

◀ The French Contract Law Reform in a European Context

I Introductory Remarks on the Development of the Law in Europe

How will European law develop over the coming years of the 21st Century? This question was posed by Professor Raoul van Caenegem in 2002. His answer, based on history and comparative law, was that a

[...] truly European law ought to contain the most helpful elements of each one of the traditions across Europe'. He explained that 'different nations have traditionally approached this issue in different ways. Indeed, the age-old English instinct is to say, with Lord Denning, 'trust the judges, for they are the true guardians of the law'. The German feeling, which also goes back several centuries, is to say, with Savigny, 'trust the learned jurists, for they are the best guides through the thickets of the law'. The French instinct, on the other hand, is to say, in true Jacobin and Napoleonic vein, trust the legislator and beware of judges and jurists who pervert the codes. As none of these traditions (and I add here the many other traditions across Europe) is the sole road to salvation, a truly European law ought to contain the most helpful elements of each one of them.¹

The civil and commercial law of each Member State is built upon three pillars, the national legal systems, EU law and the ECHR. While our national experiences influence one another, the law of the EU is built upon these reciprocal influences. In turn, our national legal systems are influenced by EU law.

Much has been written, notably in France, on the '*dialogue des juges*' which shows the way towards a constructive dialogue between national and European rules and principles. The dialogue of European scholars is also of the utmost importance; it suffices to recall what happened in the Middle Ages, when the *ius commune* was taught in our universities.

As European scholars, our role is primarily to train students to think comparatively, in order to build a common legal culture all over Europe (in spite of the considerable efforts that have

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¹ R. van Caenegem, *European Law in the Past and the Future* (Cambridge University Press 2002, Cambridge) 134; quoted by Lord Neuberger of Abbotsbury, Master of the Rolls, European Law Institute, 1 June 2011, 'Why a European Law Institute?' http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/_15_Lord_Neuberger_of_Abbotsbury.pdf.

been made in this respect, the situation is still far from being satisfactory and I am grateful to the organisers of this conference for contributing to the development of this European perspective).

As European lawyers in the 21st century, our mission goes beyond comparative teaching. In the process of recodifying civil and commercial law (which is so important in Europe – and not only in Central and Eastern Europe but worldwide), it is also to help the legislator to set up the theoretical foundations of national and European private law in a way that ensures the consolidation of our common heritage and our common efforts to build a better Union.

Legal scholarship has played its role as a guide to the European legislator. European academics have organised themselves into various workgroups with the task of drafting legal texts which, for some of them, have become well-known private codifications. Some important networks have been set up. The principle of collaborative working is now spreading all over Europe. Building on the wealth of diverse legal traditions, a lot of scholarly efforts are put in better law-making in Europe so as to favour European legal integration and also a more vigorous European legal community.

The same phenomenon may be observed in those of our countries where the recodification of important parts of the law is envisaged. This notably occurs in France as regard contract law, a key subject for comparatists and European scholars.²

II The Recodification of French Contract Law: from an Academic to a Political Process

Title III of Book III of the French *Code civil* is entitled *Des contrats ou des obligations conventionnelles en général*. This part of the Code contains 280 articles and has remained practically as it stood in 1804. The French Code civil no longer reflects our French law of contracts and torts.

Actually, French contract law has considerably evolved since 1804. This evolution started as soon as 1807 with the enactment of the Code de commerce, which took away from the Code civil all ‘commercial transactions’ (contracts concluded by *commerçants* for the necessity of their commerce).

In December 1904, the Minister of Justice established a large Commission composed of 61 members (with politicians, practitioners and writers), but this body never succeeded in drafting a project. The Parliament therefore proceeded with some partial reforms.

After World War II, in June 1945, a *Commission de réforme du Code civil* was set up by the Ministry of Justice, after a suggestion of the Association Henri Capitant. It was composed of 12 lawyers, and was divided into four sub-commissions (General part, Persons and Family,

² The law of contracts is one of the core subjects of comparative and European law. By contrast, it is relatively unimportant in the market. Indeed, even when it can be used, the imperatives of maintaining good business relationships and ensuring that transactions go ahead render the law of contract a ‘rarely used tool for business people’, E. A. Farnsworth, ‘Comparative contract law’ in M. Reimann, R. Zimmermann (eds), *Oxford Handbook of Comparative Law*, (Oxford University Press 2006, Oxford).

Obligations, Property). Under the presidency of Julliot de la Morandière, this Commission started to draft a project for a new Code civil.³

From 1964 to 1975, a profound modernisation of the Code civil was made by Jean Carbonnier in the field of family law, and many important legislative reforms have since been inserted in the Code.⁴ Some important parts of it have undergone some modernisation: over the last decades, major reforms were adopted in family law, inheritance, law, securities, prescription. Contracts, torts and evidence should be the next candidates for reform.

So far, the evolution of the law of contracts – the same is also true for torts – took place outside the Code civil. This is largely due to the creativeness of French judges. The Cour de cassation has created new rules where the Code civil was silent (particularly in the field of pre-contractual negotiations). It also modernised existing rules and sometimes completely transformed the meaning of others. It gave a practical application to some hitherto purely academic concepts (such as the *obligation de moyens* and *obligation de résultat*). Besides, many specific provisions on contract law are to be found in some other codes, notably in the *Code de la consommation* (promulgated in 1993), or in the field of specific contracts.

This sanctuarisation of our Code civil in such an important field of the law for our economy may seem rather strange. What were the reasons for it? They have changed over time. In the Sixties, reformers⁵ were divided between capitalism and socialism.⁵ In the Seventies, the legislator began to feel that he should wait for the European unification of contract law.⁶ In the meantime, some Western European countries, including the Netherlands and Germany, launched major reforms. When the *Schuldrechtsreform* of 2001 came into force on January 1st 2002 there finally was a growing realisation in France that this passive attitude might not have been the best option.

The recodification of our law of obligations and evidence is on its way. It happens to be much more difficult than initially envisaged and it encounters several obstacles. It is true that this enterprise is not just about the modernisation of the law. It affects rules which date from 1804 and are carved into our Code civil. It affects a symbol. Besides, in the field of contract law, the

³ It first dealt with a preliminary book and Book I (persons, family), then with successions, but the texts were never submitted to Parliament. The members of the Commission were divided in opinion concerning both the ambit of the social changes that had to be accomplished and the role which should be played by the General Part (should it follow the German model or adopt a more limited approach?). L. Julliot de la Morandière, *La réforme du Code civil*, (Daloz 1948, Paris) 117, see the special edition of the Recueil Dalloz, edited for the Bicentenary of the Code civil, 2004.) 14; J.-L. Halperin, *Le Code civil*, (2nd edn, Daloz 2003, Paris) 125.

⁴ Later, the division of the Code civil into 3 books was abandoned: there are now 5 books (book 5 is dedicated to rules applicable to Mayotte).

⁵ J. Carbonnier referred to this *incapacité de trancher entre capitalisme et socialisme* in 'La codification dans les états de droit: le cas français' [1996] *Année canonique*, 96 et s.; quoted in F. Terre, Ph. Simler, Y. Lequette, *Droit civil, Les obligations*, (Daloz 2005, Paris) n° 46, 51.

⁶ J. Carbonnier, in 'L'évolution contemporaine du droit des contrats' [1985] *Journées R. Savatier* 29, sp. 32: 'En 1962-64, faisons-en la confiance, quand fut entrepris un travail de réécriture sur le Code civil, si la matière des obligations fut laissée de côté au bénéfice du droit de la famille, on en donna pour argument que cette matière pourrait, dans un avenir abordable, faire l'objet d'une unification européenne. Il ne semble pas que, depuis vingt ans, la perspective se soit beaucoup confirmée. Ce qui n'interdirait pas, naturellement, à l'hypothétique législateur de consulter les droits étrangers, mais aux fins de suggestion, non pas d'unification.'

underlying principles are different from those of 1804. In 1804, the Code civil reflected the spirit of the Enlightenment and the newly gained freedom and equality. The rules on contracts are inspired by the ideas of individualism and liberalism.

In September 2005, an *Avant-projet de réforme du droit des obligations et de la prescription* was submitted to the French Minister of Justice.⁷ The *Avant-projet Catala* was drawn up in less than three years (from early 2003 to October 2005) by 34 civilian lawyers. The work was 'sponsored' – intellectually – by the *Association Capitant des amis de la culture juridique française*. Great attention was paid to this *Avant-projet*, in France and all over Europe. This is why its spirit and content should be recalled, although it is clear now that the options for the French reform are very different from those followed by the 'Catala Project'.⁸

Professor Pierre Catala, chair of the Commission which drafted the *Avant-projet*, said that the initiative was due to the Principles of European Contract Law (PECL) prepared by the Lando Commission, and that this major enterprise would not only modernise our law but also provide France with a voice in the European concert.⁹ Actually, this project remained too francocentric to meet these goals.

French lawyers, particularly French academics, have a real, cultural but also sentimental, attachment to their Code civil. It is a symbol. This explains that the Catala *Avant-projet*, in spite of the growing awareness that the French law of contracts should take the ongoing Europeanisation of the law into account, was very faithful to the Code, to its style, to its emblematic rules. The first impression made by this *Avant-projet* is therefore one of continuity. Many important texts have remained unchanged; much attention was paid to not renumbering the most famous ones (for instance articles 1134 or art. 1135 para. 1). If one compares the provisions of this *Avant-projet* which relate to contract law¹⁰ to the European *acquis*, the Principles on European Contract Law drafted by the Lando Commission and also against the Unidroit Principles, the conclusion is that the influence of this surrounding international and European legal environment was far too limited.¹¹ Many French specificities are regarded as consecrated and too little

⁷ *Avant-projet de réforme du droit des obligations et de la prescription*, [P. Catala (ed) Ministère de la Justice, Documentation française, 2006]. For a commentary, see B. Fauvarque-Cosson and D. Mazeaud, 'L'avant-projet de réforme du droit des obligations et du droit de la prescription' (2006) XI Uniform Law Review 103. The Catala project was translated into English by J. Cartwright and S. Whittaker: http://www.justice.gouv.fr/art_pix/rapportcatala0905-anglais.pdf. It was also translated into English by A. Levasseur (Louisiane), http://www.henricapitant.org/sites/default/files/Traduction_definitive_Alain_Levasseur.pdf. It is interesting to compare and contrast the two translations.

⁸ Several meetings on contract law took place, at the *Société de législation comparée*, with a group of French and Hungarian scholars, to discuss the ongoing reforms of to contract law.

⁹ P. Catala 'Il est temps de rendre au Code civil son rôle de droit commun des contrats' *Jurisclasseur Périodique* (JCP) 2005.I.1739; 'Bref aperçu sur l'Avant-projet de réforme du droit des obligations' (Dalloz 2006, Paris) 535.

¹⁰ This part of the *Avant-projet Catala* on extra-contractual liability is, by contrast, very innovative in many respects. For instance, it introduced the duty to mitigate and a specific form (quite limited) of punitive damages. It also had a very controversial text regarding big companies and their liability for their 'filiales'.

¹¹ In actual fact, as this commission was composed of 36 drafters, each of them in charge of a specific part, the influence of these instruments varied according to the personalities of the drafters. For a general presentation of the part on contracts, see (2006) 1 *Revue des contrats*.

attention was paid to foreign and European general trends. However, this project was a key element in the ongoing political reform process, which started with the law of prescription.

The part of the *Avant-projet* on limitation periods (*delai de prescription*) was drafted by Philippe Malaurie and, unlike others, this part was strongly influenced by the PECL and the German reform. The law of prescription was successfully reformed in France, in June 2008 and is now inserted in the Code civil (Book III, Title XX, articles 2219 to 2254).¹² The common limit is 5 years (instead of 30 years in previous French law, and 3 years in PECL and Unidroit Principles), subject to many exceptions. The French legislator adopted a mechanism inspired by some EU directives, by PECL and by the Unidroit Principles: the limitation only begins to run once the person who holds the right knows or ought to know the facts, as a result of which he can exercise his right and there is a maximum limitation period of 20 years (cf. the 10 years adopted by PECL and Unidroit Principles).

The *Catala Avant-projet* also contains an important and innovative part on tort law, drafted by a group of scholars under the chairmanship of professors Geneviève Viney and Georges Durry. The reform of tort law is also a government's priority and a draft legislative text is ready. However, in June 2014, the reform of French tort law was not yet on the French political agenda.

After the *Catala Avant-projet* was published and handed to the Ministry of Justice, many discussions and conferences took place.¹³ Various professional organisations, such as the Barreau de Paris, the *Medef* (the French employers' organisation), the Chamber of Commerce of Paris and the notaries, launched their own working groups and made critical observations and suggestions for new texts to the Ministry of Justice. Based on all these observations, a new academic project was prepared under the chairmanship of professor Francois Terré and published under the patronage of the French Académie des sciences morales et politiques. This project drew inspiration from all the various existing European and international models.¹⁴ It was prepared in close cooperation with the civil servants who, at the French Ministry of Justice (within the *Direction des affaires civiles et du Sceau*), were at that time preparing the new draft legislation.

The various government's projects were made public as from July 2008.¹⁵ It is interesting to see how much inspiration is taken for Europe, not so much for EU law but rather from those

¹² *Loi n°2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile.*

¹³ As soon as October 2005 a major conference on contracts was organised by the *Revue des contrats* at the Sorbonne and in May 2006, another conference took place for the part on *Responsabilité civile*; both of them were published in the *Revue des contrats*.

¹⁴ *Pour une réforme du droit des contrats*, (Daloz, 2009, Paris). Sur cet *Avant-projet*, v. D. Mazeaud, *Une nouvelle rhapsodie doctrinale pour une réforme du droit des contrats* (Daloz 2009, Paris) chron., 1364.

¹⁵ On the July 2008 version, which was submitted to a large consultation, see F. Ancel, 'Genèse, sources, esprit, structure et méthode' in *La réforme du droit français des contrats* [2009] *Revue des contrats*, 265, 277. See also P. Ancel, Ph. Brun, V. Forray, O. Gout, G. Pignarre et S. Pimont, 'Points de vue convergents sur le projet de réforme du droit des contrats' *JCP G* 2008.I.21 3; R. Cabrillac, 'Le projet de réforme du droit des contrats. Premières impressions' *JCP* 2008.I.190.; M. Fabre-Magnan, 'Réforme du droit des contrats: un très bon projet' *JCP G* 2008.I.199; A. Ghozi et Y. Lequette, *La réforme du droit des contrats: brèves observations sur le projet de la chancellerie* (Daloz 2008, Paris) chron. 2609; D. Mainguy, *Défense, critique et illustration de certains points du projet de réforme du droit des contrats* ☞

instruments which form part of the growing discipline called ‘European Private law’, notably the Principles of European Contract Law (PECL), the DCFR and also the Unidroit Principles.¹⁶

In 2014, it appears that the best way forward would be a comprehensive and coherent text (on contract, torts, quasi contract, evidence), through the parliamentary procedure (a *projet de loi*). However, realistically, the current government felt that there would never be enough time for parliamentary discussion on such important and technical issues. Besides, many consultations had already taken place: the Ministry of Justice launched a series of consultations after a first project was published in July 2008 on contract law, another one in 2010-2011 on other issues related to the *régime général des obligations* and torts.

The government issued a *Projet de loi du 27 novembre 2013 relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures*. This text contains a specific article (*article 3*) authorising the government to reform the French law of contract by way of decree. Article 3 is entitled: *Simplification du droit des contrats, du régime et de la preuve des obligations*.

The *exposé des motifs* gives a long and detailed explanation of the reasons and even of the major orientations for such a reform.¹⁷ It notably insists on the constitution goal of intelligibility of the law on the necessity to reinforce legal certainty and to contribute to the *rayonnement* and attractiveness of French law.¹⁸

On January 23, 2014, the French Senate refused to adopt article 3 and expressed strong opposition to the reform of contract law by way of ‘*ordonnance*’. However, this is not the end of the story.¹⁹

The text that the government still hopes to pass by way of *ordonnance* has 307 articles while the Titre III of the *Livre troisième* of the Code civil (that is to say Contract law) had 286 articles

(Dalloz 2009, Paris) chron 308; Ph. Malinvaud, *Le contenu certain du contrat dans l'Avant-projet Chancellerie de code des obligations ou le stoemp bruxellois aux légumes* (Dalloz 2008, Paris) *point de vue*, 2551; D. Mazeaud, *Réforme du droit des contrats: haro, en Hérault, sur le projet* (Dalloz 2008, Paris) chron. 2675.

¹⁶ See also the work accomplished in France, *Projet de cadre commun de référence. Terminologie contractuelle commune, Principes contractuels communs*, Association H. Capitant et Société de législation comparée, coll. Droit privé européen et comparé, 2008 volumes 6 and 7.

¹⁷ *Il est proposé d'aborder dorénavant dans le titre III les trois principales 'sources d'obligations' que sont les contrats, la responsabilité civile et les quasi-contrats évoqués respectivement dans trois sous-titres distincts. Les textes du deuxième sous-titre relatif à la responsabilité civile n'entrent toutefois pas dans le champ de l'habilitation, de telle sorte que ce sous-titre aura simplement vocation à accueillir, à droit constant, les textes du chapitre II (Des délits et quasi-délits) du titre IV.*

¹⁸ *Si le texte propose de moderniser le droit des obligations en introduisant de nouvelles dispositions, une grande partie du projet vise à consolider les acquis en consacrant à droit constant dans le code civil des solutions dégagées depuis plusieurs années par la jurisprudence, et connues par les praticiens. Il s'agit essentiellement de répondre à l'objectif constitutionnel d'intelligibilité de la loi, de renforcer la sécurité juridique, tout en contribuant au rayonnement et à l'attractivité du système juridique français.*

¹⁹ Article 3 was reinserted in April 2014 by the National Assembly and a ‘*commission mixte paritaire*’ is due to meet so as to decide whether or not the text should be maintained.

in 1804; in the meantime, a few articles had been added to the new text for electronic contracts.²⁰ The project also has texts on evidence.²¹

If the reform is finally made, Title III of the Code civil will be reorganised and it will have three subtitles for the three main sources of obligations: contracts, *responsabilité civile* and ‘other sources of obligations’ (quasi-contracts).

III The Content of the Rules on Contract in the Government’s 2014 Project (the ‘Project’)

The Project is an impressive achievement, based upon former draft projects, comparative studies and upon a large number of consultations that are now underway among practitioners. This recodification, if it were to be adopted, would entail some important changes.

In examining the content of the Project, I shall concentrate on subtitle I *Le contrat* of Title III. I shall leave out subtitle II on tort law (texts unchanged in the project itself), as well as subtitle III ‘Other sources of obligations’, which includes: business management, payments not due and, enrichment. I shall also leave out Title IV, which concerns the general system of obligations (*regime general des obligations*, with, for instance, texts on condition, plurality of parties, payment, restitutions, etc.) and Title IV bis on the obligation to furnish evidence (*La preuve de l’obligation*, articles 265 -307).

Chapter 1 of subtitle I *Le contrat*, entitled *Dispositions préliminaires* first defines the contract (art. 1).

It then has two major articles:

– Article 2 ‘principle of freedom of contract’ states the principle and gives details as to its ambit. It also refers to public order and fundamental rights.

Article 2.2 explicitly states that contractual freedom does not permit the rules which concern public order to be evaded, nor any violation of fundamental rights which are recognised in a text applicable to private persons, unless this is necessary to protect legitimate interests and proportionate to the objective.

– Article 3 ‘principle of good faith’. The project states a general principle of good faith, both for the formation (new) and the performance of the contract. Actually, this is not profoundly innovative: in French case law, good faith plays a leading role. However, it is possible to see some inspiration from the main European and international projects, namely PECL, – art. 1 :201; Common Frame of Reference, art. 1-1 :102 and III-1 :103); Common European Sales Law in its first version of October 2001 (art. 2), and the Unidroit Principles (art. 1.7 and 1.8).²²

²⁰ P. Catala, *Bref aperçu sur l’Avant-projet de réforme du droit des obligations* (Dalloz 2006, Paris) 535, prec.

²¹ As already mentioned, the new text on tort law is also ready, but it is not included in the scope of this ‘*loi d’habilitation*’ as the government felt that it should not be passed by way of ordonnance.

²² For brevity reasons, the main European source which will serve as a basis for examining the European influence on the provisions of the Project will be PECL.

The following articles contain definitions (4-10).

Chapter 2, on the formation of contract, fills an important gap: it contains texts on the precontractual period, which had not been envisaged by the drafters of the Civil code, because in 1804 most contracts were instantaneous. The Cour de cassation had set up various rules regarding this period; these rules are now codified, with new provisions dedicated to precontractual negotiations. In particular, two principles are enunciated: ‘principle of freedom of precontractual negotiations’ and ‘principle of confidentiality’ – this is inspired by PECL (art 2.302) and Unidroit Principles (art 2.1.16) which contain a provision on Breach of Confidentiality.

This Chapter contains rules on offer and acceptance, exchange of consents and promises of contract. By and large, these rules consecrate existing case law. There is one important deviation. While some controversial recent cases held that a promisor who had changed his mind and no longer wanted to sell what he had promised to sell could withdraw his promise when it has been accepted but not yet realised – and thus pay damages only – the *Avant-projet* takes an opposite view: such a withdrawal is deprived of any effect and the sale will proceed (a. 24). This text favours more security. It concords with the basic principle of French law, according to which specific performance – not damages – is the principal remedy for breach of contract.

Chapter 2, Section II deals with the validity of the contract.

Article 35 enunciates three conditions, necessary for the validity of a contract: consent of the parties; capacity; and licit and certain content.

Those who are familiar with French law of contracts will immediately realise that the ‘cause’ has disappeared. Some famous academics are still very attached to the cause: one of them, Jacques Ghestin, has even advocated the use of cause in European contract law.²³ Jacques Ghestin wrote the part on cause in the Catala project and tripled the number of texts dedicated to it. The drafters of the Catala project thought that maintaining and clarifying such a concept would create fewer problems than deleting it and having to find new devices in order to fill the gaps.

The government took an opposite view. In the *exposé des motifs* of the *projet de loi* (Nov. 2014, see above), the government insisted on the fact that if the concept of ‘cause’ no longer was in the texts, its main functions were maintained, in particular through the concept of illiciteity and through various texts which aim at maintaining a certain equilibrium in the contract. Some authors, however, doubt that these texts will compensate for the very many purposes that the concept of ‘cause’ can serve.²⁴ Nevertheless, this judicial creativity surrounding the cause is precisely why the concept became so controversial and led to so much uncertainty. A provision entitled ‘abuse of weakness’ (*abus de faiblesse*) is inserted (art. 50) as a specific ‘application of violence’, so as to fight contractual disequilibrium when the contract is formed; nullity is the sanction. French case law has already developed the concept of *violence économique*, but its use is very limited.²⁵

²³ J. Ghestin, ‘Faut-il conserver la cause en droit européen des contrats?’ (2005) 4 ERCL 396.

²⁴ D. Mazeaud, *Droit des contrats: réforme à l’horizon* (Daloz 2014, Paris) 291.

²⁵ Comp. art. L. 122-8 et L. 132-1 of the C. consom.

Some countries, such as Portugal and the Netherlands, have created similar tools. The Unidroit Principles also have a similar concept (art. 3.2.7); so does the Common Frame of Reference (art. II. -7:207).

Sub-section 2 of Section 2 on validity assembles the rules on capacity and representation. It was rightly felt that capacity to contract and power to do it for others (representation) deserved new rules so as to deal with the multiple situations which can occur and due to the development of intermediaries. Instead of creating a separate Chapter, as in PECL, these provisions on representation are dealt with as a condition of validity of the contract.

Sub-section 3 of Section 2 is dedicated to the 'content of the contract'. It contains many interesting innovations. It starts with article 69 entitled 'illicite of the contract' (which replaces part of the cause).

Article 70 deals with the 'objet' (unlike the cause, this important French concept is maintained).

Art. 71 is a new provision, which also draws inspiration from European models, and enables the judge, in some contracts [framework contracts (*contrats-cadres*) and *à execution successive*] to modify the price when there has been an abuse by the party who unilaterally fixed the price. This judicial power is not unfettered: the judge must notably take usage, market prices or the legitimate expectations of the parties into account. The judge may also grant damages or terminate the contract.

Articles 75 (*contrepartie illusoire or dérisoire des contrats onéreux*), article 76 (*clause privant de sa substance l'obligation essentielle*) and article 77 (*clauses abusives*) share the common feature of opening the way for the judicial restoration of some sort of equilibrium within the contract.

Article 77 is a controversial provision, inspired by the EU directive on unfair terms in consumer transactions and by PECL, which enables the judge to strike out unfair terms in B to B or C to C contracts (this is of course possible, by virtue of EU consumer law for B to C contract; see, in France, the relevant provisions in the Code de la consommation). Unlike PECL (art. 4:109) and the CESL [...], no reference is made to good faith in the provision related to unfair terms (*clauses abusives*).

Traditionally, French law is hostile to the admission of *lésion*. Article 78 expressly rejects the *lésion qualifiée*, unless the law otherwise states. At first sight, this refusal to introduce *lésion qualifiée* seems to constitute a major difference in comparison with most modern European laws of contract and codifications. However, a closer look shows that the gap may not be so wide. In most legal systems, not all sorts of *lésions* are admitted. Most of the time, *laesio* must be qualified or subjective: this means that the breach of equilibrium must be the result of the abuse of a situation where one party depends, from an economic, moral or psychological point of view, on the other one (German law, Swiss law, PECL). In some cases, one may anticipate that the new text on *abus de faiblesse* (art. 50) or art. 75 would enable French judges to reach the same results.

There is no specific provision, in the French *avant-projet*, on 'Unfair Terms Not Individually Negotiated' (comp. Art. 4:110 PECL). It therefore seems that the general principle of good faith (art. 3) may well be the last resort for a party whose claim does not fall within the scope of article 77 but is based on the general idea that one party may have violated its duty of good faith. Section

3, on the ‘Form of the contract’, consecrates the principle of consensualism but insists on the possibility, for the parties, to provide otherwise. This section has specific provisions (which already are in the Code civil) on electronic contracts.

Section 4 is about the *sanctions* and it contains provisions on nullity (the distinction between absolute and relative nullity is maintained), and partial nullity (art. 93), as well as caducity (articles 94 et s.).

Chapter III deals with the interpretation of the contract.

Traditionally, in French law, contracts must be interpreted by seeking the common interpretation of the parties rather than referring to the literal meaning of the words (subjective interpretation). This solution is firmly reaffirmed. Some provisions innovate, in that they create the tools for reassessing the equilibrium of the contract. In particular, article 101 provides that in a standard form agreement (*contrat d’adhésion*) that is not negotiated, the terms must be interpreted in favour of the party who did not suggest them (Cf. *Code de la consommation*, a. L. 133-2 paragraph 2).

Chapter IV deals with the ‘effects of the contract’.

Chapter IV has a new interesting provision on changes of circumstances. In Europe, it seems that only Belgium, Luxembourg, France and the United Kingdom do not fully recognise the judicial power to modify or terminate the contract when there has been an exceptional change of circumstances. The European and international projects all have provisions which consecrate it: PECL (art. 6:111), Unidroit Principles (art.6.2.1 to 6.2.3), Common Frame of Reference (art. III.- 3:502) Common European Sales Law (art. 89).

Article 104 entitled ‘change of circumstances’ is inspired by these texts, but it has its own originality. This text first allows a party to impose on the other party a renegotiation of the contract when, due to a change of circumstances that was unpredictable at the time of the conclusion of the contract, its performance is ‘excessively onerous for the party who had not accepted assuming the risk of such a change of circumstances.’ Article 104 then provides: ‘in the event of a refusal or a failure of the renegotiation, the parties may, if they both agree, require the judge to adapt the contract. Should this fail, a party can ask the judge to terminate the contract, at the dates and on the conditions he decides.’

To the contrary, in the Catala project, the underlying general idea was that parties should anticipate such events and that, if they had not anticipated them, a party who wished to continue the contract should then make the necessary concessions to provide the other party with the minimum benefit sufficient to encourage him to proceed with their contractual relationship. There was no text which, as a last resort, gave the judge the power to modify the contract. The traditional explanation for this reluctance (still perceptible in article 104 of the government’s project), is the fear of the severe economic consequences that such a judicial power would entail. However, why would the French courts be less suited to this job than the courts of many other countries? Unidroit Principles, PECL and CESL have rules on change of circumstances which grant such powers to the judges. In the event of a change of circumstances, the German, Austrian, Dutch, Greek, Portuguese, Italian, Danish, Finnish and Swedish courts (and these are only examples) have the power to modify the contract.

Chapter IV also contains new provisions on duration of the contract (articles 119 ff.) some of which state classic rules (such as the ‘prohibition of *engagements perpétuels*’), while others are more innovative.

Section 4 of Chapter 4 relates to non-performance of contracts. It draws some inspiration from EU law. For instance, it starts with an enunciation of the various ‘remedies for non-performance’, an innovation that is to be welcomed as it gives a much greater clarity to this part of contract law.

French law also pays tribute to recent European trends by admitting that specific performance is not a right if it would lead to a ‘manifestly unreasonable cost’ (art. 129).

Another evolution, based on recent French case law and on European trends, is the introduction of termination by way of notification (art. 132,²⁶ 134).

This possibility is widely recognised in Germany (art. 323 of the BGB), Italy (art. 1454) and the Netherlands (art. 6:267), and in PECL (art. 9:301), UNIDROIT Principles (art 7.3.1), the Common Frame of Reference (art. III-3: 503) and CESL (art. 106, 131 et 138). For a long time in France, the prevailing view was that judicial intervention was indispensable (1184 of the Code civil). Only in recent years has this presumption begun to be challenged by the Cour de cassation, which has admitted, in some limited cases, unilateral and extrajudicial termination of the contract on the grounds of non-performance. The project remains very cautious. Firstly, termination by way of notification (or ‘unilateral termination’) is consecrated on an equal footing with judicial termination and not as the primary way of terminating the contract if the conditions are met. By contrast, the Unidroit Principles, PECL, the CESL and many national texts do not refer to judicial termination in the event of non-performance and only contain provisions on unilateral termination. If one party (the creditor) opts for the latter, termination takes effect after giving the debtor a formal notice (*mise en demeure*) where performance is still not forthcoming, termination can be effected on notice by the creditor, setting out his grounds for this breaking off of their relationship (article 134). Article 134 paragraph 4 adds that the debtor can challenge the creditor’s decision to terminate before a court. He must prove that his own failure to perform did not justify termination. Article 136 states that the court may either confirm the termination or order performance of the contract, with the possibility of giving the debtor time to perform. The whole process, which had been already codified in the Catala project, requires a lot of patience from the aggrieved party: a creditor who has received unsatisfactory performance of goods or services cannot terminate at once. He is obliged to first issue a *mise en demeure* and then grant a deadline for performance.

Article 134 does not specify how consequential the non-performance should be and merely states that the creditor does so at his own risk. Obviously, the smallest breach of contract would not suffice to justify unilateral resolution. By contrast, PECL enables an aggrieved party to

²⁶ Art. 132 enumerates the conditions of termination and shows the various ways: termination by virtue of a termination clause, by notification or by the court.

terminate the contract unilaterally and immediately, but only in cases of a fundamental non-performance (PECL art 9:301; see also CISG art 49, and the Unidroit Principles, art 7:3.1).²⁷

Unlike PECL, CISG and the UP, which grant the aggrieved party a right to immediate termination in the event of an anticipated fundamental non-performance (see CISG art 72, PECL art 9:304, and UP art 7.3.3), the *Avant-projet* does not give such a right.

IV Concluding Remarks on the Major Orientations of the New French Project

1. Many new European trends have inspired the work of the French *Direction des affaires civiles et du sceau*, the division of the Ministry of Justice in charge of the reform. It is to be hoped that France will soon have a new law of contracts, tort and evidence. A new, modern and more European *théorie générale of contracts* is set out in the new government's project.²⁸

2. The French distinction between *contrats civils* and *contrats commerciaux* remains. Yet, in practice, it has lost much of its importance. Under our French legal systems, the rules contained in the Code civil apply to commercial contracts, unless the Code de commerce or commercial usages lead to other solutions. There are very few specific rules for commercial contracts, especially now that the law of prescription has been reformed. In our law faculties, *Contrats civils et commerciaux* are taught in the same course on the law of contracts or obligations. As limited as it is, this dualism between civil law and commercial law contracts does not reflect a modern or international conception of the law of contract. The Principles of European Contract Law (PECL) do not draw such a distinction. The Dutch and the Italians have abolished that dualism.²⁹ In EU laws, the dividing line is between B to B and B to C contracts.

3. The principles which currently underlie the French law of contracts have been strengthened by this new Project.

- freedom of contract
- consensualism is enunciated and in this respect, the French project may seem to resist the creeping formalism that is to be observed in EU consumer law, in the CESL and in many specific contracts.

²⁷ Comp. also Cass. civ. 1^{ère}, 13 oct. 1998, *D.* 1999, p. 197, note C. Jamin et Somm., 115, obs. P. Delebecque, *Defrénois* 1999, 374, obs. D. Mazeaud, *JCP G*, 1999, II, 10133, note N. Rzepecki : 'la gravité du comportement d'une partie à un contrat peut justifier que l'autre partie y mette fin de façon unilatérale à ses risques et périls.'

²⁸ As had already been stressed by the drafters of the *Avant-projet Catala*, especially by G. Cornu in his introduction, this will enhance the supremacy of the Code civil over all other codes, *ibid.*

²⁹ During the conference organised by the *Revue des contrats*, (2006) 1 *Revue des contrats*, some French authors suggested abolishing it: see J. Mestre, D. Mazeaud, *Observations conclusives*, *prec.*, sp. 181. O. Lando observed that, if this distinction had been abolished, it may well have incited the draftsmen to propose rules better suited to commercial transactions (2006) 1 *Revue des contrats*, 167, 168.

- contractual justice, coherence and good faith are reinforced. This goes along the lines of EU law, as well as of some recent codifications. In several laws (notably in German, Dutch and US law) or codifications (PECL and Unidroit principles), good faith acts as a general principle for all the phases of the life of the contract.
- unilateralism has become predominant, especially since the Cour de cassation consecrated the power of one party to unilaterally fix the price or even terminate the contract. The *Avant-projet* leaves all this unilateral power of one party, and the notification process that goes with it, in place (unilateral termination is placed on equal footing with judicial termination).
- judicial power is increased, but it is limited. This is showed, for instance, by art. 104 on change of circumstances or by art. 71 on judicial fixation of the price in cases of abuse.

4. Recodification of contract law in 2014: what place is there for public policy and mandatory rules?

Freedom of contract is the key pillar of French contract law. However, this principle is tempered by public order and fundamental rights. The Project does not state which rules are mandatory and which ones are not. In the field of general contract law, contract rules are usually not mandatory. However, the new emphasis placed on contractual justice, coherence and good faith may lead judges to have a stricter approach and restrict freedom of contract. In an international context, this may open the way for a more extensive use of public policy exception (for instance, if the applicable law does not have a general principle of good faith) or for the application of some provisions (for instance the one on unfair terms) which the judges would consider to be international mandatory rules of the forum (*lois de police*).

5. Back to Europe

During the past decade, European contract law has been a wonderful playing field for the law-making process, which has undergone great transformations, characterised by a much greater dialogue and broad openness to civil society.³⁰ The effectiveness and quality of the law are a real concern for European institutions. Impact assessments and statistical data become essential as part of the ‘Smart regulation’ process.³¹ Interest in comparative law is also reviving and, as common general tends develop in the modern laws of contracts, national codifications or recodifications no longer are a tool for legal nationalism; quite the contrary.

³⁰ The first Communication of the Commission on European contract law was published in July 2001; by the end of 2011 and after 10 years of intense work and debates, a legislative instrument for sales contracts was adopted by the Commission. The result may seem very thin. It is in fact immense from a methodological point of view.

³¹ The Communication ‘Smart Regulation in the EU’ COM (2010) 543 sets out the Commission’s plans to further ensure the quality of regulation. Smart regulation aims at regulating where there is a need to do so while keeping costs to a minimum.