THE NEW FRENCH LAW OF CONTRACT

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Abstract The article analyses the recent reform of contract law in France. The section of the Civil Code on the law of contract was amended and restructured in its entirety last year. The revised section came into force on 1 October 2016. The article considers its main innovations and compares them with the corresponding principles of English law and some contract law international instruments, mainly the UNIDROIT Principles and the Principles of European Contract Law. The article also assesses whether the new provisions achieve their stated aim of rendering French contract law more accessible, predictable, influential abroad and commercially attractive.

Keywords: Civil Code, contract law, France, innovations, reform.

I. INTRODUCTION

'My real glory is not to have won forty battles: Waterloo will erase the memory of all these victories. What nothing will erase, what will live eternally, is my Civil Code.'[1] Napoleon Bonaparte's statement sounds prophetic today. The French Civil Code has stood the test of time. More than two centuries after its enactment in 1804, it remains the main private law instrument in France.

Some parts have, however, been modernized to keep pace with changing times. This article is concerned with the modernization of the section of the Code on the law of contract, which was amended and restructured in its entirety last year. The revised section came into force on 1 October 2016.[2] This marked the end of the articles of the 1804 Code familiar to many generations of practitioners and scholars and the beginning of a new era of

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[1] C-F de Montholon, *Récits de la captivité de l'Empereur Napoléon à Sainte-Hélène* (Paulin 1847) 401.

[2] *Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JORF no 0035 of 11 February 2016. The Ordonnance was translated by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker: <http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf>. Many of the translations of the new articles used in this paper are based on their excellent work.

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the 150 articles[3] that replaced them and represent a more comprehensive statement of the French law of contract.

It is a major event in France. The codified articles on contract law had remained untouched, or almost so, since 1804. It is therefore the first overhaul of French contract law in over 200 years. It is also the culmination of several attempts at reform that began more than a hundred years ago and intensified greatly in the last 15 years.

Its relevance extends far beyond France's borders. Many international businesses have commercial interests in France. Its contract law regime is important to how they organize their affairs. It is also significant for law reformers in the many foreign jurisdictions that have used the Code as a model or a source of inspiration to forge their own laws. One such jurisdiction, Peru, has recently announced that it would reform its civil code. The timing, soon after the French reforms, is no coincidence.[4]

This article seeks to explain the genesis of the reforms and analyse their main innovations. It does so first by explaining the reasons why the reforms were made. It will be shown that the 1804 Code had ceased to be an accurate statement of the law of contract applied by French courts. Extensive judicial interpretation of its articles over 200 years had resulted in a growing disconnect with the text of the Code, which had been somewhat left behind. This disconnect was partly blamed for the loss of influence of the Code abroad. French contract law was also perceived to be less attractive than some common law regimes as a governing law of choice in international commercial contracts. Modernization was intended to make it more competitive in a globalizing world.

The analysis then moves to the substance of the reforms. In many respects, they simply codify the previous rules developed and applied in cases over the last two centuries; in others, they innovate. The article explores the main innovations. It does so by explaining the changes brought about by the reforms and contrasting the new articles with the old. There is also consideration of the new provisions from a comparative perspective. Comparisons are drawn with the corresponding principles of English law and some international contract law instruments, in particular the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law.

The article concludes by assessing whether the new provisions achieve their stated aim of rendering French contract law more accessible, predictable, influential abroad and commercially attractive. It will be argued that they do so to some extent. The new regime is more intelligible, certain and

[3] Arts 1101–1231–7 directly regulate contracts but there have also been reforms in other areas (the 'general legal regime of obligations' and the 'proof of obligations') and in total 353 new articles have been introduced. The focus of this article is solely on the new contract law rules.

[4] Ministerial Res No 0300-2016-JUS of 17 October 2016.

commercially orientated in some respects. However, in others, existing uncertainties are perpetuated and new ones created. Notable examples are the extensive powers still vested in the French courts to interfere with agreed contract terms and the unhelpful absence of any definition of some key concepts.

II. THE GENESIS OF THE REFORMS

The section of the Code on contract law had survived almost unaltered since 1804. While some saw this as a source of stability, and therefore a strength, most recognized that a code that contained obsolete principles and had become incomplete was a weakness.

A. The Reasons for the Reforms

1. An outdated and incomplete section of the Civil Code on contract law

Until the reforms, most of the articles in the Code on contract law had remained unaltered, even as society and technology changed almost beyond recognition around them. Instead the courts progressively reinterpreted the articles, which as generally high-level propositions or statements of principle leant themselves to adaptation in this way.

In itself, this was unremarkable. The draftsmen had foreseen that the courts would have a prominent role in adjusting and developing the law. As Portalis had noted, 'the task of the legislator is to determine those principles most conducive to the common good … The skill of the judge is to put these principles into action, to develop and extend them to particular circumstances by wise and reasoned application.'[5]

However, over the course of two centuries, the reinterpretation had become too extensive. Most articles had been substantially developed, extended or limited. Many were interpreted by analogy, *a contrario* or even *contra legem*. They became meaningless on their own and without explanation as to their judicial interpretation. In some areas the courts had shaped almost entirely new laws.[6]

To read the Civil Code therefore did not give a clear or precise picture of the French law of contract. This was largely to be found in the cases rather than the

[5] JEM Portalis, 'Discours préliminaire du premier projet de Code civil' in PA Fenet, *Receuil complet de travaux preparatoires du Code civil* (Vidocq 1836).

[6] One example is the extension by the courts of the principle in art 1134 of the 1804 Code that contracts should be performed in good faith to the pre-contractual negotiation, formation and termination stages. Another is the primacy given by the courts to specific performance and their restrictive interpretation of art 1142 of the 1804 Code, which emphasized damages to the exclusion of other remedies. The courts were also particularly creative in using 'la cause' to interfere with contracts and promote what they perceived to be fair.

Code, which was perceived as ironic and unsatisfactory in a jurisdiction with a tradition of codified law in which legislation has more legitimacy than case law.

The growing body of case law interpreting the Code also meant that knowledge and understanding of contract law became the preserve of lawyers. This was contrary to the original aim for the Code to be a set of rules written in a clear style and intelligible by lawyers and non-lawyers alike. Its complexity was compounded by new parts of the law of contract being developed outside of the Code. For instance, regulations on consumer law and insurance law were enacted through specific legislation, without ever being integrated into the Code.[7] It therefore ceased to be a comprehensive, coherent and self-contained legislative instrument, and increasingly required modernization.

2. *Loss of international influence*

Another reason for reform was the realization that the influence of the Civil Code abroad had declined. During the nineteenth and twentieth centuries, its international reach was extraordinary. The Code served as a source of inspiration, and even a template, in many countries in Europe, Africa, Asia, Central and South America, and some parts of North America.[8] France became 'one of the few legal systems that exerted such a dominant influence on other jurisdictions that the country is generally regarded as the 'lead jurisdiction' of an entire legal family that stretches from Chile to Vietnam'.[9] Its phenomenal international reach generated pride amongst French lawyers, for whom the Code was a 'symbol of national identity'[10] and an 'ambassador'[11] for French law in the world.

That this influence had faded was particularly felt at the turn of the twenty-first century, amidst the preparations for the Code's 200th anniversary. Countries which once drew upon the 1804 Code such as the Netherlands, Quebec, and Germany departed from it when reforming their own civil codes. It was also at this time that there were moves towards a form of contract harmonization within the European Union going beyond the protection of consumers. The European Parliament encouraged work towards a European civil code or contract code[12] and, by its 2001 Communication,

[7] For a detailed account of the process of 'codification, decodification and recodification' of French private law, see S Vogenauer, 'The *Avant-projet de rforme*: an Overview' in J Cartwright, S Vogenauer and S Whittaker (eds), *Reforming the French Law of Obligations, Comparative Reflections on the Avant-Projet de Réforme du Droit des Obligations et de la Prescription* (Hart 2009) 4–7.

[8] On the 'extraordinary influence' of the Civil Code in the world, see K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998) 98.

[9] Vogenauer (n 7) 7.

[10] ibid.

[11] B Fauvarque-Cosson and S Patris-Godechot, *Le code civil face à son destin* (La Documentation Française 2006) 8–9.

[12] See European Parliament Res A2-157/89 and Res A3-0329/94.

the European Commission began a debate on the future of European contract law.[13] These projects aroused anxiety and even hostility in France, partly because they were being developed with relatively little input from French lawyers, and also because they threatened to create a rival to the Civil Code.[14]

As yet, no European civil or contract code has been enacted.[15] But these harmonization proposals nevertheless gave rise to a realization amongst French lawyers that the Civil Code would hold little sway in European level projects for as long as there was such a disconnect between its articles and the state of the actual law. If it was to serve again as a model or exert real influence over or even counter future harmonization proposals, it would need to be modernized.

3. An unattractive law to international business

One last important reason underlying the reform was the recognition that French law was not as attractive to international businesses as the laws of some common law countries. In many international contracts, the laws of England or New York are chosen by the parties as their governing law. French law holds less attraction. It is perceived as less commercial and to compare unfavourably on measures such as pragmatism and the promotion of transactional certainty. Common law contractual rules are thought to have greater commerciality and be more in tune with whether particular outcomes make economic sense. In France, this has less significance and more often is counterbalanced by considerations of substantive fairness (*justice contractuelle*). The powers of the courts to interfere with the terms of the contract are significant and can be a source of uncertainty, to which business is generally averse.

The perception that French contract law was wanting in commerciality was compounded by the 'Doing Business' reports published by the World Bank between 2004 and 2006.[16] They ranked France in forty-fourth place for ease of doing business, behind less developed countries such as Botswana and Jamaica amongst others. The reports were particularly critical of the 'French civil law tradition' and its effects on business. They portrayed French law as economically inefficient, complex, unpredictable, and having few attractions. Instead they advocated the merits and superiority of common law systems.

[13] COM (2001) 398 final.

[14] Fauvarque-Cosson and Patris-Godechot (n 11).

[15] See the publication of the Draft Common Frame of Reference in 2008 and the Common European Sales Law proposals COM/2011.0635 that were abandoned by the European Commission.

[16] 'Doing Business in 2004: Understanding Regulation' (World Bank and Oxford University Press 2003; 'Doing Business in 2005: Removing Obstacles to Growth' (World Bank and Oxford University Press 2004); 'Doing Business in 2006: Creating Jobs' (World Bank and Oxford University Press 2005).

Although these conclusions were tendentious and the methodology in the reports was criticized,[17] they were still a nail in the coffin for French contract law in its current form. Described as 'electroshocks',[18] the reports led to the increased awareness that French law, and in particular contract law, would need modernization to be a serious and credible option for international business.

B. The Long Road to Reform

It was in this context of French contract law having fallen behind its international rivals that moves towards reform began to gather momentum. The bicentenary of the enactment of the Civil Code in 2004 and the surrounding celebrations marked the start of what became a serious push towards modernization. However, it took almost 15 years for this to come to fruition and reforms to be enacted. In that time, several proposals were published, only to fall away.

The first reform project in this period, commonly referred as the 'Catala proposals',[19] was drafted mainly by academics and published in 2005. It sought to reform not only contract law but all core areas of French private law. Despite generating much interest, it never made it to the statute book, due largely to an insufficiency of political will.[20] The Catala proposals were followed in 2008 and 2009 by two further reform projects that were supported by the Ministry of Justice.[21] They developed many of the same ideas. Although the proposals in the three projects were never adopted, they and the comments on them served as the foundations on which the newly enacted articles were later built.

The necessary political enthusiasm to reform contract law came between 2010 and 2016. This was despite a change in the prevailing political colour following the French presidential election in 2012, won by François Hollande. The two Ministers of Justice who held office during this period established working groups comprising lawyers, business representatives and ministers to draft what were to become the final reform proposals.

Concerned that full Parliamentary debates would lead to delay and possibly even the failure of the proposals, the French government asked Parliament for legislative authority to enact them by government decree. This meant that the normal parliamentary process could be bypassed and the proposals could

[17] See Fauvarque-Cosson and Patris-Godechot (n 11) 152–7. [18] ibid.

[19] *Avant-Projet de Réforme du Droit des Obligations (Art 1101 à 1386 du Code civil) et du Droit de la Prescription (Art 2234 à 2281 du Code Civil) under the direction of P Catala, 22 Sept 2005* (Documentation française 2006) translated in English by John Cartwright and Simon Whittaker <http://www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf>.

[20] Vogenauer (n 7) 17.

[21] Ministère de la Justice, *Projet de réforme du droit des contrats*, July 2008. A new version was drafted in 2009. See also F Terré, *Pour une reforme du droit des contrats* (Dalloz 2008).

become law without full parliamentary scrutiny. The Ministry of Justice's arguments before Parliament for pursuing this course were that the law was in urgent need of reform, the objectives of the proposed reforms were uncontroversial, and the fundamental principles on which contract law was based would remain unchanged. Additionally, the proposed text was based on the several reform proposals published over the preceding 10 years, which had all been the subject of intense scrutiny.[22]

After extensive Parliamentary debate and opposition on the basis that the reform of such an important area of private law was not appropriate for decree,[23] the government was authorized to proceed. The draft proposals were published in February 2015.[24] A short period of consultation was then initiated. At the end of this period, the text was revised by the Ministry of Justice and published in its final form in February 2016.[25] It came into effect on 1 October 2016.

III. THE SUBSTANTIVE CONTENT OF THE REFORMS: CODIFICATIONS AND INNOVATIONS

The reforms have mainly codified principles previously developed in the French case law over considerable time. They have, however, innovated in some respects. After a brief general discussion of the objectives of the reforms, this article will turn to address these innovations.

A. General Presentation

One of the stated aims of the reforms was to make contract law more up-to-date, accessible and intelligible.[26] The draftsmen sought to achieve this in different ways.

First, they tried to use more simple and modern language than could be found in the 1804 Code. The rationale was that the rules must be capable of comprehension by a layman unfamiliar with legal jargon. Citizens must be able to see how justice is done.[27]

[22] See Christiane Taubira's intervention in Parliament on 16 April 2014 <https://www.youtube.com/watch?v=OFrpvFh-I4s>.

[23] The *Conseil Constitutionnel* was asked by members of the Senate to review the constitutionality of giving the government authority to legislate on such an important topic without parliamentary debate. The *Conseil Constitutionnel* held that the authority complied with art 38 of the Constitution, which allows the government to legislate by decree in certain circumstances; it was limited and had clear and precise goals. See its Dec No 2015-510 DC of 12 February 2015.

[24] *Projet d'Ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations* published on 25 February 2015.

[25] *Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JORF no 0035 of 11 February 2016.

[26] *Rapport au Président de la République relatif à l'Ordonnance no 2016–131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JORF no 0035 of 11 February 2016.

[27] ibid.

Second, legal principles developed in case law that had become part of the French legal landscape were codified. Many of the new articles simply enshrine these principles and therefore break no new ground. This was also thought to go some way to fulfilling another stated goal of the reforms, which was to enhance the attractiveness of French contract law to foreign legislators and businesses. A codified set of predictable laws presented in a clear manner that is easier to read and more accessible was thought to be a real pull factor.[28]

Third, the structure of the 1804 Code was revised in order to give each section more defined scope and clarity.[29] The Code now distinguishes clearly the sources of obligations,[30] the legal regime governing obligations,[31] and the proof of obligations (*preuve des obligations*).[32] The articles relating to contract law are ordered in a sequence that corresponds to the life cycle of a contract. They deal first with contract formation, followed by validity, interpretation, the effect between the parties, privity, and finally remedies for breach.

Codifying the case law and adopting this new structure have resulted in the contract law provisions of the Code becoming more comprehensive and substantial. It has also led to the articles being extensively renumbered. Some of the iconic articles of the 1804 Code have disappeared. For instance, old Article 1382, which was the cornerstone of tort liability, has become new Article 1240. Similarly, old Article 1134 on the binding force of contracts has been split between Articles 1103 and 1104. Many have reacted to this renumbering with a tinge of sorrow and some have turned to social media to share their nostalgia. Various hashtags such as #rip1382 were created on Twitter shortly after the publication of the final version of the new articles. Web users mourned with humour the passing of Article 1382, some likening it to the replacement of the much-lamented French franc with the euro.

B. The Content of the New Articles

The discussion in this article of the main changes to the Code follows its new structure. First considered are the introductory provisions. The focus then turns to its innovations on contract formation, unfair terms, unforeseen circumstances, and remedies for breach. Some of these innovations are simply the formal recognition of well-known solutions but, where they relate to important principles, they are still worth noting; others are more substantive.

1. Introductory provisions: freedom of contract, the binding force of contract, and good faith

The new Code contains an initial section entitled 'Introductory Provisions' in which the fundamental principles of French contract law are set out. These

[28] ibid. [29] ibid. [30] Art 1100 to art 1303-4 of the Civil Code.
[31] Art 1304 to art 1352-9 of the Civil Code. [32] Art 1353 to 1386-1 of the Civil Code.

principles are intended to give 'general guidance … and are aimed at facilitating the interpretation of principles of contract law and to fills gaps when necessary'.[33] Three of the principles are of prime importance: freedom of contract, the binding force of contract, and good faith.

New Article 1102 enunciates the principle of freedom of contract. It provides that everyone is free to contract or not to contract, to choose the person with whom to contract and to determine the content and form of the contract, within the limits imposed by the law. It adds that the parties cannot derogate from mandatory rules.

Freedom of contract is a long-standing and uncontroversial principle in French law. It did not, however, appear in the 1804 Code.[34] The new Code recognizes it explicitly for the first time. It is symbolically placed as the outset, as the very first rule immediately after the definition of contract, to mark its significance.

The principle of the binding force of contracts is also formally recognized and given a prominent place in the new Code. Article 1103 reuses almost identically[35] the near sacrosanct wording of old Article 1134, paragraph 1, that legally formed agreements have the force of law between the parties. This means that contracts must be given effect and adhered to: *pacta sunt servanda*, one must perform that which one has promised. It is a principle that is perceived to promote legal certainty and justify the centrality of specific performance as a remedy for breach.[36]

More innovative is the new prominence given to the principle of good faith. In addition to its new location amongst the key principles that govern contracts, its scope has been expanded. Article 1104 provides that contracts must be 'negotiated, formed and performed in good faith'; this is described as 'a matter of public policy'. Whereas the 1804 Code simply stated that contracts should be performed in good faith, the reforms have codified case law that had extended the principle to the pre-contractual negotiations and formation stages.

The draftsmen could have gone further and also codified the principle that the termination of a contract must be in good faith. It is uncontroversial that the court can refuse to order termination where the remedy is sought in bad faith[37] or in a manner that 'can be characterized as disloyal speculation'.[38] Similarly, termination clauses invoked in bad faith have historically not been given effect.[39] The case law on the interaction between good faith and

[33] *Rapport au Président* (n 26).

[34] It was implied from an interpretation *a contrario* of art 6 of the 1804 Code.

[35] '*Convention*' has been replaced by '*contrat*'.

[36] S Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford University Press 2012) 49–50.

[37] Court of Appeal of Poitiers, 1st Civ Chamber, 4 July 2006, Juris-data no 2006-313835.

[38] Civ (3) 29 April 1987 RTD civ 1987.536 note J Mestre; Civ (3) 3 June 1992, GP 1992.II.656 note J-P Barbier.

[39] Civ (1) 31 Jan 1995, D 1995.389 note C Jamin.

termination is well established and should remain relevant after the reforms, albeit still in uncodified form.

The new Code does not contain a definition of good faith. This has been lamented by some commentators because good faith is perceived by some commercial parties as vague, allowing the court too much discretion, and as inimical to contractual certainty. In the absence of any definition, the case law from before the reforms can be expected to remain relevant. Good faith has been held amongst other things to mean that the parties must conduct themselves ethically, in particular that they must behave loyally (*devoir de loyauté*), cooperate (*devoir de coopération*) and be coherent (*devoir de cohérence*).[40]

The formal recognition of the principles of freedom of contract, the binding force of contract and good faith bring French law closer to some international contract law instruments. The UNIDROIT Principles, for instance, recognize all these principles as being of fundamental importance.[41]

There are, however, notable differences with the position in England. While English law has long embraced freedom of contract and the binding force of contract, it has largely resisted notions of good faith or contractual fairness.[42] Unlike in France, there is no general duty to negotiate or perform a contract in good faith. Abusive behaviour is addressed in particular contexts and through specific rules.[43] A general duty to act in good faith is seen to be vague and its content unclear, and the relationship of the parties adversarial rather than cooperative, at least in the context of contractual negotiations.[44] There is also a reluctance to go beyond the terms of the contract as this could undermine certainty.

2. *Contract formation*

An innovation in the reforms is the introduction of a whole new subsection on contract formation. The 1804 Code did not contain a single article on this topic but proceeded to deal directly with the validity of contracts. The law on contract formation therefore consisted entirely of judge-made rules. This was perceived as a 'major lacuna' by French commentators.[45] It has now been filled with 15

[40] Com 20 oct 1998, Bull civ IV, no 244; Com 8 March 2005, Bull civ IV, no 44. On the 'duty of loyalty' and the 'duty of co-operation', see J Bell, S Boyron, and S Whittaker, *Principles of French Law* (2nd edn, Oxford University Press 2008) 332–4.

[41] Art 1.1 of the UNIDROIT Principles (freedom of contract); art 1.3 of the UNIDROIT Principles (binding force of contract); art 1.7 of the UNIDROIT Principles (good faith); art 1:201 PECL (Good faith);

[42] For a summary of English law on this point, see H Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) [1:039]–[1:054A].

[43] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439 (Bingham LJ).

[44] *Walford v Miles* [1992] 2 AC 128, 138 (Lord Ackner).

[45] G Chantepie and M Latina, *La réforme du droit des obligations, Commentaire théorique et pratique dans l'ordre du Code civil* (Dalloz 2016) 139.

new articles that regulate pre-contractual negotiations, offer and acceptance, and pre-contractual agreements.

The new provisions largely codify existing case law and are unremarkable. They enshrine in the Code the long-standing notions of offer and acceptance and deal with the usual issues that arise at the time the contract is formed, for instance the distinction between offers and invitations to treat, offers to the public at large, withdrawal of offers, the time at which the contract is formed, acceptance by silence, and withdrawal of acceptance.

The provisions worth noting, particularly from the point of view of an English lawyer, are those that codify the strong protection given to contracting parties during pre-contractual negotiations. In addition to Article 1112 which provides that negotiations must satisfy the requirements of good faith, Article 1112–1 imposes a general duty to provide information (*devoir d'information*). It states that, where a party knows information that is decisively important to the other's consent, he must share it wherever the latter is legitimately ignorant or relies on him.[46] The duty does not extend to the value of the promised performance. If a party fails to provide the necessary information, he can be liable in damages and there is also scope for the contract to be annulled, if the information was withheld with an intention to deceive.[47]

While the duty to inform already existed in case law, the draftsmen have given it greater prominence by making it independent and separate from the duty of good faith. The autonomous duty to inform has been described as 'an essential principle for ensuring balance in contractual relations'.[48] It illustrates the moral vision of contract shared by many French lawyers: parties should refrain from behaving selfishly.[49]

Although a limited duty to inform can be found in international contract law instruments,[50] it is in contrast with the approach in England. There is no general duty of disclosure in English law: 'silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune', as Rix LJ put it in *ING Bank NV v Ros Roca SA*.[51] Generally no liability arises if a party does not disclose information to the other during pre-contractual negotiations. Only exceptionally in certain types of contract[52] or contractual relationships is disclosure required.[53]

[46] The Ordonnance was officially translated by John Cartwright, Bénédicte Fauvarque-Cosson, and Simon Whittaker <http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf>. The translations of the new articles used in this article are not gender-neutral so as to follow the style used in their work.

[47] See art 1137 of the Civil Code (*réticence dolosive*).

[48] *Rapport au Président* (n 26).

[49] A Benabent, *Droit civil, Les obligations* (12th edn, Montchrestien 2010) [279]–[285]; O Deshayes, T Genicon and Y-M Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations, Commentaire article par article* (LexisNexis 2016) 79.

[50] See art 3.2.5 of the UNIDROIT Principles and art 4:107 of the Principles of European Contract Law, which require that a party discloses information where non-disclosure would otherwise amount to fraud.

[51] [2012] 1 WLR 472 at [92].

[52] eg contracts of utmost good faith, such as insurance contracts.

[53] eg if the parties negotiating the contract are in a partnership.

The absence of any general disclosure obligation in English law is based on an assumption that the relationship between the parties during pre-contract negotiations is at arm's length. They are expected to act only in their own interests and information known to one party but not the other can have financial value. Beale, comparing English and French law, neatly summarized the difference in the following way: 'English law can appear harsh and unfair [to French lawyers] … Many English lawyers support this individualistic approach … What in France constitutes abusive behaviour is in England considered as necessary behaviour for business.'[54]

3. *Validity of contracts*

One of the most symbolic and widely discussed changes made by the reforms relates to the validity of contracts. The controversial notion of 'cause' has been removed from the Code. Before the reforms, a contract was only valid if it had a 'cause' and that 'cause' was lawful. This was one of the four conditions set out in Article 1108 of the 1804 Code that had to be fulfilled for an agreement to be valid. The others were consent, capacity to contract, and the existence of a defined object as the subject matter of the contract.[55] New Article 1128 requires only three conditions: consent; capacity to contract; and that the contract has content which is lawful and certain. There is no longer any reference to 'cause'.

'Cause' has been described as 'one of the most difficult [notions] for a common lawyer to grasp'.[56] Before the reforms, French lawyers distinguished between 'objective' and 'subjective' cause. 'Objective cause' was the abstract goal of the contract, which was the same for every category of contract. Usually this was the counter-performance expected from the other party. For example, in sale of goods contracts, the 'cause' of the seller was payment of the purchase price; the 'cause' of the buyer was to acquire ownership of the goods.

The absence of 'objective cause' was used by French courts as a ground to annul contracts that lacked any real reciprocity. The rationale was that all contracts must have a purpose—a *raison d'être*—in order to be valid. There had to be a minimum benefit to both parties.

'Subjective cause' on the other hand related to the subjective reasons why the contracting parties entered into the contract. This differed for each contract: parties enter into contracts for a multitude of reasons. In order for the contract to be valid, the subjective cause had to be licit. A contract could be annulled if entered by one or both of the parties for reasons that were illegal or contrary to public morals.

[54] H Beale, 'La réforme du droit Français des contrats et le "droit européen des contrats": perspective de la Law Commission anglaise' RDC 2006.146.

[55] Arts 1131–1133 of the 1804 Civil Code.

[56] Bell, Boyron and Whittaker (n 40) 317.

The main reason that 'cause' was problematic was that it came to be invoked broadly by French courts to interfere with contracts. For instance, it became a basis for rebalancing contracts that were perceived to contain unfair terms. It was famously used to strike down exemption and limitation clauses where the promisor failed to perform a fundamental obligation of the contract and sought to rely on the clause to pay derisory compensation to the promisee.[57] French courts were also known to use 'cause' to annul contracts which had become bad bargains. In one well-known case, the *Cour de cassation* annulled a contract in which, although performance on both sides was still possible, it became apparent that the promisee's commercial rationale for entering the contract was unrealistic and his commercial aspirations for the contract were unachievable.[58]

The concept of cause aroused great passion amongst practitioners and commentators. It was lauded by some as an instrument to promote fairness and criticized by others as a tool used by the courts for a multitude of purposes, not least to interfere, causing uncertainty. There was also concern that, as the notion was not used widely abroad, even in foreign systems inspired by French law, its continuing presence diminished the attractiveness of the Code.

The uncertainty and controversy surrounding 'cause' have resulted in its exclusion from the new Code. There are divergent views as to the implications. Some commentators have called it a revolution.[59] In truth, it will only be possible to make a proper assessment over time and with empirical evidence as to how the French courts react and adapt. However, this seems likely to be an overstatement. Indeed, the changes made by the reforms may prove to be more semantic than substantive and make little difference in practice. Although 'cause' as a formal requirement has gone, it has been replaced with clearer and more defined rules that will allow the courts to reach similar solutions.[60]

The former requirement of 'subjective cause' has to a large extent reappeared in new Article 1162. This provides that a contract cannot derogate in its terms or aims from public policy. The spirit of 'objective cause' can now be found in Article 1169. This provides that the benefit of an onerous contract cannot be illusory or derisory at the time it is made. Those seeking to persuade the court to rebalance the contract need look no further than new Article 1170 on unfair terms, which appears to keep that jurisdiction alive by providing that any contract term which deprives a debtor's essential obligation of substance is deemed not written.

[57] See the well-known *Chronopost* decision: Com 22 Oct 1996, D 1997.121 note A Sériaux; Com 30 May 2006, D 2006.1599 note X Delpech and D Mazeaud.

[58] See the well-known *Video cassette* decision: Civ (1) 3 July 1996, D 1997.500 note P Reigné.

[59] Deshayes, Genicon and Laithier (n 48) 171.

[60] *Rapport au Président* (n 26).

It is therefore a little surprising that the removal of 'cause' as an essential ingredient of a valid contract has generated such controversy. The likely explanation is that some commentators are very attached to it. For them, it is 'culturally important'[61] and an 'emblem of the French civil code'.[62] However, these points are more ideological than technical[63] and the disappearance of 'cause' is mainly symbolic.

The notion of cause has been characterized as peculiar to French law and it has been said to exist in no other jurisdiction. This is not entirely true. It can be found in several articles of the Quebec Civil Code[64] and in the Italian Civil Code,[65] both of which have historically drawn inspiration from French law. It is true that there is no such notion in international instruments such as the UNIDROIT Principles and the Principles of European Contract Law or in English law. However, as in the new Code, some of the functions performed by 'cause' can be found in other mechanisms.

In England, it has been suggested that the doctrines of consideration, illegality, public policy, frustration and the rules on unfair terms achieve some of the same solutions as 'cause'.[66] This is partly true, although new Articles 1169 and 1170 clearly go further. Under English law, a court will refuse to enforce a contract only where there is a real lack of consideration. Unlike in France, it is not enough that consideration is derisory or does not fulfil the subjective expectations that the parties had when they entered into the contract. Consideration is assessed objectively. It must be sufficient; it need not be adequate.[67] Article 1170 also has some parallels with an aspect of the now defunct English law doctrine of fundamental breach under which it was not possible for a clause to exclude liability for breaches of contract that were fundamental. This was rejected by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*[68] on the basis that contracts need to be upheld.

4. The extended protection against unfair terms

A real innovation of the reforms is in relation to unfair terms, on which there are two new articles. As already noted, Article 1170 provides that any contract term which deprives a debtor's essential obligation of substance is deemed not written. Article 1171 extends the protection against unfair terms still further by deeming not written any standard form contract terms which create

[61] T Genicon, 'Défence et illustration de la cause en droit des contrats – à propos du projet de reforme du droit des contrats, du régime général et de la preuve des obligations' D 2015.1551.
[62] R Boffa, 'Juste cause (et injuste clause)' D 2015.335
[63] Contra Genicon (n 61).
[64] Arts 1371, 1385, 1410, and 1411 of the Quebec Civil Code.
[65] Arts 1325 and 1343–1345 of the Codice Civile.
[66] B Markesinis, '*Cause* and Consideration: a Study in Parallel' 37(1) CLJ 53.
[67] Bell, Boyron and Whittaker (n 40) 321-2.
[68] [1980] AC 827, 844-7 (Lord Wilberforce).

significant imbalance in the rights and obligations of the parties. However, the significant imbalance cannot relate to the main subject matter of the contract, nor the adequacy of the price. These rules have their origin in consumer protection law but now apply more broadly.

This extension in the general protection against unfair terms is intended to promote 'contractual justice' (*justice contractuelle*). To a certain extent, it represents a break from the past. Until the reforms, outside the context of consumer contracts, the jurisdiction of the French court over unfair terms was piecemeal. There was no general power to strike down unfair terms. The usual suspects—penalty clauses, exclusion clauses and non-compete clauses—were regulated separately and discretely.[69] The scope and extent of the protection varied depending on the type of clause.

Article 1171 is very broad in scope. The jurisdiction of the court is not limited to assessing the fairness of exclusion and limitation clauses; rather it applies to all contract terms. The only limitation on its scope relates to the type of contract. It is confined to terms contained in standard form contracts, where unfair terms are most commonly found.

The new approach to unfair terms in France has more differences than similarities with international contract law instruments and English law. Whilst Article 1171 is close to Article 4:110 of the Principles of European Contract Law, it differs from the corresponding provision in the UNIDROIT Principles, Article 7.1.6. The scope of protection is more limited in some respects and broader in others. Article 7.1.6 is more limited in that it only concerns exclusion and liability clauses but broader in its application to all contracts, whether negotiated or in standard form.

English law confers more limited protection against unfair terms. There is no general jurisdiction for the court to invalidate terms based on concepts of reasonableness or fairness. Any interference is exceptional. The rules on unfair terms are limited and piecemeal, being mainly confined to consumer contracts.[70] Outside this context, only very specific terms such as exemption clauses in standard form contracts[71] or penalty clauses can potentially be challenged.[72] The extension of the remit of the court to other terms on grounds of unfairness and unconscionability was firmly rejected, even in exceptional circumstances, in *Union Eagle Ltd v Golden Achievement Ltd*.[73] Lord Hoffmann justified the strict enforcement of contract terms by reference to commercial certainty. He said 'in many forms of transaction, it is of great importance that if something happens for which the contract has made

[69] Arts 1152 and 1231 of the 1804 Code; Art L442-6-I-2 of the Commercial Code.
[70] Consumers are protected by the Consumer Rights Act 2015.
[71] See the protection provided by the Unfair Contract Terms Act 1977.
[72] See *Cavendish Square Holding BV v Talal El Makdessi*; *ParkingEye Ltd v Beavis* [2016] AC 1172 (SC); it is also not possible to exclude liability for one's own fraud.
[73] [1997] AC 514 (PC).

express provision, the parties should know with certainty that the terms of the contract will be enforced'.[74]

5. *Unforeseen circumstances (Imprévision)*

Another substantive innovation of the new Code can be found in Article 1195. This gives the court broad powers to adjust the contract when unforeseen circumstances have made the bargain unduly costly. Paragraph 1 provides that, if a change of circumstances that was unforeseeable at the time the contract was made renders performance excessively onerous for a party and that party had not accepted the risk of such a change, he may ask the other party to renegotiate the contract.[75]

Paragraph 2 sets out the consequences of the proposed renegotiation being refused or failing. The parties may agree to terminate the contract on such date and under such conditions as they determine or ask the court to revise it. Where the parties fail to come to an agreement within a reasonable time, the court may, on the request of one party, revise the contract or terminate it, on such a date and subject to such conditions as it determines.

This article departs from the previous approach. Its effect is to reverse the famous and very long-standing '*Canal de Craponne*'[76] decision in which the *Cour de cassation* held that the contract should be upheld rigidly in accordance with its terms. The court should not use the passage of time or changes in circumstances as grounds for inserting new terms that the parties have not agreed. In the absence of a clause requiring or allowing the variation of its terms, the contract would remain in its existing form.

This principle had come under increasing strain as the number of long-term contracts multiplied and economic conditions became more unstable. Its potential severity was attenuated by the recognition and enforcement of hardship clauses and the scope for unilateral termination by one party of a contract of indeterminate duration.[77] In some cases, the courts also resorted to the principle of good faith to make adjustments that were thought to be fair.[78]

The introduction of Article 1195 is intended to promote 'contractual justice' (*justice contractuelle*). It does so by allowing the parties to correct serious imbalances that arise during the life of their contract. Like Article 1171, which protects against unfair terms, it acts as a counterweight on the principle of the binding force of contract. A balance is sought between holding parties to the agreed terms and a concern for fairness. It is, however, open to the parties to contract out of Article 1195.

[74] ibid at 518.
[75] Translation by Cartwright *et al.* (n 2).
[76] Civ 6 March 1876, 1876.1.193 noted by A Giboulot.
[77] P Stoffel-Munck, 'L'imprévision et la réforme des effets du contrat', RCD Hors-Série 2016.30.
[78] Soc 25 Feb 1992, D 1992.390 noted by M Defossez; Com 29 June 2010, RDC 2011.1.34 noted by E Savaux.

Article 1195 is inspired by the laws of certain other European countries[79] and also international contract law instruments. Both the UNIDROIT Principles[80] and the Principles of European Contract Law[81] contain provisions which require or enable renegotiation. They also give the court jurisdiction to rebalance the contract in the light of changed circumstances.

Unsurprisingly, there is no similar rule in English law. Unless a right to terminate arises, only the narrow doctrine of frustration can rescue a party that is unable to point to a force majeure or undue hardship clause. Its effect is to discharge the contract, not enable the court to adapt it. The rationale is that the parties themselves are better placed to anticipate how circumstances might change and negotiate and agree the consequences. This avoids the uncertainty attendant upon possible intervention by the court.[82]

6. Remedies

It is in respect of remedies for breach of contract that the reforms have been most innovative. Remedies were dispersed across the 1804 Code. All remedies are now grouped together in one section of the Code. New Article 1217 provides that the remedies potentially available to the injured promisee where there has been a breach are as follows: to refuse to perform or suspend performance of his own obligations, to claim enforced performance, a reduction in the price, compensation for loss, and to terminate the contract. Any remedies that are not incompatible can be combined.

Spatial constraints mean that the focus in this article will be on the most striking innovations, which relate to specific performance and termination.

a) Compelling performance

The reforms affirm the central place of specific performance as a remedy for breach of contract. Articles 1217 and 1221 state that, upon breach, the injured promisee can seek performance of the contract. Although specific performance has long been widely available, Article 1142 of the 1804 Code emphasized damages to the exclusion of other remedies.[83] This had, however, been construed by the courts restrictively as only applying to obligations which were personal in character. The new Code adopts this interpretation and clearly asserts the centrality of the remedy.

One notable innovation is the limitation of the availability of specific performance. Article 1221 states that the remedy should not be ordered where there is 'a manifest disproportion between its cost to the promisor and

[79] Para 313(1) of the BGB; art 1467 of the Italian Civil Code.
[80] Art 6.2.2 of the UNIDROIT Principles.
[81] Art 6:111 of the Principles of European Contract Law.
[82] E McKendrick, *Contract Law, Text, Cases, and Materials* (7th edn, Oxford University Press 2016) 740–2.
[83] Art 1142 of 1804 Code.

the benefit to the promisee'. This is a significant break from the past. Before the reforms, the remedy was available as of right; the defaulting promisor could not resist it on grounds of proportionality or reasonableness.[84]

This was illustrated in several famous decisions of the *Cour de Cassation*. In one, a building company built a house 13 inches beneath the height required in the contractual specification. The Aix-en-Provence Court of Appeal found that the breach did not relate to an essential term of the contract, and that the house was fit for purpose. It therefore declined the invitation to order that the house be demolished and rebuilt. This decision was quashed: the injured promisee was entitled to compel the defaulting promisor to perform its obligations to the letter.[85] In another, a similar conclusion was reached in respect of a swimming pool built with three rather than the contractually specified four steps, even though the missing fourth step did not impede access to the pool.[86]

Limiting specific performance is a reaction to these controversial decisions. The rationale is that seeking performance where there is a manifest disproportion between its cost and the benefit to the promisee would amount to an abuse of right (*abus de droit*).[87]

The scope of the exception is unclear. No guidance is given as to the meaning of 'manifest disproportion'. The general consensus amongst commentators is that it will be interpreted narrowly by French courts, which have historically been very willing to order specific performance.[88] Only in extreme cases can the court be expected to refuse the remedy. It is unlikely to be sufficient that compensatory damages are adequate to fulfil the expectations of the promisee, that a replacement can be obtained in the marketplace, or that the cost of granting the remedy is high. Specific performance is therefore likely to remain available for the promisee to prefer over damages.

This nudges French law closer to the approach taken in international contract law instruments. Both the UNIDROIT Principles[89] and the Principles of European Contract Law[90] recognize that the injured promisee is entitled to specific performance subject to certain exceptions, including that performance would be unreasonably burdensome or expensive, as in the new Code. There is also an exception where performance is reasonably obtainable from another source, which the draftsmen of the reforms chose not to adopt.

Article 1221 also brings about a modest *rapprochement* with English law. In England, where specific performance is granted only exceptionally, the remedy will be refused if it would cause undue hardship to the defaulting promisor.[91] This has parallels with the new French law exception where the cost of performance to the promisor is wholly out of proportion to the benefit that it

[84] Rowan (n 36) 37–52.
[85] Civ (3) 11 May 2005, RDC 2005.323 note D Mazeaud.
[86] Civ (3) 17 Jan 1984, RTD civ 1984.711.
[87] *Rapport au Président* (n 26).
[88] Chantepie and Latina (n 45) 546–54; Deshayes, Genicon and Laithier (n 48) 485–8.
[89] Art 7.2.2 of the UNIDROIT Principles.
[90] Art 9:102 of the Principles of European Contract Law.
[91] *Wedgwood v Adams* (1843) 49 ER 958.

would confer on the promisee.[92] The wording of the exception might even bring to the mind of an English lawyer the terms of the House of Lords decision in *Ruxley Electronics and Construction Ltd v Forsyth* on the scope of cost of cure damages.[93] As with specific performance, the availability of this remedy is restricted in order to avoid undue hardship to the defaulting promisor. Both restrictions are rooted in a desire to balance the competing interests of the promisor and the promisee.

b) Termination

Another interesting innovation concerns termination for breach of contract. The Code now contains a detailed and comprehensive section comprising seven articles on termination. This is in contrast with the 1804 Code, in which only one article dealt with the remedy.

The main substantive change is the formal recognition of self-help termination. Until the reforms, termination was a matter for the court. The long-standing rule deriving from the 1804 Code[94] was that, subject to certain exceptions,[95] the victim of a breach who wished to terminate had to apply to the court for an order discharging the contract. He was unable to treat the breach as terminating the contract; only the court could make this decision.

The supervisory role of the court over termination was regarded as necessary protection for the contractual relationship and the interests of the defaulting promisor.[96] It meant that the court could ensure that any attempt to oust him from the contract was legitimate[97] and verify that the contract could not be saved.[98]

Following the reforms, judicial termination is one of three options available to the injured promisee that are listed in Article 1224; the others are termination pursuant to a right in the contract and self-help termination. As to the latter, the promisee can now terminate the contract where the breach is 'sufficiently serious', simply by notifying the defaulting promisor. The aim is to make it quicker, easier, and cheaper for the promisee to terminate. This can be

[92] *Tito v Waddell (No 2)* [1977] Ch 106 325–8 (Megarry VC).
[93] [1996] AC 344 (HL).
[94] Art 1184 of the 1804 Code.
[95] One exception was where the contract included a termination clause. Another exception was where the breach was so serious (*comportement grave*) that continuation of the contract was extremely difficult or impossible: Civ (1) 13 Oct 1998, Bull civ I no 300, D 1999.198 note C Jamin; see Rowan (n 36) 80–94.
[96] J Rochfeld, 'Résolution et exception d'inexécution' in P Rémy-Corlay and D Fenouillet (eds), *Les concepts contractuels français à l'heure des Principes du droit européen des contrats* (Dalloz 2003) 216.
[97] Introductory comments of Rochfeld in *Avant-Projet de Réforme du Droit des Obligations (Art 1101 à 1386 du Code civil) et du Droit de la Prescription (Art 2234 à 2281 du Code Civil) under the direction of P Catala, 22 Sept 2005* (Documentation française 2006).
[98] R Cassin, 'Réflexions sur la résolution judiciaire des contrats pour inexécution' RTD civ 1945.12, [2].

attributed to a desire to promote economic efficiency ('*efficacité économique*') in French law.[99]

Despite the curtailment of the court's role, the new termination regime continues to be protective of the defaulting promisor and the contract. Various safeguards have been introduced in new Article 1226. First, upon breach, the injured promisee must put the promisor on notice that performance must be effected within a reasonable period of time, failing which termination will follow.[100] This gives the promisor another chance to perform. Second, if the defaulting promisor remains in breach at the end of the period, the promisee must give him a further notice that the contract is at an end, stating the grounds for termination. The terms of the notice are a potential source of ammunition for the promisor to bring proceedings to challenge the termination.

The powers of the court, although restricted by the reforms, are still remarkable. This is likely to be particularly striking to English lawyers unaccustomed to judicial intervention in the bargain made by the parties. Where the defaulting promisor challenges the termination, the court can deny the remedy and compel performance such that the contract remains on foot. It can even grant him a period of grace (*délai de grâce*) in which to perform. Good faith can also be invoked to protect him against termination without good cause.

The formal recognition of self-help termination brings French law closer to the position in English law and international contract law instruments. In England, if the injured promisee elects to terminate following a repudiatory breach of contract, he does not need any order from the court.[101] The court only has a role to play if the defaulting promisor wishes to challenge termination and to argue ancillary issues such as competing claims to compensatory damages.

The convergence between French and English law should, however, not be overstated. Notable and telling differences remain. In England, there are no procedural requirements for self-help termination similar to those in new Article 1226. The injured promisee wishing to terminate needs only to communicate to the defaulting promisor—orally or in writing—that he is treating the contract as at an end.[102] He does not have to give any reason, as long as a valid reason exists and he is entitled to terminate.[103] Termination takes effect immediately and the promisor is allowed no additional time to perform. Unlike in France, the remedy for wrongful termination is not to compel performance but damages. The court does not have a general power

[99] *Rapport au Président* (n 26).
[100] Except where there is urgency: art 1226 of the Civil Code.
[101] For a statutory exception, see section 90 of the Consumer Credit Act 1974.
[102] *Vitol SA v Norelf Ltd (the 'Santa Clara')* [1996] AC 800 (HL) (Lord Steyn).
[103] *James Spencer Co Ltd v Tame Valley Padding Co Ltd* (CA, 8 April 1998); *SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm); [2012] All ER (D) 259 [73] (Cooke J).

to grant a period of grace[104] and the defaulting promisor is also unable to invoke the principle of good faith to challenge termination. This is justified by a desire for commercial certainty and the speedy resolution of disputes.

There are more parallels with international contract law instruments, although differences remain. Termination by notice is allowed under the UNIDROIT Principles[105] and the Principles of European Contract Law.[106] In both, there is scope for the notice to allow the defaulting promisor additional time to perform, effectively giving him a second chance.[107] Unlike in France, the UNIDROIT Principles do not permit the court to grant a grace period. This is due to a concern to avoid delaying the injured promisee exercising his right to terminate.[108] The promisor does, however, have a right to cure defective performance where the cure is prompt and the promisee has no legitimate reason to refuse, unless time is of the essence.[109]

IV. A MORE ACCESSIBLE, PREDICTABLE, AND ATTRACTIVE FRENCH LAW OF CONTRACT?

The last part of this article assesses the reforms. An important question is whether the new provisions fulfil their avowed goals of making French contract law more accessible, predictable, influential abroad, and competitive on the international business scene. It will be argued that, while the reforms have achieved these goals in some ways, they have failed in others.

A. A More Accessible and Predictable Law

Undoubtedly, the new Code has made French contract law more accessible and predictable. Its text is a more coherent, up-to-date and accurate statement of the law. There is now much less need to delve into the mass of case law that had developed over 200 years to interpret the Code.[110] By codifying and

[104] See the exceptions mentioned to this general principle in S Rowan, 'Resisting Termination: Some Comparative Observations' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Contract* (Hart 2017) 163. See also S Whittaker, 'A Period of Grace for Contractual Performance?' in M Andenas *et al.* (eds), *Liber Amicorum Guido Alpa, Private Law Beyond the National Systems* (BIICL 2007) 1083. For examples of statutory exceptions, see the Law Property Act 1925, section 146; the Consumer Credit Act 1974, sections 76, 87 and 98.

[105] Art 7.3.2 of the UNIDROIT Principles.

[106] Art 9.303 of the Principles of European Contract Law.

[107] Art 7.1.5 of the UNIDROIT Principles and art 8.106 of the Principles of European Contract Law.

[108] H Schelhaas, 'Commentary on article 7.1 of the UNIDROIT Principles' in S Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, Oxford University Press 2015).

[109] See art 7.1.4 of the UNIDROIT Principles and art 8.104 of Principles of European Contract Law.

[110] An example is the law on termination, which had little coverage in the 1804 Civil Code. The absence of a comprehensive termination regime meant that termination principles developed mainly in the cases, with solutions that were not always coherent and predictable. The *Ordonnance* has introduced a comprehensive termination regime and there is now less need to rely on case law.

clarifying the solutions reached in those cases, the reforms have brought greater certainty.

The consensus amongst French lawyers that codification of case law has served to enhance certainty and predictability is perhaps not obvious to a common law lawyer.[111] After all, contract law in England is almost entirely found in case law. One needs to look at a constellation of judicial decisions—many only properly intelligible to lawyers—to form a clear picture. Yet English law is praised for promoting legal and transactional certainty and its flexibility. It is highly influential abroad and favoured by many commercial parties. There may therefore seem to a common law lawyer to be some irony that, in order to compete with this, the French reforms sought to address a perception that the law had become too case-law based and consequently uncertain and inaccessible.

This very different perception of the role and uncertainty of case law stems from the fact that cases do not have anything like the same authority in French law.[112] There is no formal doctrine of precedent. The number of appellate cases is innumerable in comparison with England and the court system is not centralized. The *Cour de cassation* is composed of 6 chambers and more than 100 judges who deal with over 20,000 disputes a year in civil and criminal matters alone.[113] There are 33 courts of appeal, comprising over 1,000 judges. It is therefore much more difficult than in England to identify important decisions to which weight should be attached and extract binding principles. There is also an increased risk of inconsistent decisions. It does not help that the style of judgments in France is laconic and often does not reveal the reasoning of the court. The inaccessibility and resulting uncertainty of judge-made law was therefore real. Codifying and clarifying principles that had become well-established was necessary and welcome.

B. A More Attractive and Competitive Law?

A key part of the rationale for the reforms was to render French law more attractive to foreign legislators and commercial parties. The hope was that renewing the Code would re-establish its status as a model for other countries, 'attract potential foreign investors', encourage contracting parties to choose French law to govern their contracts, and facilitate its use in

Similarly, the 1804 Code did not contain a single article on the formation of contracts, which was dealt with only by judge-made rules. The *Ordonnance* has introduced 15 new articles that regulate this area, rendering the case law less important.

[111] Although note the various texts that attempt to 'restate' English law using a series of propositions or statements of principles, eg N Andrews, *Contract Rules, Decoding English Law* (Intersentia 2016).

[112] On the role of the courts and the authority of case law in civil law, see J Bell, *French Legal Culture* (Butterworths Lexis 2001) 66–72.

[113] Statistics of the *Cour de cassation*: <https://www.courdecassation.fr/IMG///CC-STATISTIQUES-2015.pdf>.

international contracts.[114] Whether the reforms succeed in fulfilling these lofty aspirations remains to be seen but the following early observations can be made.

1. *Positive aspects of the reforms*

On one view, the extensive codification of the case law has in itself rendered French law more attractive to foreign legislators and commercial parties. At the very least, they can now more readily and clearly understand it. Some of the innovations introduced by the reforms are also commercially sensible. An obvious example is the new provisions on remedies for breach. The new remedial regime is now less rigid and more flexible. It strikes a fairer balance between the competing interests of the parties. The new exception to specific performance enables the court to reach more proportionate results that avoid punishing the defaulting promisor. Similarly, the injured promisee's option to terminate unilaterally reduces the scope for interference by the court. He can escape from the failed contract and reallocate his resources to other opportunities more quickly, thereby minimizing the losses of both parties. This can only serve the interests of commercial parties.

It is doubtful, however, that the new Code goes far enough. The significant powers vested in the French court to interfere with the contract, the new uncertainties that have been created and the absence of important concepts found elsewhere are unlikely to appeal to foreign law reformers and commercial parties. They can be expected to deter any significant move away from the contractual regimes of common law countries.

2. *The significant powers of the court to interfere with the contract*

French contract law has not been fundamentally changed by the reforms. It remains highly interventionist and the court's jurisdiction to interfere with the contract is still considerable. The reforms have actually reinforced this jurisdiction in several respects. Aside from the greater prominence for the principle of good faith, the best examples are the new general powers to strike down unfair terms and the new provisions on hardship that allow the court to adjust the allocation of risk agreed by the parties.

Even where the reforms sought to reduce the role of the court, its powers are still significant. This is most striking in the context of self-help termination. Where the defaulting promisor challenges the injured promisee's termination of the contract, there is considerable scope for the court to intervene. It can do so to keep the contract alive and even grant the defaulting promisor a period of grace. This creates uncertainty that in practice is likely to compound the difficulties that arise out of the failure of the contract.

[114] *Rapport au Président* (n 26). See the article by J Cartwright 'Un regard anglais sur les forces et faiblesses du droit français des contrats' RDC 2015.691.

There are various possible explanations as to why the draftsmen chose to retain and even enlarge the already significant powers of the court, despite their avowed aim of making French law more commercially attractive. One is that the reforms were never meant to be a break from the past. French contract law has always had different values and philosophical underpinnings to many common law systems, not least England. It adopts a more moral approach and is less liberal. Unlike in England, the injured promisee's interests are not mainly understood in economic terms.[115] The concept of contract is more subjective. It is seen as a consensual bond that has intrinsic value.[116] The relationship between the parties is of paramount importance. In the words of the renowned French contract lawyer, Mestre: 'the *raison d'être* [of the contract] is to unite individuals… It is to be performed loyally … and is … above all a human affair … The contract cannot be reduced, in an economic approach, to a transfer of values or a modification of estates.'[117]

While the draftsmen sought to make French contract law more commercial, this was never intended to be at the expense of its core values. The *Rapport au President*, which is the explanatory note written by the draftsmen to accompany the reforms, explains that 'enhancing the attractiveness of our law does not, however, require us to relinquish balanced legal solutions that are not only protective of the parties but also effective and responsive to changes in the market economy'. Enhancing legal certainty and commercial attractiveness was therefore balanced against the desire to promote substantive fairness. In many circumstances the latter was given precedence.

Another possible explanation is that the commercial parties which the draftsmen had in mind are not the international corporations that commonly choose to resolve their disputes under English law. Litigants in the senior English courts are often organizations of substantial size and geographical footprint. They are adept at looking after their own interests and judging the commerciality and fairness of opportunities and their agreements. English law has inevitably been developed by and to some extent for these parties. Its individualism and preferment of freedom of contract are suited to them.

These factors may have been thought to hold less sway in France. It does not have anything like the same status as an international dispute resolution centre. Commercial parties involved in disputes there are generally more disparate; small and medium-sized enterprises are more prominent. Many will have limited access to legal advice and insufficient sophistication to scrutinize and challenge disadvantageous terms. Protective rules that blunt the perceived harshness of freedom of contract might have been thought to be more appropriate for this core group of users of French contract law. It is in their interests that interventionism continues to prevail.

[115] Cartwright (n 114) 289. [116] ibid.
[117] J Mestre, 'Préface' to B Fages, *Le comportement du contractant* (PUAM 1997).

3. Uncertainty in relation to key notions

Another reason for doubting that the reforms have improved the attractiveness of French law is that they do not define or give guidance on several key concepts. The lack of definition of good faith has already been noted and there are other examples. One is in the context of unforeseen circumstances (*imprévision*). There is no definition of 'unforeseen circumstances' in the new code. This begs a number of questions. For instance, must the circumstances be outside of the control of the parties? Does 'unforeseeable' mean 'reasonably unforeseeable'? There is no guidance either as to when performance should be considered as 'excessively onerous'. This leaves considerable leeway for interpretation.[118]

Another example relates to the new termination regime. The reforms contain no guidance as to what constitutes a breach that is 'sufficiently serious' to justify termination. This question is of enormous practical relevance and all the more important now that the injured promisee can terminate without court involvement. He needs to be confident in his right to terminate safely with minimal risk of challenge.

Leaving these issues to be resolved by lower courts does little to promote certainty. It is unlikely to dissuade commercial parties from English law as their governing law of choice. This is especially so since, as already explained, the style of judgments in France is laconic. The courts seldom give reasons for their decisions. It can therefore be difficult to determine from the case law precisely what criteria have been taken into account. Providing guidance on key concepts would not have eliminated all uncertainty and the courts would still have had considerable discretion. But it would nonetheless have been a step in the direction of improved predictability.

In remaining silent on these points, the French draftsmen chose to depart from the approach taken in the UNIDROIT Principles and the Principles of European Contract Law. They are much more precise than the new French Code: they provide a definition of hardship[119] and guidance as to the types of breach that justify termination.[120]

4. Missed opportunities?

The reforms might have gone further in other ways to render French law more commercially competitive. Opportunities arguably missed include the introduction of a right to terminate for anticipatory breach of contract. This would have enabled the victim of a breach to treat himself as discharged, even before the time that performance becomes due. Even after the reforms,

[118] Stoffel-Munck (n 77)
[119] Art 6.2.2 UNIDROIT Principles.
[120] Art 7.3.1 of the UNIDROIT Principles and art 8.103 of the Principles of European Contract Law.

French law does not recognize anticipatory breach.[121] The injured promisee cannot terminate or seek specific performance or damages before the due date of performance.

To introduce termination for anticipatory breach would, like self-help termination, have promoted commercial efficiency. It would have meant that the injured promisee could escape from the contract even more quickly, potentially further minimizing his losses. This would have been consistent with the new Article 1220, which provides for anticipatory *exceptio non adimpleti contractus* (*exception d'inexécution*). A contracting party can suspend his own performance as soon as it becomes evident that the other party will not perform his obligations by the due date, if the consequences of breach are sufficiently serious. The practical effect is that performance can be suspended before it becomes due, even if the contract cannot be brought to an end. The absence from the reforms of anticipatory breach is not only regrettable but also surprising, given that earlier reform projects had countenanced forms of 'anticipatory termination'.[122]

V. CONCLUSION

Before the reforms the then French Minister of Justice lamented that 'our law dates from over two centuries … Times have changed … Our law does not inspire anyone in the world …There is a battle of influence in Europe between our continental law … and the common law…. This battle is … permanent.'[123] Whether French contract law will inspire and be more competitive is doubtful in view of the unanswered questions that still remain and the new uncertainties created.

The reforms are, however, welcome. They are a clear improvement on the 1804 Code. The new regime is much more comprehensive and intelligible. At least in some respects there is now a better balance between the interests of the parties and, without compromising key values of French law, more sensible and fairer solutions should be reached. Bringing French law more into line with solutions that work effectively in other jurisdictions and international contract law instruments is also to be applauded, despite the missed opportunities.

The face of the Civil Code in the area of obligations is likely to change again soon. Another reform is on the way. Proposals relating to delictual liability have been drafted to replace the iconic Articles 1382–1386 of the Civil Code.[124] The

[121] S Whittaker, 'How Does French Law Deal with Anticipatory Breaches of Contract?' 45 (1996) ICLQ 662.

[122] Art 111 of the Terré Project (n 20); Art 169 of the Ministry of Justice reform project 2008 (n 20).

[123] Official report of the session of 23 January 2014 in the *Sénat* <https://www.senat.fr/seances/s201401/s20140123/s20140123014.html>.

[124] Avant-Projet de Loi, Réforme de la responsabilité civile <http://www.textes.justice.gouv.fr/art_pix/avpjl-responsabilite-civile.pdf>.

first proposals were published in April 2016. A period of consultation was initiated and closed at the end of July 2016. Based on the comments that were received in this consultation, new proposals were published in March 2017.[125] They contain 83 new articles in which there are significant innovations.[126] It is to be hoped that the presidential elections this year, which will lead to a change of government, will not slow this exciting process.

[125] Projet de réforme de la responsabilité civile of 13 March 2017 <http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf>.

[126] For example, the introduction of a form of mitigation (proposed art 1263) and an 'amende civile' which is akin to punitive damages (proposed art 1266-1).