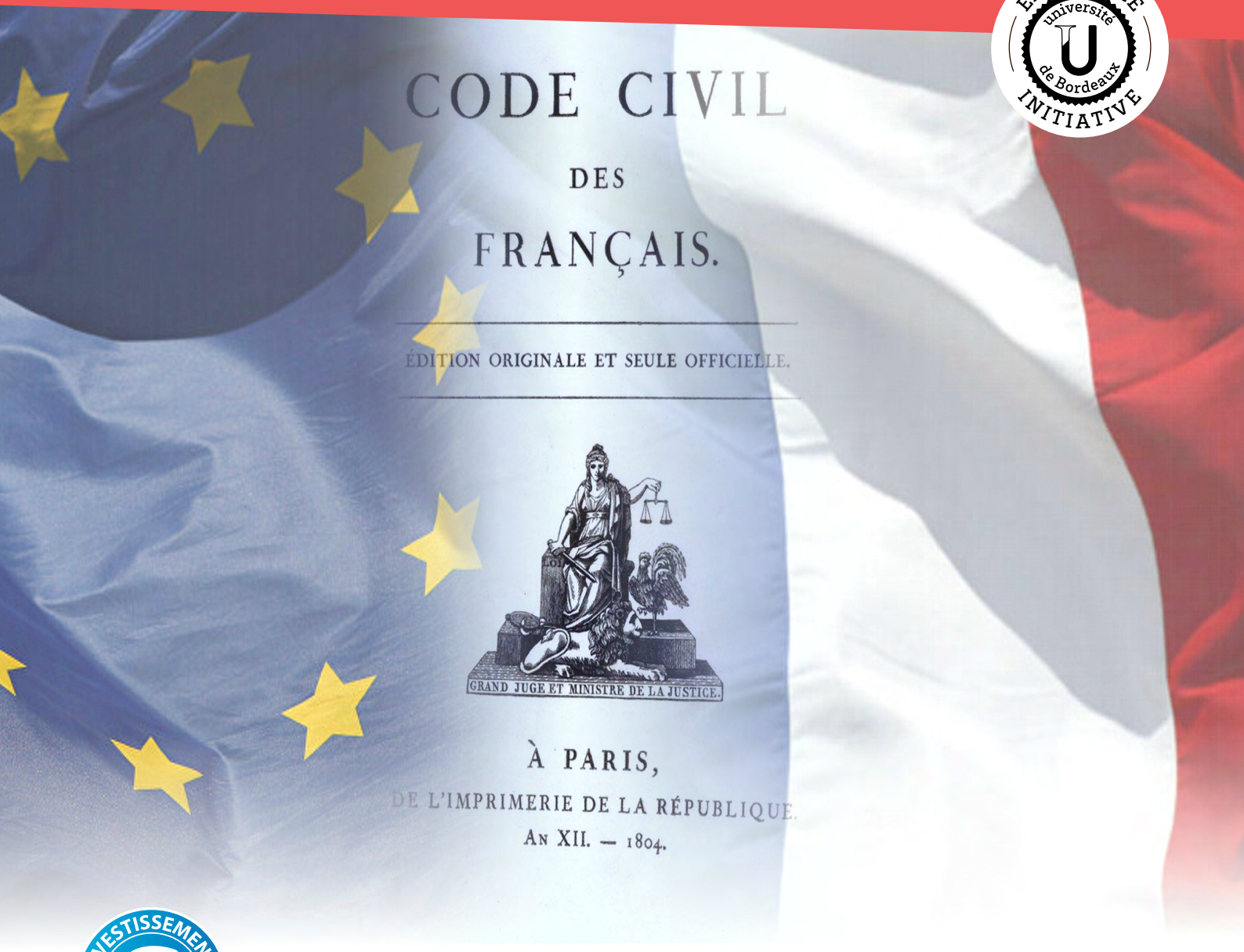

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International Perspectives on the French Reform

The Reform of French Contract Law – a German Perspective

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From a German perspective the 2016 French reform is reminiscent of the 'modernisation' of the German law of obligations in the year 2002 (1). The question thus arises of the similarities and differences between these two laws of obligations post reform. However, on a broader scale the recent changes to the law of obligations in France and Germany also contribute to a new focus on the law of obligations at continental-European level. This overarching effect will be briefly examined before several examples are given of past and future mutual inspiration between French and German law in this particular context.

I. National reforms in an international framework

The UN Convention on Contracts for the International Sale of Goods (CISG) has had notable influence on the changes in the law of obligations in several countries (2). Its adoption in 1980 thus marks a turning point for the present development in contract law (3). At supranational level, the "Principles of European Contract Law" (PECL) (4), the "Principes Contractuels Communs" (5) and the Draft Common Frame of Reference (DCFR) (6) use the CISG as a model for their principles. The CISG's influence is characterised by e.g. the central role of "agreement" for the formation of contract (without additional requirements such as "consideration" in the Common law or "cause" in previous French law), claim to performance *in natura*, the general notion of conformity and non-conformity, the corresponding catalogue of remedies and favouring objective liability instead of fault-based liability (7). The national and model contract laws influenced by the CISG do not, however, exhibit all of these features. Nonetheless, the overlaps are unmistakeable and allow the CISG to be deemed as the most important common source of inspiration for the changes to the law of contract (at national and European level) over the past 25 years.

The CISG has not just inspired innovations at European level but moreover the EU legislation has developed additional innovative approaches that have resulted in considerable changes to national law (e.g. pre-contractual information duties, rights of withdrawal, and unfair contract terms in consumer contracts) (8).

Where the modernisation of the German law of obligations is concerned, preparatory work on the draft legislation made express reference to the CISG (9) and to EU legislation. The Consumer Sales Directive 1999/44/EC (which in turn was heavily influenced by the CISG), gave the opportunity to introduce new rules and served as an important model for their content (10). However, the German legislator modified the approaches in the CISG and European legislation in order to ensure compatibility with the system of the German law of obligations and its legal tradition. For example, in relation to a damages claim, the concept of "non-conformity" is broadened by the notion of "breach of duty" and, in accordance with the structure of the General Law of Obligations, positioned alongside the contractual and statutory obligations in a single provision (§ 280 BGB). Furthermore, the concept of "presumed fault" was favoured as a requirement for the claim to damages – a compromise between the traditional fault-based liability in German law and the objective liability in the CISG.

From a German perspective, such experience with linking national traditions with influences from the CISG and European rules places particular attention on the role of these international and supranational sources of law in the reform of French law, as is apparent from the analyses of the development of this reform (11). The question arises as to the common bases of each reform as well as the concepts and techniques used in order to integrate the sources into the different legal traditions. With this in mind it appears possible that both laws will now more than before refer to one another in academia and practice due to the interplay of similarities and differences. These cannot be covered in detail here. Selected examples for the conclusion of contract and for defects in performance will demonstrate that, despite structural differences, the reforms have broadened the possibility for mutual inspiration. This concerns the future developments in legislation and in practice through "comparative interpretation" (12).

II. Conclusion of Contract

1. Structure

The basic structure of the new French contract law follows a pattern outlined by the PECL and adopted in other European sets of rules up to and including the proposal for a Common European Sales Law (13): the "life cycle" of the contract determines the structure of the legislative provisions – from conclusion, to content and effect, to the consequences of non-performance. The structure increases the comprehensibility and accessibility of the rules as they reflect the order of the processes in contract practice and in this respect the parties' own awareness.

This is certainly a positive feature of the European sets of rules and the new French contract law (14). Nonetheless, German contract law is not structured in accordance with the "life cycle" of the contract but is rather integrated into the structure of the BGB. The first book (*Allgemeiner Teil*) contains the general provisions on "legal transactions" and the second book (*Recht der Schuldverhältnisse*) contains the provisions on the "Law of Obligations" (with the three further books containing the rules on property law, family law, and inheritance law). The structure of the second book follows a similar pattern: the general principles applicable to the law of obligations (*allgemeines Schuldrecht*) are followed by specific rules for different contractual and non-contractual obligations (*besonderes Schuldrecht*). Contract law is therefore divided across provisions in the General Part on the conclusion of contract as a particular form of legal transaction, and provisions in the Law of Obligations on contractual relationships as a particular form of obligation (alongside "statutory obligations"). Contract law in the Law of Obligations is spread across various sections – from provisions applicable in all obligations (from pre-contractual and contractual), to provisions for all types of contracts or for numerous types of contracts (e.g. all bilateral contracts), to specific provisions for a particular type of contract (such as a sales contract).

The complex structure of German contract law renders it less accessible to the layman. However, the structure is so firmly anchored in the system and logic underlying the BGB that the German legislator could not make fundamental structural changes in order to make German law more attractive and comprehensible. The particular clarity and attractive features of the model adopted by the European sets of rules and French law must therefore remain an unfulfilled dream for German contract law.

2. Examples

a) Information duties

Pre-contractual information duties belong to the notable developments in national and European contract law over the past decades. In light of the aforementioned system, such duties are spread out in different sections of the BGB. Information duties arise particularly from rules on pre-contractual liability (*culpa in contrahendo*) in §§ 311(2), 241(2) BGB but also from many specific rules in the General Law of Obligations and (for individual types of contract) in the Specific Law of Obligations, supplemented by provisions in the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*). In addition, rules on mistake and misrepresentation in the General Part may also be considered (including the obligation to pay reliance damages when the contract is rescinded due to mistake) in relation to the communication of false or incomplete information.

By comparison Art. 1112-1 Code civil attempts to give a new answer to the questions posed by the expansion of pre-contractual information duties. Under its more streamlined approach the requirements, limitations and central elements of pre-information duties (15), and the burden of proof are mandatory. Furthermore, the provision contains a cross-reference in relation to the liability and termination of contract with respect to a breach of these duties. The French Code civil thus contains a clearly outlined foundation for the law relating to pre-contractual information. The discussions of the strengths and possible weaknesses of its innovative features (16) as well as the future experiences with its application in practice are thus not just of significance for French law. The responses could also be a source of inspiration for Germany in providing a clear structure to information duties in civil law – perhaps on the basis of an overarching notion of "information risks" in the formation of contract (17).

b) Imbalance of contract terms

A possible stimulus for German law could also be Art. 1143 Code civil, in which the exploitation of a contractual partner's dependence (18) amounts to duress and thereby protects the contract party in such a situation of dependence. When comparing this rule to German law it is necessary to consider the respective backgrounds to French and German civil law. Whereas the Code civil from 1804 maintained the canon law doctrine of "*laesio enormis*" (though expressly limiting its application to certain cases) (19) the younger BGB arose in the later stages of liberalism with the effect that its limitations on admission of a considerable disparity between performance and counter-performance are found within the general provision of "contrary to public policy" (§ 138 BGB). In so doing its provision on "usury" § 138(2) BGB did however introduce an effective restriction.

By comparison, Art. 1143 Code civil resembles the European sets of rules from the PECL (Art. 4:109) to the (since withdrawn) proposed CESL (Art. 51) (20). These European sets of rules stipulate the "avoidance" of the contract due to unfair exploitation in their framework of provisions on validity and defects in consent, respectively. Unlike the new French law, unfair exploitation is a separate category in the European sets of rules and not a sub-category of duress. In contrast to German law, unfair exploitation does not render the contract void *ipso iure* but the avoidance exists as a formative right.

Such a provision can rather be tailored to the specific demands of protection in circumstances of dependence than the general approach in present German law of "contrary to public policy".

Furthermore, it allows greater flexibility in relation to the parties' interests in the individual case as the decision to avoid the contract rests with the injured party. In this respect, the new French rule on exploitation can provide the opportunity for German law to consider the question of a specific form of avoidance rights with regard to the unfair exploitation in a situation of dependence.

III. Performance

1. Structure

The new French law of obligations collates the consequences of non-performance in the notably concise section on "*L'execution du contrat*" (Arts 1217 et seq. Code civil). In contrast the corresponding provisions in the BGB are scattered across various chapters and sections depending on whether they apply to contractual and "statutory" obligations (such as the provisions on damages) or just to contractual obligations (such as termination) or only to particular contract types (such as price reduction). Moreover, German legal doctrine has developed the notion of "defective performance" (*Leistungsstörung*), a phrase which does not appear in the BGB itself (21). It describes all the defects that can arise in the performance of the contract (or a "statutory" obligation) and the legal consequences of these defects as a whole. Alongside the remedies for the creditor, which are provided in French law in Arts. 1217 et seq. Code civil, it can e.g. include the "interference with the basis of the transaction" (*Störung der Geschäftsgrundlage* – Art. 1195 Code civil now contains the French equivalent of "change of circumstances").

2. Examples (22)

a) Price reduction

Where the remedies in Arts 1217 et seq. Code civil are concerned, the particular example of price reduction shows how French law can serve as a source of inspiration for German law. The remedy of price reduction is only provided in German law as a remedy for individual contract types – e.g. as a right for the buyer (§§ 437 Nr. 2, 441 BGB), the lessee (§ 536 BGB), the customer in a contract to produce a work (§ 638 BGB) etc. In contrast, Art. 1223 Code civil takes a notable step further as price reduction is provided as a general remedy for the creditor. In this respect there is a convincing reason for the reform to adopt an approach that has been outlined at European level by the PECL and other sets of rules (Art. 9:401 PECL; Art. III.-3:601 DCFR; Art. 120 CESL) (23). According to these provisions the easily applicable response (and therefore of particular importance in practice) to retain the non-conforming performance after notice is generally available to the creditor (and not only in certain contracts, such as a sales contract). The weakness in German law can indeed be countered by corresponding clauses in the contract, but the general provision in French law provides the advantage of a statutory rule in all cases in which the parties do not consider this possibility. In this respect it indicates that the German law of obligations has to catch up.

b) Termination

The new French provisions on termination appear to resemble a model that has long existed in German law. The General Law of Obligations in the BGB provided from the outset that termination can be exercised by a unilateral statement without requiring judicial intervention. The modernisation of the German law of obligations later extended this concept to sales law (replacing the previous notion of "redhibition"). From a German perspective, termination is a type of "formative right" which is a statutory entitlement for a party to change or end the contract by means of a corresponding statement (24).

French law prior to the reform had to some (albeit limited) extent already acknowledged the notion of a "formative right" as case law allowed, in some instances, termination without judicial intervention (25). However, it also became a part of French law through the transposition of EU directives that afford the consumer a right to withdraw from the contract by sending notice to the business. Art. 1226 Code civil has now anchored this approach to termination in legislation.

From a German perspective, there is however the question whether the recognition in a legislative provision on termination represents a paradigm shift in French contract law and leads to an acknowledgement of the concept of "formative rights" similar to German legal theory. Yet, this does appear doubtful when one considers that such a fundamental conceptual change would, from a German perspective, also be similar to avoidance without judicial intervention in instances of mistake and similar defects in consent (as provided in §§ 119 et seq., 142, 143 BGB). The French reform has not included such changes even though e.g. Art. 4:112 PECL provides for avoidance without judicial intervention. In this respect it may be worth considering whether the French reform would not have been more convincing in international comparison had it been more resolute in its use of the instrument of "formative rights".

c) Change of circumstances

One of the most important assimilations between the French and German laws of obligations is ultimately the revision of the contract by the court in the event of a change of circumstances. Following intense discussions on the "*imprévision*" over the past two decades (26), the new Art. 1195 Code civil (27) now opens the possibility for the court, on the request of a party, to revise or put an end to the contract if the parties cannot agree on renegotiations in light of a change of circumstances.

The principles in German law on the interference with the basis of the transaction ("*Störung der Geschäftsgrundlage*") were outlined almost a century ago by the courts and were codified in 2002 in § 313 BGB by the modernisation of the law of obligations (28). The principles have become a model for provisions on change of circumstances in the European sets of rules (Art. 6:111 PECL; Art. III.-1:110 DCFR; Art. 89 CESL) and to some extent in some new civil codes (29).

France has followed this European tendency with its 2016 reform. A common tendency towards this development indeed does not exclude the possibility for considerable differences. A clear distinction between the German and French approaches can be seen in the latter's approach to only allow changes in relation to circumstances unforeseeable at the time the contract was concluded. The wording of the French provision suggests that, unlike § 313(2) BGB, the (later) discovery that material conceptions that have become the basis of the contract are incorrect is not equivalent to a change of circumstances. In principle, this is minor in comparison to the fundamental decision to permit a revision of the contract (30) due to a change of circumstances and for the revision to ultimately lie with the court. The French law therefore – as German law – has broken through the traditional "all or nothing" approach in provisions on invalidity and avoidance in favour of maintaining the contract with judicial amendments in light of the changed circumstances.

Almost 100 years of experience with the generally-accepted German jurisprudence (31) shows that this assignment of decision-making authority to the courts does not lead to an inappropriate infringement on private autonomy or an "incapacitation" of the parties in relation to their freedom

to choose the content of their contract (32). The years of experience with the interpretation and application of these rules on the adaptation of the contract could perhaps be suitable in order to inspire French courts in their interpretation of Art. 1195 Code civil. Should this be the case it could become an example to show that comparative law is useful not just on a legislative level but also in the judicial interpretation of legislation (33) – "comparative interpretation" can therefore also serve as a source of inspiration for the courts.

Notes

(1) *Gesetz zur Modernisierung des Schuldrechts* (Act on the Modernisation of the Law of Obligations) of 26 November 2001, Bundesgesetzblatt (BGBl.) 2001, part I, no. 61, 3138–3218; for further explanation, see Hans Schulte-Nölke/Reiner Schulze, *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Tübingen: Mohr Siebeck, 2001); Markus Artz/Beate Gsell/Stephan Lorenz (eds), *Zehn Jahre Schuldrechtsreform* (Tübingen: Mohr Siebeck, 2014); Jürgen Schmidt-Räntsch, "Zehn Jahre Schuldrechtsreform" (2012) ZJS 301–321. For an overview of publications in French on the German reform see Francis Limbach, "Die französische Reform des Vertragsrechts und weiterer Rechtsgebiete" (2016) GPR 161–164, at 161.

(2) For example in China and the Netherlands, in the "transitioning" countries in mid- and Eastern Europe and also in the 2002 German reform. For an overview see Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (Munich: Sellier, 2008); Reiner Schulze/Fryderyk Zoll, *The Law of Obligations in Europe: A New Wave of Codifications* (Munich: Sellier, 2013).

(3) Reiner Schulze, "The New Shape of European Contract Law" (2015) 4 EuCML 139.

(4) Ole Lando/Hugh Beale (eds), *Principles of European Contract Law, Parts I & II* (The Hague: Kluwer Law International, 1999); Ole Lando/Eric Clive/André Prüm/Reinhard Zimmermann (eds), *Principles of European Contract Law, Part III* (The Hague: Kluwer Law International, 2003).

(5) Bénédicte Fauvarque-Cosson/Denis Mazeaud (eds), *Principes contractuels communs : Projet de cadre commun de référence* (Paris: Société de Législation Comparée, 2008).

(6) Christian von Bar/Eric Clive/Hans Schulte-Nölke, *Principles, Definitions and Model Rules of. European Private Law. Draft Common Frame of Reference (DCFR) (Full Edition)* (Munich: Sellier, 2009).

(7) Reiner Schulze, "Vertragsverhandlungen – eine kurze Einführung" in Florian Bien/Jean-Sébastien Borghetti (eds), *Die Reform des französischen Vertragsrechts – ein Schritt zu mehr europäischer Konvergenz?* (Tübingen: Mohr Siebeck, forthcoming 2017) 9–18, at 11.

(8) On these and other innovative features of European contract law see Schulze (n 3) 141; in detail Reiner Schulze/Fryderyk Zoll, *European Contract Law* (1st edn, Baden-Baden: Nomos, 2015; 2nd edn, forthcoming 2017).

(9) See, for example, *Draft legislation by the SPD Parliamentary Group and the Bündnis 90/Die Grünen Parliamentary Group*, BT-Drucks. 14/6040 of 14 May 2001, 86.

(10) *Draft legislation* (n 9) 1–2; Jens Kleinschmidt/Dominik Groß, "La réforme du droit des contrats, perspective allemande sur la balance délicate entre liberté contractuelle et pouvoirs du juge" (2015) RDC 674–690, at 677.

(11) François Chénedé, *Le Nouveau Droit des Obligations et des Contrats. Consolidations – Innovations – Perspectives* (Paris: Dalloz, 2016) para 62.22; the PECL's influence on specific provisions is explicitly pointed out in the *Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du février 2016 portant réforme du droit des obligations, du régime générale et de la preuve des obligations*, JO of 11 February 2016, text nr. 25, 4, 13,19.

(12) Reiner Schulze, "Vergleichende Gesetzesauslegung und Rechtsangleichung" (1997) ZfRV 183; in general on the use of comparative law in the courts see Mads Andenas/Duncan Fairgrieve (eds),

Courts and Comparative Law (Oxford: OUP, 2015), in particular the contribution by Thomas Kadner Graziano "Is it Legitimate and Beneficial for Judges to Compare?" therein at 25–53.

(13) Commission, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final.

(14) With regard to the new French contract law, see Yvaine Buffelan-Lanore/Virginie Larribau-Terneyre, *Droit civil. Les Obligations* (15th edn, Paris: Dalloz 2017) para 78.

(15) As to the question which information has to be revealed, see Hans-Jürgen Sonnenberger, "Die Reform des französischen Schulvertragsrechts, des Regimes und des Beweises schuldrechtlicher Verbindlichkeiten durch Ordonnance Nr. 2016-131 vom 10.2.2016, Erster Teil, Quellen der Schuldverhältnisse" (2017) ZEuP 6-67, at 23-24.

(16) See, for example, the contributions by Bertrand Fages, "Die Vertragsverhandlungen im neuen französischen Schuldrecht" 19-35, in particular 34-35; and Beate Gsell, "Die Neuregelungen zu den Vertragsverhandlungen nach der Reform des französischen Schuldrechts" 37-63, in particular at 55, both in Bien/Borghetti (n 7).

(17) See Schulze (n 7) at 17; for more detail see Reiner Schulze, "Pre-contractual Duties: A Brief Introduction" in Reiner Schulze/Pilar Perales Viscasillas (eds), *The Formation of Contract: New Features and Developments Contracting* (Baden-Baden: Nomos, 2016) 27-28, at 28.

(18) According to the *Rapport au Président* (n 11) 9, the term is not limited to economic dependence, but aims to cover any kind of situation of dependence; for criticism see Claude Witz, "Störung des vertraglichen Gleichgewichts im neuen französischen Schuldrecht" in Bien/Borghetti (n 7) 125-145, at 133.

(19) For further details on the *lésion* in French law see, for example, Muriel Fabre-Magnan, *Droit des obligations. 1 - Contrat et engagement unilateral* (4th edn, Paris: puf, 2016) paras 410-413; Christian Larroumet/Sara Bros, *Traité de Droit civil*, tome 3, *Les Obligations, Le Contrat* (8th edn., Paris: Economica, 2016) paras 408-423; for concerns on its narrow scope of application see Witz, (n 18) at 129-130.

(20) Witz (n 18) at 133 regretting however that the new French provision is not separate from its dependency on defect of consent.

(21) The term can be traced back to Heinrich Stoll, *Die Lehre von den Leistungsstörungen: Denkschrift des Ausschusses für Personen-, Vereins- und Schuldrecht* (Tübingen: Mohr, 1936); see also Claude Witz, "La nouvelle jeunesse du BGB insufflée par la réforme du droit des obligations" (2002) D. 3156-3161, at 3158 with further references.

(22) On these examples, see also Reiner Schulze, "Le juge et la modification du contrat : perspective allemande" (2017) Les Petites Affiches, numéro spécial (to be published).

(23) For criticism of Art. 1223 see, for example, Gaël Chantepie/Mathias Latina, *La réforme du droit des obligations. Commentaire théorique et pratique dans l'ordre du Code civil* (Paris: Dalloz, 2016) paras 642, 645.

(24) Beate Gsell, "Le nouveau régime de l'inexécution du contrat", in Reiner Schulze/Guillaume Wicker/Gerald Mäsch/Denis Mazeaud (eds), *La réforme du droit des obligations en France - 5èmes Journées franco-allemandes* (Paris: Société de Législation Comparée 2015) 171-178, at 177-178.

(25) Cour de cassation civ. 1re, 13 October 1998, nr. 96-21.485 (1999) D. 197 ("*Tocqueville*"), note C. Jamin; see also Hugo Barbier, "Les grands mouvements du droit commun des contrats après l'ordonnance du 10 février 2016" (2016) RTD civ. 247-261 at 258. A formative right is also recognised in Articles L. 133-3 Code des assurances, L. 114-1 Code de la consommation and 1657 Code civil.

(26) For example Eric Savaux, "L'introduction de la révision ou de la résiliation pour imprévision - Rapport français" (2010) RDC, 1057-1067; Bénédicte Fauvarque-Cosson, "Le changement de

circonstances" (2004) RDC 2004, 67–92; Denis Mazeaud, "La révision du contrat" (2005) 129 Les Petites Affiches 4–23, in particular paras 18–35; from a German perspective see Arne Alberts, *Wegfall der Geschäftsgrundlage* (Baden-Baden: Nomos 2015).

(27) For further details see, for example, Philippe Stoffel-Munck, "L'imprévision et la réforme des effets du contrat" (2016) RDC/hors-série *La réforme du droit des contrats : quelles innovations ?* 30–38, in particular at 30–36; from a German perspective Béatrice Deshayes/Iris Barsan, "Das neue französische Vertragsrecht" (2017) IWRZ 62–67, at 65; Kleinschmidt/Groß (n 10) at 682–685.

(28) See, for example, the comments by Thomas Finkenauer in *Münchener Kommentar* (7th ed., Munich: C.H. Beck, 2016) § 313, paras 1–2, 20–28; Kleinschmidt/Groß (n 11) at 682.

(29) See for example in Hungary or in the Czech Republic, Luboš Tichý, "Czech and European Law of Obligations at a Turning Point" in Schulze/Zoll (n 8) 27, 38–39; Zoltán Nemessányi, "Contract Formation and Non-performance in the Changing Hungarian Civil Law" in Schulze/Zoll (n 8) 123, 135–18.

(30) Similarily Witz (n 18) at 140, 143.

(31) Overview in the comments by Reiner Schulze in Reiner Schulze et al. (eds), *Bürgerliches Gesetzbuch. Handkommentar* (9th ed, Munich: Nomos, 2017) § 313, paras 22–25; from a French perspective, see Pascal Ancel/Bénédicte Fauvarque-Cosson/Robert Wintgen, "La théorie du « fondement contractuel » (Geschäftsgrundlage) et son interêt pour le droit français" (2006) RDC 897–913, in particular 898–902; Michel Pédamont*, Le contrat en droit allemand* (2nd edn, Paris: LGDJ 2004) n° 171–174.

(32) Similarily Witz (n 18) at 145.

(33) See in general, Andenas/Fairgrieve (n 14).