DOI: 10.33498/louu-2019-03-220

François Ancel

President of the International Chamber
of the Court of Appeal of Paris
(Paris, France)
chambre5-16.ca-paris@justice.fr

Bénédicte Fauvarque-Cosson

Doctor of Law, member of Conseil d'Etat, Professor
in Private Law (University Panthéon-Assas, Paris 2),
Full Member (Academician) of the International
Academy of comparative law
(Paris, France)
benedicte.fauvarque-cosson@conseil-etat.fr

УДК 347.44

IS RENOVATING THE GENERAL LAW OF CONTRACTS USEFUL? THE FRENCH EXPERIENCE

ABSTRACT. The ordonnance of 10 February 2016 for the reform of contract law, of the general regime and of proof of obligations came into force on 1 October 2016. Further changes were made by the legislator in 2018. This reform modifies one of the most important part of the Code civil: the provisions on contracts and obligations

The reform aims at giving more accessibility and clarity to French contract law, and it undeniably has already made it more attractive internationally.

In this paper, we explain why, in an international world where contracting parties can chose the law applicable to their contract, we believe that a codified law is very important to overcome the void left by the contract and to resolve the difficulties that have arisen during its existence. Besides, it brings legal certainty, accessibility and visibility.

We also explain why we think that a modern general law of contracts is a unique opportunity to propose a base of legal provisions considered as "minimal" and to affirm a specific legal policy. If it is clear, that practitioners and judges should not conceive contract law as the expression of a contractual public order *(ordre public contractuel),* it is sometimes difficult to know to what extent contracting parties can set aside some provisions of the governing law.

Finally, we explain how, after having been for nearly two centuries the instruments of a certain legal nationalism, national codifications have become the cement of European private law. Indeed, the French contract law reform, which was built on the diversity of Europe, drew much inspiration from various European and international models. In turn, it has attracted a great deal of interest abroad, was translated into several languages and is extensively commented.

KEYWORDS: codification; contract law; mandatory rules; non-mandatory rules; civil law tradition; Code civil; European contract law.

© François Ancel, Bénédicte Fauvarque-Cosson, 2019

The *ordonnance* of 10 February 2016 for the reform of contract law, of the general regime and of proof of obligations, which came into force on 1 October 2016 and which was ratified by the law on 20 April 2018[1], constitutes an important step in the long life of the *Code civil* that governs civil law applicable in France since 1804. It does not change the *Code civil* in its entirety, but it modifies one of its most emblematic parts, the provisions on contracts and obligations that had remained almost unchanged since 1804.

The ambitions of the reform are threefold: to give more accessibility and clarity to French contract law, to strike a good equilibrium between conflicting objectives, to make French law more attractive internationally. This reform is characterised by its openness to external inspirations. This spirit of openness, which forms part of its richness, results from the academic and governmental drafts, from the confrontation of the opinions expressed during the course of many consultations – which made it possible to neutralise the extremes and to reach a certain consensus around balanced positions, – and from taking into consideration the European and international context.

The opportunity to redraft the French *Code civil* arose in the late nineteenth century and was under consideration until the beginning of the twenty-first century. The comparison with the German civil code – the BGB – which came into force on 1 January 1900, sharpened the desire for a French reform. In the twentieth century, other parts of civil law were either governed by specific legislative texts, or left to be developed by courts. These movements accentuated the isolation of the *Code civil* and widened the gulf between the Code and civil law more generally. Since 1964, and mainly under the initiative of Jean Carbonnier, the *Code civil* has undergone some reforms which mainly concerned family law[2].

It is not until 2004 that, thanks to the celebrations of the bicentenary of the *Code civil*, a strong political input was given by the President of the Republic, Jacques Chirac, who proposed the challenge to rewrite "in 5 years the law of contracts and the law of sureties"[3]. Shortly before the bicentennial of the Civil Code, "a handful of civil lawyers who were academics" (according to Pierre Catala in his general presentation of the preliminary draft of the law of obligations and the prescription that was elaborated under its aegis) engaged in a project of modernisation of the law of obligations. Pierre Catala himself said that the impulse came from a symposium comparing French law with the Principles of European Contract Law, resulting from the work of the commission chaired by Professor Ole Lando. By that time, several academic initiatives launched by the European Commission, as well as by networks of

[1] H Beale and others, *Cases, Materials and Texts on Contract law* (3rd ed, Hart Publishers 2019).
[2] F Ancel, J Gest (coréd), *Aux sources de la réforme du droit des contrats* (Dalloz 2017).
[3] Beale (n 1).

European scholars, brought awareness to the necessity of reforming our law of contracts, torts and prescription. Besides, the first *Doing Business* report (2004 edition, under the aegis of the World Bank) revived French pride in its codified legal system by criticising the French legal tradition[4].

Is renovating the general law of contracts useful? In this paper, we will first consider the reasons for asking such a question and then, based on the specificities of the civil law tradition, we will develop two arguments for our affirmative answer: the first one relates to the usefulness of the central distinction between mandatory and non-mandatory rules, and the second to the formation – through comparative law and national codifications – of a European common legal culture.

Reasons for raising the question of the usefulness of a recodification

Legislations and special codes have multiplied. They bring specific answers according to the types of contracts, the quality of the parties (individuals, traders, consumers, professionals) and the nature of their contractual relationships (private, commercial or professional). Therefore, some may doubt the usefulness of a "general law of contracts".

In addition, the law is now developed according to various circuits, some of which are beyond State control. Soft law, guides and good practices are brought by continuously increasing transnational actors: companies, professional organisations, NGOs, experts, stakeholders... Economic actors draft complex contracts, following models emanating from professional associations and large multinationals. Thus, at a time where standard-form contracts and contract terms are the main legal instruments of large firms, some may think that one could use contracts rather than legislation or case law to create the standard.

The 2016 Nobel Academy Prize for Economic Sciences was awarded to two authors, Oliver Hart and Bengt Holmström. They were awarded the prize for their work on the theory of contract which promotes the so-called "incomplete" contract theory, after having noticed the quasi impossibility of drafting the ideal contractual document, that is to say exhaustive, in light of the complexity of the legal, operational and financial issues involved. Faced with contracts that are today inherently incomplete, they consider it preferable to abandon the ideal of "completeness" of a contract and instead to privilege what they call "the best elementary contract", which we know it cannot predict everything. In this context, we also see the point of developing mechanisms, within general contract law, that will make it possible to overcome the void left by the contract and to resolve the difficulties that have arisen during its existence[5].

[4] Beale (n 1).
[5] Ibid.

www.pravoua.com.ua

We believe that a codified law is indeed very important to overcome the void left by the contract and to resolve the difficulties that have arisen during its existence. Besides, it brings legal certainty, accessibility and visibility. Moreover, this allows the legislator to forge a model that finds its source, not in the implicit will of the interested parties but in a set of social, economic, and historical considerations. In addition, the general law of contracts allows the parties to avoid the cost of drafting contracts. Lastly, specific law is not generally sufficient in itself, it may contain inaccuracies, or even omissions, which the general laws are capable of completing.

This issue has been specifically debated as regard the question of "change of circumstances" which led to the introduction, into the French Civil code, of a new provision (art. 1195) enabling the judge to adapt or terminate the contract in case of an unexpected change of circumstances. Some representatives of companies promoted the drafting of this text, as they expressed the difficulties encountered by the small and medium-sized enterprises to get the support of a legal department which could guarantee them the implementation of hardship clauses into their contracts during the negotiations.

Codifying or recodifying the law also creates a vibrant intellectual environment. There are now many commentaries of the new provisions of the Code civil and these considerably enrich the reflections and the practice[6].

The French law of obligations has constantly been updated thanks to the creativity of French judges, scholars and also through legislative initiatives which had taken place outside the *Code civil* (in other Codes or in statutory provisions not inserted in any code). This, however, had made French law difficult to read. For all these reasons, a modernised *Code civil* was considered the best instrument to promote legal certainty and business efficiency. However, the new French common law of contracts does not make a clean slate of the past. It must find its place within a complex legal environment, which takes account, for reasons of legal certainty, of the contracts concluded previously, but also of the will of the parties and the existence of special legal regimes that it is not intended to alter. A difficult question that has arisen and will certainly give rise to some important decisions by the courts is whether the new rules are mandatory or non-mandatory, a distinction that is characteristic of the civil law tradition[7].

ПРАВО УКРАЇНИ • 2019 • № 3 • 220-228

[6] Beale (n 1).
[7] F Ancel (coréd), *Le nouveau droit des contrats. Guide bilingue à l'usage des praticiens* (LGDJ 2019).

The distinction between mandatory and non-mandatory rules: a key feature of the civil law tradition

The general law of contracts is an opportunity to propose a base of legal provisions considered as "minimal" and to affirm a specific legal policy. It is clear, both from the report to the President of the French Republic and from parliamentary works, that practitioners and judges are invited not to conceive contract law as the expression of a contractual public order *(ordre public contractuel).*

All that is not forbidden is allowed. The exceptions that come from public policy, however widespread they may be in fact for certain sectors, always have, in law, a characteristic of exceptions and this should be kept in mind by the judges when, as part of their mission of interpreting the law, they qualify certain provisions as mandatory.

There are several indications that, in its general spirit, the texts of the *ordonnance* of February 10, 2016, as in some cases modified by the law of ratification, remain, like the Civil Code of 1804, "suppletive" of the will of the parties. The Report to the President of the Republic deduces the non-mandatory nature of these provisions when it explains "their suppletive character is inferred directly from Article 6 of the *Code civil* and from the new Articles 1102 and 1103, unless the imperative nature of the provision concerned stated explicitly otherwise". If some articles still contain the words "unless otherwise stated" (C. civ., Art. 1216-1, para. 2), or an equivalent precision, the Report is careful to note that this reference authorises "no contrary interpretation and does not in any way call into question the general principle of the suppletive nature of the provisions: this reminder results only from a pure didactic concern, taking into account the wishes expressed by professionals regarding certain provisions in particular (in particular on obligations)". In this matter, doubt must benefit the suppletive nature of the provision[8].

During the examination of the ratification law (2018), parliamentarians discussed the desirability of establishing a list of the mandatory provisions of contract law. This would have the advantage of avoiding excessive legal uncertainty for the parties. However, this was rejected. Some flexibility was needed. It was rightly argued that certain provisions, for example, those relating to the conditions of validity of the contract and to their sanction, are in essence of public policy without this being expressly reminded. It must also be admitted that provisions which recognise rights to third parties cannot be put aside by the parties. In addition, there are provisions such as those carrying definitions or classifications, for which a contrary stipulation would be nonsense[9].

[8] Ancel (n 7).
[9] Beale (n 1).

www.pravoua.com.ua

The importance of the French reform for the development of European private law

A close and complex relationship has developed between French contract law and the construction of European private law.

Long awaited by civil lawyers, the project of a European contract law first had the effect of suspending the French reform, in anticipation of a European model. Then, when the prospect of a European contract code came closer, French mistrust and resistance had an accelerating effect on the internal reform. In order to really understand the French reform, it is therefore necessary to have an idea of the European context near the end of the twentieth century and of the reactions that the European contract law project, sometimes confused with that of the European Civil Code, instigated in France as well as in other Member States of the European Union, sometimes for different reasons.

There was a time when Europe mobilized lawyers in its favor. Thus, after the First World War, a draft of a French-Italian code of obligations, conceived as the prelude to a Europeanisation of law, was born.

In the same way, at the end of the Second World War, some leading French academics engaged in the elaboration of a type of European law which, in their eyes, was inseparable from the political project of European construction: 'To make Europe, our Europe – and we know the vital necessity of constructing it – wrote Henri Mazeaud – we must make a European law'. What remains then to overcome? This spirit of particularism and pride of which we are all imbued... The question is not to know which code will prevail – the Italian code, the Swiss code, the German code or the French code – the question is whether, as the drafters of the Napoleonic Code did when they unified French law, good-willed jurists want to seek in the civil institutions of all the countries of our Europe those which should be preferred. In 1953, the Henri Capitant Association voted unanimously for a proposal aimed at the elaboration of a common code of obligations in Europe[10].

In 1961, in the early hours of European economic unification, Julliot de la Morandière raised this question:

> Is it conceivable that a real Common Market develops without unity of legislation? And should France, instead of thinking of reforming alone the part of its code relating to obligations and contracts, take the initiative to propose, at least to the signatory countries of the Treaty of Rome, an international conference in view of the development of unique rules?[11]

[10] Ancel, Gest (n 2).
[11] Ibid.

Later, Jean Carbonnier suggested to suspend the French project of recodification of contract law, pending a European codification that nonetheless did not arrive to finition. Thus, as early as 1945, one perceived the interest of such a unification had been perceived and the absence of a reform of contract law was largely a response to a desire to create an open market through European unification. The hope and the expectation of this unification have led the French authorities to favor the reform of some other parts of the Civil Code and in particular the law of persons and of the family[12].

This French movement in favor of the unification of European contract law declined as the draft of European contract law became a priority for the European Commission, supported by the European Parliament that believed at that time that "further harmonisation in the field of civil law [was] essential in the internal market". In 2001, the Commission issued a communication "concerning European contract law" in which it presented various options for "future European initiatives".

The Draft Common Frame of Reference (DCFR) was entrusted to European academics under the 6th Framework Program for Research and Technological Development. The official order was that it consists of: principles, definitions, and model rules and is based on national contract law (established case law and practices), the acquis communautaire, relevant international instruments, in particular the United Nations Convention on the International Sale of Goods (1980). It also had to provide consumers with high-level protection. The common European private law network that won the tender brought together academics, judges and practitioners from all EU countries and even other countries. It was composed of several autonomous groups. The most important of these was the study group on the European Civil Code (Study Group for the European Civil Code), chaired by Professor Christian von Bar[13].

Throughout the process, academics have played an important role in the contract law reform. From 2005 to 2016, many of them were involved with the Chancellery, along with other stakeholders, so that one cannot subscribe to the denunciation made by some of an "ordonnance-express". This expertise was independent, contradictory and dynamic. The work of a joint working group of the *Association Henri Capitant des amis de la culture juridique française and the Société de legislation comparée*, specially set up within the framework of the European Network of Excellence, constituted a formidable source of comparative law. This work was published by the *Société de législation comparée* in two separate volumes in 2008 (*Terminologie contractuelle commune* (2008) and *Principes contractuels communs* (Common Contractual Principles hereinafter

[12] Ancel and Gest (n 2).
[13] Ibid.

www.pravoua.com.ua

"CCP") and it was translated into English (as regard the CCP, the translation was limited to the black letter provisions) and published by sellier European law publishers. It has inspired the Chancellery, in particular its guiding principles built on the three pillars of freedom, security and contractual fairness as well as the analysis of each article of the CCP, insofar as they had been confronted with other sources (UNIDROIT Principles; Vienna Convention on the International Sale of Goods, CESL, Catala project and also the DCFR. In the part that was not translated, the CCP explain the changes proposed to the PECL, and analyse them in the light of the two French drafts (Projet Catala and Terré) as well as in the light of the existing soft law (PECL, UNIDROIT Principles, Code Européen des Contrats). The *"principes directeurs du droit européen du contrat" (liberté contractuelle, sécurité contractuelle, loyauté contractuelle)* which precede the CCP have formed the basis for an introductory passage entitled "Principles" in the first volume of the DCFR (where four principles are listed: freedom, security, justice, efficiency). Perceived by the European scholars as particularly "French", this work has had a limited influence on the final text of the DCFR. However, and much more importantly, they influenced the European Commission's decision to set up its own group of experts and to limit its ambition to the codification of the law of contracts (a decision which was subsequently further narrowed down to sales contracts)[14].

In 2011 the European Commission proposed a Common European Sales Law (CESL) for sales where one party is a consumer or an SME. It received strong support from the European Parliament but not from the European Council and in 2014 the Commission withdrew it. The Commission subsequently proposed much narrower texts, dealing only with certain aspects of the supply of digital content and the sale of goods to consumers. All these developments have had major impacts on national laws which continue to apply to both domestic and cross-border contracts in Europe[15].

In 2000, the European Union adopted 'United in Diversity' *(In varietate concordia)* as official motto. Due to the diversity of Member States, the unity targeted is complex. Based on an understanding that difference enriches human interactions, the path to unity is shown by the comparative analysis of existing texts and models. After having been for nearly two centuries the instruments of a certain legal nationalism, national codifications become the cement of European private law. The French contract law reform was built on the diversity of Europe, drawing inspiration from certain national laws and non-state, European and international models. From 2004 to 2016, the French drafts in turn attracted a great deal of interest

[14] Ancel and Gest (n 2).
[15] Beale (n 1).

ПРАВО УКРАЇНИ • 2019 • № 3 • 220-228

abroad, was translated into several languages and extensively commented. The 2018 modernised *Code civil,* also translated, is now part of Europe's legal heritage.

REFERENCES

Bibliography

Edited books

1. Ancel F (coréd), *Le nouveau droit des contrats. Guide bilingue à l'usage des praticiens* (LGDJ 2019) (in French).
2. Ancel F, Gest J (coréd), *Aux sources de la réforme du droit des contrats* (Dalloz 2017) (in French).
3. Beale H and others, Cases, *Materials and Texts on Contract law* (3rd ed, Hart Publishers 2019) (in English).

Франсуа Ансель
Бенедікт Фоварк-Коссон

ЧИ ДОЦІЛЬНЕ ОНОВЛЕННЯ ЗАГАЛЬНИХ ПОЛОЖЕНЬ ДОГОВІРНОГО ПРАВА? ДОСВІД ФРАНЦІЇ

Анотація. Постановою від 10 лютого 2016 р., яка набула чинності 1 жовтня того ж року, проведено реформу договірного права, яка змінила одну з найважливіших частин Цивільного кодексу Франції, а саме норми, що регулюють договірні зобов'язальні відносини. Подальші зміни були внесені законодавцем у 2018 р.

Реформа мала на меті забезпечення більшої доступності та зрозумілості французького договірного права і, безсумнівно, зробила його більш привабливим на міжнародному рівні.

У статті висловлена позиція, згідно з якою на міжнародному рівні, де договірні сторони можуть обирати право, застосовне до договору між ними, кодифіковане право відіграє важливу роль для подолання прогалин, що не закриті договором, а також для вирішення питань, що виникли за час його існування. До того ж цим забезпечується правова визначеність, доступність і видимість.

Обґрунтовано твердження, чому, на нашу думку, сучасні загальні положення договірного права – це унікальна можливість запропонувати базу правових положень, що розглядатимуться як "мінімальні", та закріпити конкретну правову політику. Поряд із тим, що фахівці-практики і судді не повинні розглядати договірне право як вираження договірного суспільного порядку *(ordre public contractuel),* іноді важко зрозуміти, як саме договірні сторони можуть не застосовувати деякі положення регулюючого права.

Аргументовано, яким чином національні кодифікації, які протягом майже двох століть були інструментами певного правового націоналізму, створили міцне підґрунтя європейського приватного права. Дійсно, реформа договірного права у Франції, побудована на різноманітті Європи, значною мірою спиралася на різні європейські та міжнародні моделі. Зі свого боку реформа викликала велику зацікавленість за кордоном, була перекладена на декілька мов і нині широко коментується.

Ключові слова: кодифікація; договірне право; імперативні норми; диспозитивні норми; цивільно-правова традиція; Цивільний кодекс Франції; європейське договірне право.