

## THE REFORM OF FRENCH CONTRACT LAW: A CRITICAL OVERVIEW

Alexis Downe\*

### ABSTRACT

Since the Napoleonic Code of 1804 we have seen republics, monarchies, and empires coming and going; local and world wars; revolutions, from the industrial to the informational; and our society has moved from an economy based on agriculture to one open to the world, based on tertiary services. In all this time, French contract law has been able to stay up and keep up to date with the many changes in society, thanks to the judicial interpretation of the various articles of the French civil code and the generality of its articles\*\*. There have been many previous attempts to reform French contract law but its principles, forged in 1804, have escaped unscathed, except for certain transpositions of European directives. This article focuses on an academic point of view with regards the reforms to the French civil code that will bring private contract law into line with modern international standards. This is the first step in a series of broader changes the government is making to the French law of obligations. This reform is said to have both adapted and revolutionised French contract law and merits scholarly attention.

### KEYWORDS

French contract law. Reform. French civil code. Certainty. Attractiveness.

*He who reforms often deforms* \*\*\*

Now that the reform has passed its final stages, it seems pertinent to examine its context (1) and objectives (2) before analysing some of its more innovative aspects (3). In an ultimate part we will conclude on an internal critic of the project by generalising on whether this reform satisfies its own aims and goals (4).

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\* PhD student in Private and Comparative Law working on contractual risks under the supervision of the Professor Jérôme Julien (co-director of the Institut of Private Law, UT1). Teaching assistant at University of Toulouse 1 Capitole (Toulouse, Haute-Garonne, France). *E-mail*: alexis.downe@gmail.com

\*\* Many examples could serve to illustrate this purpose, from the extension of tortious liability and quasi-contracts to the numerous applications of the principle of good faith found in article 1,134 of the Civil Code. For other examples see Cartwright 2015.

\*\*\* German colloquial saying, it is sometimes said that such a reform is a deformation (*eine solche Reform ist eine Verformung*).

## 1 THE CONTEXT OF THE REFORM

To codify is to regroup in a systematic order an ensemble of rules relating to a particular domain or legal matter (Guyomar 2015, p. 1.271). Codifying law has been a continuous process throughout France's history although it is traditionally associated with Napoléon as it was during his reign that the five great Codes were born<sup>1</sup>.

Reasons for this change of French contract law are to be found everywhere, from the depths of new contractual practice to the heights of European law<sup>2</sup>.

One of the most famous causes for this project is the *Doing Business Reports* that criticised the effectiveness of the French legal system in comparison with the common law systems. It has been over ten years<sup>3</sup> since the first Doing Business Report of the World Bank ranked France well below other nations regarding the evaluation of its legal system and judiciary order. The Doing Business reports can be criticised (Siems 2007, p. 143-145) from a methodological perspective – the reports take a more common law approach. Epistemologically, the reports are focused on economic evaluations of law and neglect the specific axiology of the French legal system viewpoint. Yet one cannot deny that many of the reports remarks have been integrated into this project.

This reform is far from the first attempt to modify French contract law. It draws upon the two previous attempts: the *Catala* project and the *Terré* project.

The *Catala* project was run by a large team of forty academics who had less practical contact and operational experience than subsequent projects. It was rapidly finished but didn't receive much political support. On the other hand the *Terré* project included many more patricians.

Thus, and this point has been explicitly admitted, this project has drawn some of its inspiration from the previous attempts to reform French contract law. Although it does appear as a tremendous innovation happening in such a short time, it actually comes after ten years of propositions and debates (Champalaune 2015, p. 15). More importantly, such a reform appears necessary in order to reduce the gap between the law and its practice (Cartwright 2015).

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<sup>1</sup> In particular the Civil Code, that has been used as a model for countless countries and is sometimes referred to as the *civil constitution of France*.

<sup>2</sup> The sources of inspiration for this reform are actually controversial. For instance the rules governing *l'imprévision* have been completely changed, however it can be argued that the inspiration for that change is European contract law, French administrative contract law or even the practice of contract law as contract-makers have been circling *imprévision* rules for decades. Thus inspiration is coming from above (European contract law), from below (contract practices) and from the "sides" (Administrative contract law).

<sup>3</sup> The *Doing Business Reports* began in 2003. They can be viewed (2004 onwards) online at <<http://goo.gl/iJ4TQg>>.

However this time the reform is more politically motivated, stemming directly from the Minister of Justice. Its method of implementation has been heavily criticised as, rather than resorting to legislation, a *government decree*<sup>4</sup> was used.

The law of the 16<sup>th</sup> of February 2015 allowed the government to reform French contract law by decree<sup>5</sup>. The Chancellery then opened a public consultation until the 30<sup>th</sup> of April 2015. The project was then examined by the *Conseil d'état* before being presented to the Council of Ministers.

It is true that ever since the declaration of the state of emergency and, more recently, with the resignation of Christiane Taubira as Minister of Justice<sup>6</sup>, many have wondered whether this project to reform French contract law would be carried through. However, the *ordonnance* of the 10<sup>th</sup> of February indicates otherwise: the final revised text was published on the 10<sup>th</sup> of February 2016<sup>7</sup>.

Interestingly enough the *ordonnance* has made some changes to the initial project, which we will go over below. But before analysing the substance of the reform, its objectives must be understood (2).

## 2 THE OBJECTIVES OF THE REFORM

The reform pursues simplicity, efficacy and protection. It has been constructed to render French contract law more attractive (Stoffel-Munck 2015). Thus we will examine the following aims: simplification of the law (2.1), protection of the weaker parties (2.2) and attractiveness of French law (2.3).

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<sup>4</sup> The French Constitution of 1958 fixes the competency of the Parliament (article 34) and of the Government (article 37) with regards enacting laws (Parliament) or *règlements* (Government). However the Parliament can (article 38) habilitate the Government (Executive Power) to pass decrees on matters normally to it.

<sup>5</sup> Loi n° 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures (this is the French designation for the legal text). The text can be viewed online at <<https://goo.gl/9S4v2m>>.

<sup>6</sup> Replaced by Jean-Jacques Urvoas.

<sup>7</sup> Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations. The text can be viewed online at <<https://goo.gl/AxlucC>>.

## 2.1 SIMPLIFICATION OF THE LAW

Simplification and intelligibility of the law have always been proclaimed as fundamental objectives, and sometimes duties, of lawmakers. In France the accessibility and intelligibility of the law are *constitutional principles and objectives*<sup>8</sup>.

This goal is perhaps foremost in the need to update the French civil code. In order to maintain the applicability and relevance of the dispositions of the civil code, French courts have delivered evolving and innovative interpretations. And in many aspects this project of reform simply consecrates some of the finest judicial decisions of the past centuries echoing the normative mission of the Court of Cassation (Zénati 2003)<sup>9</sup>.

It is not just because we live in an era of normative inflation that we must codify, because such a codification does not resolve this problem. Indeed, as it is the case here, most reforms and codifications projects merely consecrate existing case law and this would hardly deal with the problems linked to normative inflation (Guyomar 2015, p. 1.272).

One must combine accessibility; intelligibility and simplification of the law to real seize the objectives of the project.

The point is not merely to regroup legal knowledge previously dispersed across disparate sources – such as case law and different codes etc. – but also to offer a complete and unified vision of contract law to those in possession of the newly updated civil code. It is both a legal and an architectural – in a normative sense – project. This can be observed on several levels.

First, a *chronological* plan to the obligation has been adopted. Hence the contract appears within the *sources* of obligations and the text distinguishes between the *formation*, the *interpretation* and the *effects* of the contract. Contrarily to some legal systems or traditions – such as *common law* – French contract law cannot be thought of without reference to *obligations*<sup>10</sup>. This in turns explains why contract law is generally integrated – alongside *delictual liability* or torts – into law of obligations, i.e. contract law is seen as a sub-branch of the law of obligations. This means, in terms of legal education, that one must turn to books on *law of obligations* that do justice to the structure of French law (Julien 2012). One of the downsides to such a way of viewing contracts is that for a long time *producing obligations* was seen as the only specific effect of

<sup>8</sup> Cons. const., déc. n° 99-421 DC du 16 décembre 1999 ; n° 2001-455 DC du 12 janvier 2002, cons. 8; n° 2004-500 DC du 29 juillet 2004, cons. 12. The purpose is to *clarify* legal discourse, i.e. make it more transparent to legal actors who, in general, are *profane* in the matter.

<sup>9</sup> The text is also available online at <<https://goo.gl/MrzToR>>.

<sup>10</sup> If French scholars start from the contractual obligations, Anglo-Saxon lawyers can remain at the level of the contract. For instance they would discuss breach of contract whilst a French scholar would insist of *l'inexécution de l'obligation contractuelle*, i.e. the violation of the contractual obligation be it through non-performance or misperformance.

contracts, so that contracts were only viewed as a particular *source of obligations* (Ghestin, Loiseau & Serinet 2013, p. 2). On the other hand the upside is that French law possesses a certain unity, stemming from its historical roots and the influence of Roman law, which you do not always find in other legal traditions (Whittaker 2008, p. 294).

Second, and more importantly, one finds some *preliminary dispositions* and definitions. Dispositions aimed at understanding contracts that recap important principles, such as freedom of contracts at article 1,102. Definitions including a new vision of what contracts are. This is actually a major change because the contract is no longer defined as an act producing obligations but as “a concordance of wills of two or more persons with a view to creating legal consequences”<sup>11</sup>. This in turns means that the former distinction between conventions and contracts must be abandoned as the production of obligations was seen as the distinguishing feature. Unfortunately one must point out the inconsistency of removing *obligations* from the definition of contracts but maintaining them, for instance, as the key to understanding the privity of contracts. Indeed article 1,999 of the *ordonnance* declares that contracts only create obligations amongst the parties.

Another way of viewing this objective of simplification is from the viewpoint of legal practice. Even if one looks at some of the changes brought about by this project, one will realise they are not really new for lawyers. For instance, the admission of *l'imprévision* that we will examine later is theoretically bold but not a godsend for lawyers who have always got around the refusal of *l'imprévision* by stipulating *force majeure* or *hardship* clauses. However by conciliating the French civil code with contract and business practices, we are in effect simplifying the law for the economic actors of the legal system<sup>12</sup>.

## 2.2 PROTECTION OF THE WEAKER PARTY

One of the problems of the French civil code of 1804 is its contractual paradigm.

When one gets familiar with it, we start noticing that clearly all the rules governing contracts in general are issued from the model of the instantaneous sale of chattels between equal parties, i.e. a sale between individuals with equal or comparable bargaining power.

However, due in part to the industrial revolution and the process of standardisation, such a model is more an ideal aspiration than a concrete reality on which to base our rule making. Today

<sup>11</sup> The definition quoted above was taken from the English translation of the *reform project* (<<http://goo.gl/0zukei>>). All quoted English articles, present in this study, of said project are from this source. However the actual *ordonnance* – published on the 10th of February 2016 – has not yet been translated.

<sup>12</sup> For instance from the point a view of legal actors, normative simplification reduces transaction costs whether they be information costs, bargaining costs, drafting costs or implementation costs.

the majority of contracts are standard forms – the famous boilerplates – and are based between people of very different bargaining power. All of us here have in their life signed a phone contract, a lease or utilities contract in which we had no input on the terms and, most likely, we probably didn't even read it before signing. If we, who are legal professionals, didn't read it, you can be sure no one else in a similar position did, until it's too late.

This reform aims to correct this gap by adjusting general contract law to mirror the evolutions that society has known since 1804 and namely the impressive soar of standard contracts between unequal parties.

Of course one may ask whether it is pertinent for contract theory to change or update its paradigm. As Schwartz and Scott (2003, p. 2)<sup>13</sup> have said “[c]ontract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be”. But currently although they represent a huge part of contracts, specific laws and special dispositions – and not the common law of contracts – regulate contracts between parties of different bargaining strength and/or standard form of contracts.

Because of this, one may wonder what kind of contractual relationships are still governed by this “common law of contracts”<sup>14</sup>. Hence the proclaimed objective to protect the weaker party through general dispositions that will integrate the civil code instead of having to carry on relying on outside codes such as the consumer code and the commercial code.

That is why we find numerous mentions of *contrats d'adhésion*<sup>15</sup>, i.e. contracts where one of the parties' freedom of contract is reduced to either accepting the entirety of contract – as it was drafted by the other party – or reject it but cannot effectively negotiate and thus participate in the determination of the content of the contract. In turn this pursuit of *protection* should lead to some normative *simplification*, if simply from an architecturally perspective.

## 2.3 ATTRACTIVENESS OF FRENCH LAW

There is an obvious substantive difference between the attractiveness of a legal system and its simplification although both aims are heavily tied to the law's *content*.

<sup>13</sup> I would like to thank Associate Professor Dr. Eoin O'Dell of Trinity College Dublin for a link to the quoted material.

<sup>14</sup> Indeed relations among professionals are regulated by the commercial code whilst relations between a professional a consumer by the consumer code. All that remains, thus, are contractual relations among non-professionals.

<sup>15</sup> Article 1110 defines *contrats d'adhésion*, article 1171 concerns the control of unfair contract terms in *contrats d'adhésion* whilst article 1190 indicates the specific rules of contract interpretation applicable to *contrats d'adhésion*.

However there is also a difference in its recipients. The simplification of the law will benefit all the legal subjects of said legal system whilst when one aims to make a legal system more attractive, one is obviously not interested in making it more attractive to every legal subject.

Attractiveness only makes sense to individuals or entities that have a choice, i.e. that can decide to submit their contractual relationship to French law or another law (Cartwright, p. 699).

Thus attractiveness of French contractual law must be viewed within the context of international contracts where the parties have a freedom of choice of the law applicable to their contract. Moreover attractiveness can also be aimed at legal States who are undergoing legal reforms and hesitating on a model to inspire them. Finally the attractiveness of a legal system could be viewed within a European context. Indeed with the desire to promote and institute a European law of contracts, the question of which features of each particular system to promote begs to be asked. One could answer that the attractiveness of a particular system would aid it to become a fundamental part of this new European law of contracts (Champalaune 2015, p. 9).

What this shows is clearly that *to be legally attractive* is to be preferred over another legal system. Thus *attractiveness* makes sense only in the context of *competition* and *choice*<sup>16</sup>.

So what would push international contracting parties or reforming legal States to choose the French legal system over another? Obviously multiple variables come into play and one must bear in mind the concrete aim of each contract, but here are some ideas:

- (1) Legal certainty and transactional certainty, that are linked to the idea of predictability and rationality of the law;
- (2) Easy to understand rules;
- (3) Predictable judiciary interpretations and applications of said rules.

We are already in quite a predicament as these clearly necessary elements raise quite a few obstacles.

(1) With regards the *rationality* of the reform a problem arises because the text was drafted and adopted so rapidly although it did draw upon previous attempts. Usually we look to parliamentary debates in order to understand what the authors of the text had envisioned and glean

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<sup>16</sup> This aim stems from several factors but perhaps most famously the “*Doing Business Reports*” that claimed that Anglo-Saxon law was more attractive and favoured economic development. Although more recent “*Doing Business Reports*” do indicate that some of the points that make French contract law so unique – for instance its large admission of specific performance – are implemented more efficiently than in Anglo-Saxon systems.

from that the finalities and purposes of the law with the aim to better interpret it to new circumstances<sup>17</sup>. So how to find the intentions which are not accessible as the method of implementation – governmental decree – means no *debates*<sup>18</sup>?

(2) Understanding is not only about substantial content – although we could challenge the content of some of articles – but also about their *force*, i.e. do these rules form part of some public policy or can the parties stray from them by exercising their freedom to contract?

(3) French judiciary interpretations rest harmonisation of the Court of Cassation<sup>19</sup>. However, bearing in mind procedural delays, it will be many years before we get the first rulings on these new articles. Until then of course we can rest on previous decision on similar points – and some articles echo past decisions – as well as doctrinal propositions but we will still be in uncharted waters, which may scare away contract-makers.

With the objectives of the reform in mind, it is time to turn our gaze to the examination of some of the most fundamental innovations of this *ordonnance* (3).

### 3 EXAMINATION OF SOME OF THE IMPORTANT CHANGES IN THE REFORM

Many articles could have be studied but I have decided to present just a few that I believe will interest and surprise both people familiar and the public less familiar with French contract law. With that goal in mind, will be examined the following innovations: the disappearance of the cause (3.1); the admission of *l'imprévision* (3.2); the extension of the control of unfair contract terms (3.3) and finally the economic restrictions to enforced performance in kind (3.4).

#### 3.1 THE DISAPPEARANCE OF THE CAUSE

Even though the cause is said to have vanished from the law of contracts, it is necessary to attempt to define it, as it is a very controversial topic. The cause attempts to explain *why* a party contracted and it was a condition of *validity* of contracts. In that way the cause was distinguished

<sup>17</sup> See Cass. Ass. Plén., 23 January 2004, n° 03-13.617: Bull. 2004 Ass. Plén., n° 2 p. 2; *D.* 2004, p. 1108, note P.-Y. Gautier; *D.* 2005, p. 1090, note L. Rozès. The judges ruled out a certain interpretation by stating that “it doesn’t follow from the parliamentary debates [...]”.

<sup>18</sup> One could imagine relying on some of the following methods: administrative *circulaires* or finding the doctrinal origins to the articles and understanding their rationality. Furthermore one could look at the previous attempts to reform French contract law upon which this reform drew considerable inspiration.

<sup>19</sup> Cf. article L. 411-2 of the Judicial Organisation Code (*Code de l'organisation judiciaire*).



from the *object* that designated *what* was due (Whittaker 2008, p. 317). Broadly one may view the *cause* in two ways:

- (1) Subjectively or concretely as being the *reasons* or *motives* that pushed a party to conclude the contract;
- (2) Objectively or abstractly as the legal justification for the contractual obligations.

From these two visions of the cause came two different control mechanisms:

- (1) The *existence* of the cause was determined *abstractly* according to the type of contract<sup>20</sup>;
- (2) The *legality* – whether the cause is lawful or unlawful – of the cause was determined *concretely* according to the real motivations of the parties.

Nevertheless the cause has always been criticised in its definition and applications whether by French or foreign legal scholars. It is true that it has revealed ever-extending tentacles<sup>21</sup>. In quite a *revolutionary* manner the reform abolishes the cause as a condition of validity of the contract. Indeed article 1,128 of the *ordonnance* states that a contract must satisfy three conditions in order to be valid; the consent of the parties, who in turn must have had the capacity to conclude the contract and the contract must have a licit and certain content.

One thus notes that both the *cause* and the *object* have disappeared from the conditions of validity and seem to have been replaced by the contractual *content*. This could be interpreted in different ways:

- (1) The contractual content represents both the *cause* and the *object*;
- (2) The contractual content designates something other than the *cause* and the *object*;
- (3) The contractual content represents either the *cause* or the *object* but not both.

<sup>20</sup> For example: Cass. 1<sup>re</sup> Civ., 25 May 1988, *Bull. civ.* I, n° 149 declaring that the cause of an obligation in a synallagmatic contract resides in the other party's obligation. This principle suffers from an exception; when the *concrete motifs* of a party have entered the contractual sphere (*champs contractuel*) then they may be used to determine the existence of the cause, see Cass. Com., 6 Dec. 1988, *Bull. civ.* IV, n° 334.

<sup>21</sup> Indeed beyond the controls mentioned above the cause has been extended to the question of contract equilibrium and utility. For an illustration cf. Cass. 1<sup>re</sup> Civ., 3 July 1996, n° 94-14.800, in which the *cause* was used to annul a contract which technically had a cause but was not *economically lucrative*. In short the obligation lacked cause because of what amounted to a bad bargain – although it was justified by resorting to the economic purpose of the contract – showing the *equitable dimension* of the cause.

These hypotheses do merit scrutiny. Unfortunately the content cannot be seen as representing both the cause and the object or just the cause because it was expressly stated the reform would erase the cause.

Additionally article 1,162 states that the contract cannot derogate from the public orders by its content *or its aim*. This would indicate that the aim of the contract has to be distinguished from its content. But if it cannot contradict public order by its content or its aim, why hasn't the legality of its aim been included in the list of its conditions of validity as clearly what contradicts public policy cannot be valid. Thus the content could be signifying the object of the contract or something new entirely although the latter seems quite implausible.

In an interesting manner although the cause is suppressed, its functions are supposed to have remained intact<sup>22</sup>. Indeed certain articles of the *ordinance* pertaining to the content of a contract echo traditional case law founded on the concept of cause. Let us take two examples:

(1) According to article 1,167 any onerous contract in which the counterpart appears illusory or derisory is null;

(2) Article 1,168 seems to consecrate the famous *Chronopost*<sup>23</sup> case law regarding the essential obligations of a contract.

Now this leads to speculation. Why abandon a concept only to retain its functions? This could reduce the coherence of the legal system. One could think of some reasons for the suppression of the concept of cause and the maintenance of a few of its functions depending upon which legal actors we turn our gaze:

(1) If we look towards the legal subjects – actual and potential – then the suppression of the concept is perhaps aimed towards making French contract law more accessible, more intelligible. It is true that the *cause* is a very complex concept to grasp;

(2) If we turn our gaze towards the judge this erasure seeks perhaps to reinforce legal certainty by depriving the judge of an instrument whose imprecision and subtlety lead to some very questionable decisions.

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<sup>22</sup> Essentially the lawfulness of contracts, of the parties' expectations and controlling contract terms, cf. <<http://goo.gl/2ilRGP>>.

<sup>23</sup> Cass. Com., 22 October 1996, n° 93-18.632 where an exclusion clause – limiting a parties' liability – was deemed unwritten because of a parties violation of his essential obligations that contradicted what he undertaken to achieve.

Thus this suppression would actually concur with the objectives of the reform. But one could argue that this artificial simplification of the law will create a certain structural void that the concept of *cause* used to fill although we could debate on whether it filled it in a pertinent or satisfying manner.

Perhaps our legal discourse will be clarified, as what used to be artificially attributed to the cause will now be free to be rationalised and justified in a more satisfying manner.

### 3.2 THE ADMISSION OF L'IMPRÉVISION

*L'imprévision* is usually seen as encompassing all situations in which a party's contractual obligations have become harder and more onerous to perform – although not impossible – because of an unforeseen event posterior to the conclusion of the contract. Thus an “imprévision” is *unforeseeable*; it is not *irresistible* or *exterior* to the party, as is the case with “force majeure” events.

Unfortunately, this term seemed impossible to effectively translate and it would be wrong to try to assimilate to English concepts such as *frustration* or *hardship* as *frustration* seems to be situated in between what the French call *force majeure* and *l'imprévision* (David 1946, p. 11-14; Nicholas 2005, p. 202; Albarian 2009, p. 1.713).

Although the theory of *l'imprévision* has been admitted by some branches of French law – such as administrative contract law –, it has always been traditionally refused as grounds for the extinction of contractual obligations by French civil law; the most famous case being *Canal de Craponne*<sup>24</sup>. According to many authors such a decision would be founded on:

- (1) The enforceability of contracts (Zimmermann 1996, p. 579; Dupré-Dallemagne 2004, p. 74);
- (2) The link between enforceability and specific performance (Aynès 2005, p. 579; Fages 2009, p. 528-529);
- (3) Freedom of contract (Mazeaud 2010, p. 2.483);
- (4) The will of the parties (Larroumet & Bros 2014, p. 428).

Now it is true the Court of Cassation has more or less unanimously upheld such a position. Not as much can be said of the lower courts and we can observe more recently some minor

<sup>24</sup> Cass. Civ., 6 mars 1876, *De Galifet c/ Cne de Pelissanne*. En ce sens, v. Cass. Civ., 30 mai 1922, *D.* 1922. 1. 69, *S.* 1922. 1. 289, note HUGUENEY; Cass. Com., 18 déc. 1979, *Bull. civ.* IV, n° 339, *RTD civ.* 1980, p. 180, obs. G. CORNU.

inflections from the Court of Cassation. Obviously these cases cannot be used to argue that French civil contract law has admitted the theory of *l'imprévision* but is interesting to see some of the justifications invoked in order to admit *l'imprévision*.

The lower courts usually founded their decisions on:

- (1) Good faith and thus article 1,134 of the Civil code;
- (2) Equity;
- (3) Contract interpretation and namely the famous clause *rebus sic stantibus*.

However the only true exceptions one could possibly note from the Court of Cassation were founded on:

- (1) The obligation to renegotiate in good faith;
- (2) The disappearance of the *cause* of the contract during the period of contract performance<sup>25</sup>.

But both alleged admission of *l'imprévision* could be criticised. Indeed the obligation to renegotiate the terms of the contracts is only an *obligation of means*<sup>26</sup> signifying that the parties are only obliged to negotiate but no result is imposed. Hence they often do not lead to any contractual modifications.

Whilst the disappearance of the *cause* is a pertinent mechanism it can only lead to a very limited admission of *l'imprévision* as it only works in the presence of *structural imbalances*.

Finally one cannot ignore recent decisions that seriously dampen the effects of these previous alleged admissions of *l'imprévision*<sup>27</sup> (Laithier 2014, p. 345).

Hence before the reform French civil contract law was characterised by its constant refusal to admit the theory of *l'imprévision*. The project seems to shatter this feature of French law and needs to be understood. Of course it does participate in a certain European harmonisation on contract law as illustrates article 6-111 of the Principles of European Contract Law 2002. From an

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<sup>25</sup> Cass. Com., 29 juin 2010, n° 09-67.369: *D.* 2010. 2481, note D. MAZEAUD; *ibid.* 2485, note GENICON; *JCP* 2010, no 1056, note FAVARIO ; *ibid.* 2011, no 63, obs. GHESTIN; *Defrénois* 2011. 811, obs. SEUBE; *RDC* 2011. 34, obs. SAVAUX; *RTD civ.* 2010. 782, obs. FAGES.

<sup>26</sup> *Obligation de moyens* as opposed to an *obligation de résultat* in which the debtor of such an obligation would be liable if the result was not achieved regardless of the circumstances.

<sup>27</sup> Cass. Com., 18 mars 2014, n° 12-29.453: *D.* 2014. 1915, note D. MAZEAUD; *ibid.* 2015. 529, obs. AMRANI-MEKKI and MEKKI; *AJCA* 2014. 78, obs. DUBARRY; *RTD civ.* 2014. 884, obs. BARBIER; *RDC* 2014. 345, note LAITHIER.

internal aspect with regards *l'imprévision* the project is actually in between the *Catala* and *Terré* ones (Dupichot 2015, p. 74).

Article 1,195 of the *ordonnance* declares the three conditions to be satisfied in order to invoke *l'imprévision*:

- (1) There must have been an *unforeseen change of circumstances*;
- (2) This change must render a parties' obligations excessively more onerous to perform;
- (3) Said party must not have accepted the *risks* of such a change of circumstances.

If these conditions are present, then the victim of *l'imprévision* can ask to renegotiate the terms of the contract, which is not really a change with regards contemporary French case law<sup>28</sup> and such an agreement would indeed hold up in a court of law. Both parties can also turn to the judge and ask him to *adapt* the contract to these new and unforeseen events.

Where the project gets interesting is that it stipulates that if both of these measures fail – party renegotiating and seizing the judge – then one of the parties can ask the judge to terminate the contract. This threatening alternative may incite parties to renegotiate and adapt their contract of their own accord as otherwise they may be forced to have to contract again at the current market price. Of course – as indeed English law shows us – if the performance of the contract is still of utility and interest to the parties then it is not necessary to incite them to renegotiate the terms of the contract (Laithier 2010, p. 411).

Article 1,195 of the *ordonnance* states that:

If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.

However salutary this article may appear, some ambiguity remains and may be indicated. First, with regards the *unforeseen change of circumstances*. Admittedly the requirement of *unforeseeability* makes sense because the *foreseeability* of the change either merits a presumption of acceptance of said risk or the possibility of avoiding said change. But some problems still linger (Dupichot 2015, p. 75-76):

<sup>28</sup> Cass. Com., 3 nov. 1992: *Bull. civ.* 1992, IV, no 338; *RTD civ.* 1993, p. 124, obs. J. MESTRE; *Defrénois* 1993, art. 35663, n° 131, obs. J.-L. AUBERT; Cass. Com., 24 nov. 1998, n° 96-18.357: *Bull. civ.* 1998, IV, n° 277; *JCP G* 1999, I, 143, n° 5, obs. C. JAMIN, et II, 10210, note Y. PICOD; *Defrénois* 1999, art. 36953, n° 16, obs. D. MAZEAUD; *RTD civ.* 1999, p. 98, obs. J. MESTRE and B. FAGES.

(1) The criterion of a *change of circumstances* seems a bit vague especially when one compares it internally to administrative contract law where *l'imprévision* has been accepted for a while. In such a context what is required is a *disruption of circumstances* and this seems much more restrictive than a mere *change* of circumstances.

(2) One may also ask what *type* of changes will merit to be taken into consideration. Could a party invoke an *economic, financial, physical, legal, or even technological* change?

Second, performance must be rendered *excessively onerous* as a result of this unforeseen change of circumstances. Obviously it is hard to estimate what will be considered *excessively onerous*. Two interesting leads could be exploited.

(1) Internally one could turn to the control of *penalty clauses* in French law. Under French law a judge can *revise an excessive penalty*. In practice that is usually the case when the clause stipulates a penalty four or five times the amount of the prejudice actually suffered.

(2) Externally one could also turn to the Anglo-Saxon of impracticability as a source of answers. However as we have shown not many cases actually allow it. But we could note that American courts have refused the doctrine in cases of an increase of 400% of the cost of performance. On the other hand, in an English case Lord Denning did suggest in an *obiter dictum* that an increase of 100 times of the costs of performance of a seller could lead to the frustration of the contract<sup>29</sup>. Even if we did admit these two measures, they don't seem to help much.

Obviously we would agree that the admission of the doctrine of *l'imprévision* does seem to promote fairness and commutative justice that are important in contract law. However such a rule seems to increase legal uncertainty as the criteria of its implementation are vague and have not yet been firmly and precisely defined by case law.

Thus contracting parties will not be able to clearly predict when the doctrine of *l'imprévision* will and won't be applicable to their contract and until they can do it is unlikely that they will voluntarily choose to submit their contract to a legal system that appears so uncertain on such an important aspect as the extinction of contractual obligations.

### 3.3 THE EXTENSION OF THE CONTROL OF UNFAIR CONTRACT TERMS

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<sup>29</sup> *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497, p. 501.

This has been one of the most hotly debated and perhaps most unanimously criticised innovation and it must duly be noted that the rule proposed by the *reform project* has been considerably dampened by the *ordonnance*.

Initially – that is in the version submitted by the *reform project*<sup>30</sup> – the very well known control in consumer law relating to unfair contract terms was generalised to all contractual relationships. Article 1,169 of the project indicated that:

A contract term which creates a significant imbalance in the rights and obligations of the parties to the contract may be struck out by the court on the request of the party to the contract to whose detriment it is stipulated. The assessment of significant imbalance must not concern either the definition of the subject-matter of the contract nor the adequacy of the price in relation to the act of performance.

The proposal was heavily criticised and on several fronts (Chagny 2015, p. 55):

- First because it extends what has clearly been thought of within the context of unequal contractual relationships such as between consumers and professionals or between professionals of unequal power;
- Second because such an extension has not been associated with any pertinent criterions;
- Third because the concept of a significant imbalance is not easy to compute and seems to dampen the law's predictability;
- Fourth the imperative nature – or its absent – of this rule has not been made explicit;
- Fifth the sanctions of unfair contract terms seem both vague and arbitrary.

Perhaps in light of the critics the *ordonnance* has changed this and article 1,171 has restated the rule of the *reform project* but has circumscribed to *contrats d'adhésion*. It is permitted to believe that such a modification has not resolved or lifted the objections formulated above. Let us return to each point made above individually as it seems that only the first and fifth argument has been addressed by the *ordonnance*.

(1) Although limiting the control to *contrats d'adhésion* does restrict the extension somewhat, it still means that technically this mechanism would be applicable to business-to-business (B2B) contracts where general conditions and standard terms are common practice.

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<sup>30</sup> Text available online at <<http://goo.gl/EmWQsL>>.

(2) We are still lacking pertinent criterion for this control, especially if it will be applicable in B2B contracts. Indeed it could have been limited to contracts between entities or companies of different size and market or bargaining strength (Whittaker 2015).

(3) We were currently operating, in consumer law, with lists of abusive clause – the black<sup>31</sup> and grey<sup>32</sup> list – which helped operators predict the reception of the clauses they draft. Within this framework these lists do not seem operable, signifying that the criteria of *significant imbalance* must be explored. Although it is limited the article does indicate that this control will not cover the contractual object or the adequacy between the price and the counter-obligation. So this for instance means that the domain of the *lesion* has not been extended. Let us also not forget that the concept of *cause* has disappeared also, so the significant imbalance must be appreciated *without any reference to the concept of cause* (Delperier & Durand-Pasquier 2015).

With regards the criterion of *significant imbalance* a French legal scholar could turn to two pre-existing controls of contractual terms referring to *significant imbalance*: L. 442-6-I-2 of the commercial code (*le Code de commerce*) and L. 132-1 of the consumer code. This is of particular interest as it was decided that the expression *significant imbalance* used in both the article of the commercial and the consumer code had the same meaning<sup>33</sup>.

a. Nonetheless it can be doubted whether these *significant imbalances* share the same reference as the article 1,171 of the *ordonnance* where it is expressly mentioned that the control “must not concern either the definition of the subject-matter of the contract nor the adequacy of the price in relation to the act of performance” whilst in the commercial code it is only made reference to the creation of a “significant imbalance between the rights and obligations of the parties”. Hence the control implemented by the commercial code seems much larger in scope as the judge can examine take into account *economical imbalances*. Additionally it seems that the commercial control of unfair terms may take a more holistic view and appreciates the potential imbalance within the global relation between the parties and not just the imbalance created or not with regards one particular contract or through one particular clause. However, the commercial code dispositions are mainly used in contractual relations between a large distributor and a smaller supplier because such relationships are usually characterised by a *structural imbalance*, indicating a certain judicial restraint (de Lammerville 2015, p. 61) restricting the domain of the control to contracts involving large retail outlets. Moreover the control of unfair terms in commercial contracts requires a lot more

<sup>31</sup> The black list is a list of clauses that are in all circumstances irrefutably presumed unconscionable and thus simply banned; the list is exposed at article R. 132-1 of the consumer code (*Code de la consommation*).

<sup>32</sup> The grey list is a list of clauses that are presumed unconscionable but the professional may bring evidence supporting the contrary; the list is exposed at article R. 131-1 of the consumer code.

<sup>33</sup> Cons. const., déc. n° 2010-85 QPC du 13 janvier 2011, *Etablissement Darty et Fils*.



conditions than what the reform implements through article 1,171. Indeed you need a result, potential or achieved, consisting in a significant imbalance and an intentional element consisting in submitting or trying to submit your commercial partner to said imbalance.

b. There appears to be more points of convergence with the rule in the consumer code as both rules exclude certain points from the scope of the *control*. However the exclusions are not exactly identical as the consumer code is much precise (especially since the transposition of the 1993 European directive). Indeed L. 132-1 of the consumer code declares that the control of unfair contract terms does not concern “the definition of the principal subject-matter of the contract nor the adequacy between the price or remuneration with the good sold or the service offered provided the terms are clear and intelligible”. At first glance the main difference seems to be the one between the “definition of the subject-matter” and the “definition of the principal subject-matter” of the contract although one could hazard that in practice these two concepts would tend to intersect. More importantly such an exclusion of the mechanism of control rests on the intelligibility of such clauses contrarily to future article 1,169 (Whittaker 2015, p. 165).

c. Moreover as all these controls rest on the concept of *significant imbalance* some authors have wondered how they will interact (Chagny 2015, p. 52). Could one invoke article 1,171 instead of L. 442 of the commercial code because article 1,171 requires fewer conditions to be established?

(4) We know that the control of unfair terms in consumer contracts cannot be excluded by clauses because it is of public policy, but what of this article? Indeed if it aims to regulate relations between professional we could either consider it to be an expression of residual will or forming part of public policy. But if it is to integrate public policy perhaps it is because it aims to protect *weaker professionals* when faced with more powerful professionals. However such an interpretation must be relativized, as this reform has not decided, unlike the Dutch civil code, to restrict such control as professor Whittaker (2015, p. 160) points out “to the situation where one of the parties is a small or medium sized business” and that such structural *imbalances* are regulated either by the commercial code or the consumer code. Thus article 1,169 could regulate relations between professionals of equal bargaining strength as much as contracts between professionals of unequal bargaining strength. Perhaps that means it can be excluded or limited by contractual clauses although one may have to prove that such a clause was negotiated and discussed by both parties.

(5) The *ordonnance* has removed the hazardous sanction of the *project – may be struck out* – and replaced it with the well-known *deemed unwritten* sanction. This reduces the uncertainty

attached to the previous sanction, which also ran the risk of increasing judiciary power and discretion.

On a more theoretical level, it forces us to re-examine the division between contract law and special dispositions such as consumer law: which one is really the common law of contracts (*droit commun*) and which one is simply a derogatory special law? Indeed consumer law – through national reforms and European impact – seems to have redefined the very rules and ordinary concepts of contract law to such a point that it appears as a pilot of contract law (Chagny 2015, p. 51; Julien 2015).

More importantly, with regards the attractiveness of French contract law, considering all the uncertainties stemming from this article 1,171, one can only conclude that international contract makers will avoid designating French law as their law of choice.

### 3.4 ECONOMIC RESTRICTION OF ENFORCED PERFORMANCE IN KIND

The domain of enforced performance has always been a distinguishing factor of French contract law, at least theoretically. In a general manner enforced performance in kind is seen as the judicial decision condemning a breaching party to perform his contractual obligations rather than to pay damages to compensate the victim of the breach.

The French term *exécution forcée* is translated as *enforced performance in kind* in accordance with the English translation of the *reform project*<sup>34</sup> and not through the use of English concepts such as *specific performance* or *injunction*. This seemed preferable because such concepts can only be understood with reference to specific historical and sociological evolutions in English law, the distinction between *equity* and *common law*, the power struggles between the Chancellor, a member of the King's council, and the chief justice of common law. Also such terms refer to *substantive differences* between French and English law. *Specific performance and injunctions* are discretionary remedy of equity whilst *enforced performance in kind* is a right of the creditor under French law and shapes all the creditor's remedies, although we will be examining a new limit to this subjective right.

Traditionally the French legal system has always given a rather large acceptance to enforced performance, inducing some authors to claim that it has confused the principle of enforceability of the contract with one of the ways to enforce contracts, namely enforced

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<sup>34</sup> See footnote n° 11.

performance in kind (Laithier 2005, p. 168). Indeed many French authors believe that to say that a contract is enforceable logically means that the parties can reasonably expect that the other party will perform his side of the obligations, whether voluntarily or through judicial force. Thus specific performance is seen as a *subjective right* (Forest 2012, p. 249) in France and not subject to the discretion of the judge because it is the simple expression of the enforceability of contracts and of the will of the parties (Penin 2012, p. 98). This can be observed on two distinct levels:

- (1) Within the domain of specific performance;
- (2) Regarding the conditions of specific performance.

The extensive interpretation of article 1,142 of the French civil code of 1804 illustrates the particular French apprehension of the enforceability of contracts. Article 1,142 clearly states that “obligations to do and not to do resolve themselves in damages in case of non-performance”.

A very careless glance at French law would have thus indicated that only *obligations to give* – i.e. to transfer property – were susceptible of specific performance. But in practice, French judges have been inclined to extent the domain of specific performance to all obligations<sup>35</sup> thereby engineering a very fruitful doctrinal research on the topic<sup>36</sup>. This explains why the reform doesn’t reproduce article 1,142 of the civil code and, thus, doesn’t distinguish between types of obligations when it comes to *enforced performance in kind*.

As enforced performance in kind is seen as a right and the only means of properly enforcing the contract whilst respecting the parties’ expectations, the action for enforcing performance is not submitted to the previous establishment of a party’s interest in the performance of the contract or of the damage he has suffered from the non-performance (Fages 2013, p. 226). On the contrary if a party were to sue for damages they would have to establish the fault of his debtor, the damage caused and the causal link between the two.

Before the reform only two motifs could allow a judge to refuse a claim for specific performance:

- (1) Material impossibility (for instance because you lost the *unique good* you were supposed to deliver);

<sup>35</sup> Cass., Com., 16 June 1963, *Bull. civ.*, III, n° 316; Cass., Com., 23 May 1964, *Bull. civ.*, III, n° 260; Cass., Com., 3 Dec. 1985, *Bull. civ.*, IV, n° 286, page: 244.

<sup>36</sup> Although one must note that article L. 111-1 of the Code of Civil Enforcement Procedures (*Code des procédures civiles d’exécution*) clearly states that every creditor is entitled to constrain his debtor into performing his obligations in kind.

(2) Moral impossibility for certain types of obligations (for instance with regards *obligations to do*, we mainly see it being applied to artists whose work was commissioned because in such cases an order of specific performance would be seen as violating their personal freedom).

However the *ordonnance* in its article 1,221 has added a new restriction. This article provides new grounds for refusing specific performance when it appears that its cost is obviously unreasonable. Thus French law has introduced the following limit or test: specific performance will be refused if its cost is wholly unreasonable. Whereas before what counted was that performance was *possible*, now it seems that performance in kind need not only be *possible* but also *financially reasonable*.

Theoretically there has been a lot of criticism of this new disposition by scholars claiming that we should not bend to the Anglo-Saxon legal way of life. However as one author has already shown, many French scholars were already in favour of such limitations and for a time following the adoption of the French civil code, the Court of Cassation actually recognised implicitly such limitations by stating that the lower judges could assess sovereignly whether *enforced performance in kind* was appropriate or not (Laithier 2015, p. 100).

Moreover one can also relate several instances where the demand for enforced performance in kind was qualified of being *abusive* and was thus excluded on the basis of an abuse of right. In such cases the abuse was admitted because the victim of the breach had little personal interest in the enforced performance and said performance was extremely costly for the breaching party with regards its value.

It is interesting to note that article 1,221 of the *ordonnance* differs from the one of the initial reform project. The latter stipulated that a “creditor of an obligation may, having given notice to perform, seek performance in kind unless performance is impossible or its cost is manifestly unreasonable”. This raised a certain number of questions or issues:

(1) Technically how will the unreasonableness of its cost be appreciated? Should this be understood along the same lines as that of *severe hardship* well known to Anglo-Saxon lawyers?

(2) How should we *measure* what is manifestly unreasonable? We could indeed use a number of reference points as comparison:

- a. With respect to the creditor’s prejudice or damage?
- b. With respect to the value of the counter-obligation? This in turn could designate its objective value – market value – or its subjective value for the victim of the breach.

- c. With respect to initial value of the performance or the initial cost of performance?
- d. With respect to the utility or interest the victim of the breach still has in the contract?
- e. With respect to the patrimonial situation of the debtor, i.e. his solvency?

(3) If the cost of specific performance appears unreasonable will the amount of damages not appear also unreasonable? This point actually translates the axiology of French contract law. Indeed as enforced performance in kind has been viewed as a subjective right, damages are quite often calculated according to the cost of cure<sup>37</sup>, i.e. the cost of, for instance, hiring a third-party to perform what was due. But with this economic limitation to enforced performance in kind, it would be difficult to maintain such a measure of damages in principle. Indeed if we maintain cost of cure even in cases where enforced performance in kind is denied because viewed as wholly unreasonable, then that unreasonableness will necessarily reverberate in the damages granted. Therefore as well as implementing a new limit to enforced performance in kind, article 1,221 of the *ordonnance* may well force the courts to adopt new measures of contract damages such as the difference in value or perhaps damages based more on a party's reliance.

(4) Finally, and this has already been asked (Laithier 2015, p. 101), could the parties contradict this rule in their terms, i.e. could a contractual clause impose *performance in kind regardless of the cost*?

Article 1,221 of the *ordonnance* actually settles the second objection although it doesn't address the other points raised. Indeed if the cost of enforced performance in kind is *manifestly unreasonable for the debtor with regards the creditor's interest in said performance* then the judge can refuse to pronounce it.

What can be noticed is that one of the specificities of French law was the primacy it accorded to enforced performance in kind. Technically that could be viewed, as a factor of attractiveness for some contract-makers – as it gives some certainty to the enforceability of contracts<sup>38</sup> – and it seems doubtful that a restriction to this policy closing the gap with other legal traditions would maintain or increase said attractiveness.

<sup>37</sup> Cass. Civ. 3<sup>e</sup>, 27 March 2012, n° 11-11.798: *RDI*, 2012, p. 352, note Ph. MALINVAUD; Cass. Com., 7 Feb. 2012, n° 10-20.937. The first case concerned the installation of floor tiles that had cracked. Rather than removing all the tiles and laying down new ones, the judicial expert advocated a cheaper method consisting in placing new tiles on the previous ones that would result in elevating the floor by two centimetres. The judges refused this alternative in spite of the costs incurred.

<sup>38</sup> Although it could be viewed as being *non-efficient*.

#### 4 A CRITIC OF THE REFORM OF FRENCH CONTRACT LAW

The points insisted on above were selected for numerous reasons, namely because I believe they are of some interest to non-French lawyers and legal scholars. But also and perhaps more importantly because they will have a profound impact on French contract law and jeopardise the reform's own goals (Leveneur 2015, p. 10). On this conclusion we concur for a variety of reasons as the reform, for instance, does create legal *uncertainty* by creating new conditions to admit the doctrine of *l'imprévision*, by abandoning the concept of *cause* whilst retaining its functions and by extending beyond its natural domain the control of unfair contract terms. Moreover the role of the judge and his possible interventions, be it to terminate a contract struck by an unforeseen event or to control the fairness of the terms of the agreement, installs uncertainty (Cartwright 2015, p. 695).

More vitally the reform has shaken French contract law to its very core and erased some of its essence, i.e. what made it unique and identifiable. Indeed when one thinks of French contract law, one thinks about what differentiates it from other legal traditions such as the condition of the *cause* or the domain of *enforced performance in kind*. This says much about the juristic axiology of the reform but also seems to affect the aims of the reform. By denying what renders French contract law so unique and specific and creating a period of legal *uncertainty* – at least for the years following the passing of the reform –, this project does not fulfil at least one of its aims: making French contract law attractive<sup>39</sup>.

However one could easily retort “so what?” Except for serving as a model for other legal reforms – be they national or European –, contract rules do not play such a pivotal role as one may think. As Professor Vogenauer has shown that investors or international contract-makers do not take into account *only* the rules of one legal system in order to choose it (Vogenauer 2015). Indeed before picking a legal system one reflects on the:

- (1) Political stability of the country of interest;
- (2) Work force;
- (3) Taxes;
- (4) Other legal domains such as company law, insolvency law, labour law etc.

So in the end contract law only plays a small part in that choice. Moreover even when it does come into play what counts aren't necessarily the rules themselves but whether they are

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<sup>39</sup> Indeed an Anglo-Saxon would view certainty – be it legal, transactional or commercial – as the bedrock of Contract Law and certainly the key feature for parties who can choose the Law they wish to submit their contract to.

*imperative* or not because if they aren't then the parties can change the rules they don't wish to be applied. Of course that generates more transaction costs – negotiating and drafting cost – but we are reasoning in the hypothesis where the parties are hesitating over which law to submit their contract to and, usually, in such cases contract negotiations are quite extensive. What matters are the intelligibility, predictability and imperative nature of the law as well as the bargaining powers of the parties. Parties generally tend to favour either their home system or one comparably close that they can understand, which implies they understand the language of said system. For non-French speakers this raises the question of the translation, translatability and intelligibility of the reform (Legrand 2009, p. 215).

What the argument neglects is that in terms of attractiveness what matters is competition and choice. Thus to be more attractive you either have to *better* than your competition or *different*. This project seems to have erased the singularities of French contract law, aligning it with some of its competitors. But since a certain period of legal uncertainty is bound to follow its implementation (Cartwright 2015), why would any person or entity decide to elect a contractual law that resembles the one of other legal systems whose interpretation is more predictable and secure?

Another method would have been to maintain the uniqueness and specificities of French contract law whilst affirming their rationalities in order to create a more predictable and secure legal system, perhaps inspiring the confidence of nations and contract-makers alike.

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## THE REFORM OF FRENCH CONTRACT LAW: A CRITICAL OVERVIEW

### ABSTRACT

Since the Napoleonic Code of 1804 we have seen republics, monarchies, and empires coming and going; local and world wars; revolutions, from the industrial to the informational; and our society has moved from an economy based on agriculture to one open to the world, based on tertiary services. In all this time, French contract law has been able to stay up and keep up to date with the many changes in society, thanks to the judicial interpretation of the various articles of the French

civil code and the generality of its articles. There have been many previous attempts to reform French contract law but its principles, forged in 1804, have escaped unscathed, except for certain transpositions of European directives. This article focuses on an academic point of view with regards the reforms to the French civil code that will bring private contract law into line with modern international standards. This is the first step in a series of broader changes the government is making to the French law of obligations. This reform is said to have both adapted and revolutionised French contract law and merits scholarly attention.

#### **KEYWORDS**

French contract law. Reform. French civil code. Certainty. Attractiveness.

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