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Comparative ideas on the French reform of law of obligations[1]

Clément Cousin, Hélène Guiziou, Marie Leveneur, Benjamin Moron-Puech, Anne Stévignon

Introduction

In the debate about the French reform of contract law — which is getting closer with the official publication, last February of the project of ordinance — some arguments of comparative law are frequently used to oppose or promote the reform, especially on two topics: the cause and the place of the judge in the contract.

Aiming to assess theses arguments, five young researchers of Panthéon-Assas University (Paris II) headed by Professor Bénédicte Fauvarque-Cosson organised a workshop to collect opinions on theses topics from foreign researchers.

The following developments are a summary of the debates held in Leiden (Netherlands) on the 23 of January during an international congress dedicated to interaction between legal systems.

I. The disappearance of the cause: a real problem?

As the notion of cause pursues different aims, we have chosen to focus on two of them, so as to see how the reform could modify French contract law.

The cause is currently used as a tool to declare a contract void, when it contradicts some value that are important in the French society. Such a contract will be said to have an illicit cause. The cause is also used to ensure that every contractual performance has a counterparty. If not, it is said that the cause is absent of such a contract.

As we will see, those two functions of the cause are kept in the project of ordinance, but they are no more part of the container-notion which is the cause.

A. From illicit cause to public order

What French law says

To study the illicitness of the cause, we focused on a very recent case in French law, in which the Cour de cassation has confirmed the nullity of an insurance contract, based on an illicit cause (Cass., 1re civ., 29 oct. 2014, n° 13-19.729). In this case, an exhibition showing dead human bodies in everyday life positions and situations had been cancelled by the French local authorities, considering its disrespect for the human body after death. A case was brought before the Cour de cassation by the organizer of this exhibition, who sued his insurer who did not want to pay him the insurance premium after the cancellation.

[1] Les auteurs tiennent à remercier le Professeur Bénédicte Fauvarque-Cosson sans laquelle cet article n'aurait pu

Using the illicitness of the cause, the Cour de cassation decided that the insurance contract was null, even if the insurance contract itself was not immoral or infringing the public order, morality and public order being the two standards included in the notion of illicit cause.

The cause was thus here understood as the motives of the parties, more than the content of the insurance contract. Since the motives of the insured party was to organize an exhibition that disturbed public order, the insurance contract was to be declared null.

What the project of reform suggests (art. 1161)

The ordinance project would introduce an article 1161 in the civil code saying that "*the contract cannot derogate from public order by its content, or its aim, known or unknown by all the parties.*"

This article would put into the law the solution in the case mentioned above. The contract would still be declared null, not because its cause is illicit due to disturbance of public order, but directly because it derogates to public order. Indeed, the idea of article 1161 is that public order alone is enough. It does not need the support of the cause to be applied.

What foreign experiences can suggest

This exhibition has also taken place in other European countries. For example, it is interesting then to see that the exhibition was allowed in the Netherlands, but cancelled as well in Belgium or in Italy. But it is even more useful for our reflection to see which tools other legal systems use to deal with the same situation.

The most interesting elements came from Dutch law. The Dutch civil code has got rid of the cause in 1992. The notion of good faith has replaced it in most of its applications. Even though, writing off the notion of cause does not prevent from controlling the conformity of the contract to the public order. According to Dutch law, a control can be operated by the judge on any legal act, to say if this contract violates a statutory provision. The Supreme court insists on several elements in that regard, including the purpose of the contract, the parties' motives and the fact that the parties were or not informed of the fact that the contract was in violation of a statutory provision.

Another interesting evolution seems to have been an important reluctance of the Dutch judge to opt for the nullity of the contract. He rather likes to terminate the contract without any retroactivity. It would be hasty to say that this evolution is linked by the absence of the notion of cause. But it is likely that the absence of the cause may have favored the judge's tendency to avoid nullity.

Conclusion on the illicitness of the cause

These discussions on the question of the illicitness of the cause are very encouraging. The project seems to provide a useful tool, that would replace the illicitness of the cause[2].

[2] One could however wonder what will happen with the rules developed by the courts in order to characterize the illicitness of the cause. If the project mention some of these rules, such as the possibility to declare the contract void even if the illicitness was know only by one party, other are unmentioned, like the rule stating that the illicit motive has to be decisive. What will happen with this rule, that was part of the notion of illicit cause ?

Inspired by the different European examples, three main evolutions could appear with this new provision. First, we notice that a larger control could be operated by the judge. Public order is a rather wide but modern notion. It mainly enables a control of the conformity of the contract to the most important statutory provisions. Even though the good morals are written off the civil code, moral considerations could probably find a place in the very large notion of public order. As a consequence, if the reform was to be conform to the project of ordinance, the possibility of controlling the contract, and not only the cause, could usefully even increase the judge's room for maneuver.

Then, a whole case law could be easily developed, giving the judge a plastic tool, easy to adapt to new hypothesis that cannot be seen yet. Giving the judge a large power would enable him to adapt the statutory provisions to social evolutions, according to Portalis' vision, one of the most influent writer of the French civil code.

Finally, a certain reluctance of the judge to declare a contract void could appear. The judge could use this provision to find new outcomes for a contact that does not respect the public order.

B. From the absence of the cause to the good faith ?

After debating on the Our Body's case, we then focused on the Chronopost's case, whose solution has been set down in the article 1168 of the project.

What French law says

The Chronopost's case (Cour de Cassation, com., 22 oct. 1996, n° 93-18.632) is the story of a late mail delivery. The Société Banchereau, specialized in bovine import-export has sent a mail in order to concur to an adjudication of meat. The carrier of the mail, the Société Chronopost commits to deliver it the day after, before mid-day. This deadline corresponds to the adjudication's deadline. The contract between Chronopost and Blanchereau includes a limitation of liability clause. This clause limits the compensation due to the delay to the price paid for the transport. The mail is delivered after midday. The Société Banchereau cannot participate to the adjudication. Thus, the society sues the carrier asking for compensation of its loss. The carrier responds that its compensation cannot exceed the price paid for the transport, because of the limitation of liability clause.

The French Cour de cassation judges that the Chronopost society is specialized in express delivery. It has committed itself to deliver the mail in a prefix delay (the day after before midday). Thus, the limitation liability clause contradicts the essential commitment taken. Then, this clause has to be deemed unwritten.

The contradiction to the commitment taken reveals the *cause*, considered as the requirement of a counterparty in the contract.

What the project of reform suggests (art. 1168)

The ordinance project codifies the solution of the Cour de cassation in a new article 1168 of the civil code saying that « *Every clause that deprives the substance of the essential obligation of the debtor is deemed unwritten.* » This has been suggested since the first project

(Project called "Catala" in 2005). Thus, this article would not change the solution given by the Cour de cassation in this case.

What foreign experiences can suggest

Italian law Some countries have not suppressed the cause but understand it narrowly. In Italy, the cause is only the cause of the contract, not of the obligation. Thus, it cannot be the legal basis to an action deeming unwritten a special clause of a contract. But, the Italian legislation has created a special provision for this situation (Art. 33 of the Consumer code) saying that the clause limiting or suppressing the responsibility of the debtor its deemed unwritten.

Dutch law In countries where the cause doesn't exist, the good faith is used. For instance, in Dutch law, a fault has to be proven considering of the absence of good faith. Thus, the article 6:248-2 of the Dutch civil code says that "A rule, to be observed by parties as a result of their agreement, is not applicable insofar this, given the circumstances, would be unacceptable to standards of reasonableness and fairness." The only way to obtain the same effect in Netherlands as the Chronopost case is to characterize unreasonableness or unfairness, which are both corollary of good faith.

Chinese law The Chinese law uses the same tool than the Duch law. Article 54 alinea 2 of the Contract law of the People's Republic of China provides that "Either a party has the right to request a people's court or an arbitration institution to alter or rescind any of the following contracts [...] 2) any contract the making of which obviously lacks fairness" [3]. The obvious fairness is narrowly interpreted by the People's supreme court. The article 114 of the same code authorize the court to adjust the compensation when, compared to the actual damage it is disproportionate. Then, the judge can adapt the compensation to the damage.

Conclusion on the absence of cause

Foreign experiences teach us that the inexistence of the cause is not an obstacle to the compensation of the damages when there is a limitation liability clause. Good faith or its corollary can be and is used in the same manner by courts of other countries.

What we see in the project of ordinance is that the rule that would paralyze excessive limitation liability clause is no more linked to the cause. If the aim of the project is to clarify the French law and transform it into a comprehensible law — by suppressing the hardly exportable concept of cause — this is a good start. But, one could wonder if it is not necessary to link the rule stated by article 1168 to a comprehensive notion, just as it is right now. If the cause is no more the container notion of this rule, than an alternate has to be named. Foreign experience shows us that good faith could be this alternate and it would great if the draft of ordinance said so explicitly.

Conclusion on the cause

To conclude on the cause, it seems that its suppression can be seen as a desire to match with the majority of other legal systems, without changing — at least for this matter — the rules that currently govern French contract law.

[3] We thanks Jing Zhang (PhD Candidate at Universiteit Leiden) for his accurate translation of this article.

The suppression of the cause will probably not changed much to the power of the judge considering what happened in other countries where it has been suppressed. Their, the judges has found in public order and good faith the tools to do the same than they did before. Also, looking at Dutch law, in which the cause has been suppressed, teaches us that this suppression does not necessarily implies that scholars change the way they teach contract law. In deed, cause is still used in Dutch law to explain part of contract law, even if the word of cause has disappeared from the Dutch civil code.

Finally, the suppression of the cause can also be seen as the expression of a desire to refrain judges from using the cause to intervene actively on the contract, as they did those past years. Suppressing the cause would be a political move to show that the government is trying to protect legal certainty against the intervention of judges in the contract. This move could be seen as a counterweight to the new important powers, that the project now recognize to the judge when confronted with an unbalanced contract.

II. The judge: a part of the contract?

When a contract is unbalanced, from the beginning or during its performance, the question arising is whether the court should equilibrate the contract. The reform gives the judge new powers, to remove unfair terms from any contract, or modify a contract in the case of unforeseen circumstances. Comparative law will help us to assess whether these powers are too wide, or if the judge will use them in a restrictive way.

A. The Judge: king of unfair terms

What French law says

Nowadays, there are two provisions related to unfair terms in French law. First, the consumption code prohibits unfair terms in all B to C (business to consumer) contracts, even negotiated. Secondly, the French competition law has introduced a new mechanism that allows the courts to remove a clause if it creates a "significant imbalance" in the contract.

What the reform suggests (art. 1169)

The project plans to insert a provision in the civil code (art. 1169) to suppress unfair terms:

> *"A term that causes a significant imbalance in the parties' rights and obligations arising under the contract may be removed by the court at the request of the contracting party to the detriment of whom it is stipulated.*
> *Assessment of the significant imbalance shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price."*

This provision allows the court to remove unfair terms from ANY contract: especially between professionals (B to B), and between private parties (C to C); even a negotiated contract is in the scope.

Since the French consumer code already contains rules related to unfair terms, article 1169 would only apply to B to B and C to C contracts.

What foreign experiences can suggest

Foreign experiences can help to have a critical look on this part of the project. Three points can be maid.

A question of principle

Thanks to a quick overview, we can say that the 1993 EU directive has harmonized unfair terms in the consumption law field, and that some countries let their courts removing unfair terms in B to B contract, like Netherlands (art. 6:233 *BW*), but only when the terms have not been individually negotiated (and only to companies under 50 employees). However, there are also few countries — like Denmark and Finland (Section 36 Contract Act) — allowing unfair terms removal in all contracts.

This difference between European legislations raise a question of principle: do we need a general clause for unfair terms? Or, in other words, are unfair terms such a bad thing in B to B contracts?

It could be said, that in many contracts a professional may be a victim, but in other contracts he may be a beneficiary of a pretended "unfair term". Therefore, should we not let people be able to get into a contract, negotiate it, without fearing the intervention of the judge afterwards? If private law enables autonomous citizen to contract, then it should not track unfair term. Wouldn't legal certainty be too much affected by this general clause?

Risk of judicial arbitrary

The criterion of unfair clause in the project is the "significant imbalance". Even though it has been used for a long time in consumer law, this notion is vague. Thus, one could fear that using such a provision in all contracts would generate a risk of judicial arbitrary.

Foreign experiences show us that quite often the courts interpret strictly texts on unfair terms. For instance, a participant to the conference explained us that Chinese provision on unfair terms were very strictly interpreted, and the court takes into account the parties' situation and their judicial knowledge.

However, we cannot say for sure that French courts will follow this trend. Indeed French courts have been very vindictive in the 90's when suppressing unfair terms in B to C contracts and one could say that will hold this position, even if they are given more powers to control unfair terms. But on the other hand, in competition law, they have shown "self-restraint" in the past few years. Therefore we cannot predict French courts' attitude towards unfair terms.

French law attraction in international contracts

Thanks to EU directive, unfair terms have similar treatments in European countries. But with this huge change in French law, will the contracting parties continue to choose French law?

The German experience shows us that with such a wide provision, French law will loose of its international influence. Indeed when the German law decided to extend unfair terms to B to B contracts (only for standard terms), then the important German firms adopted a common practice: they choose Swiss law to avoid this provision.

Thus, a question arises: is the French Government willing to risk this loss of influence, and all the economics loss that goes with it?

Conclusion on the unfair terms

The comparative law tells us that courts assess unfair terms by looking at the situation of the parties, their law skills, and this tool is eventually not that dangerous. However, we do not know whether French courts will adopt the same attitude.

Furthermore, if this provision is strictly used, we may wonder whether it is essential to write it in the civil code, because on the other hand, French law will be avoided by contracting parties to avoid this risk of judicial control. This could be counterproductive, since one of the reform's aim is to let French law radiates beyond its frontiers.

B. Allowing unforeseen circumstances, allowing unforeseen rulings?

What French law says

Unforeseen circumstances may affect a long term contract during its performance. But the French Cour de cassation has always adopted a firm stance since the Canal de Craponne ruling in 1876. As for the legislator, it has so far refused or failed to implement a reform on that matter. A number of criticisms were formulated by the French doctrine although the business community usually object to contracts being adapted by courts in the event of a change of circumstances.

What the project of reform suggests (art. 1196)

Article 1196 of the project may be translated as follows: (free translation)

> *"If a change of circumstances, which was unforeseeable at the time the contract was concluded results in its performance being excessively onerous for a party, which had not accepted to bear the risk, such party can ask the other party to renegotiate the contract. Such party continues to perform its obligations during the renegotiation.*
>
> *In case of refusal to renegotiate, or if the parties fail to reach an agreement, the parties may agree to ask the court to adapt the contract. Otherwise, either party may ask the court to terminate the contract at a date and on terms to be determined by the court."*

As we can see, this article allows the judge to intervene in a contract if an unforeseeable change of circumstances occurs. This would be an important change in French law, even if the role of the judge is quite limited. Indeed, first he can intervene only if one of the contracting party refuse to renegotiate the contract. Second his power are limited: unless the parties allow him to modify the contract, he has only the power to terminates it.

One could notice that article 104 only contemplates a negative change of circumstances, which leave open the question on how to deal with a positive change of circumstances, *i.e.* the situation in which a party would make an excessive profit that was not foreseeable at the time the contract was concluded.

What foreign experiences can suggest

Unforeseen circumstances and force majeure

In Belgium civil law, unforeseen circumstances claims are solved with the force majeure. It means that the boundaries between the change of the circumstances and the force majeure are not easy to draw.
Indeed, when looking at the project of reform, one can notice that this provision is applicable only if the performance is excessively onerous. Thus this raise the question of how those two mechanism will be articulated. Unfortunately the project does not answer this question.

Role of contracting parties

In case of a reform, the provision that we're studying will only apply if the parties did not consider a risk of change of circumstances in their contract. Yet, numerous clauses manage this risk and are very often included in long-term contracts. So the scope of the legal regime is quite narrow.

In the Netherlands, when a contract has no clause about unforeseen circumstances, the first question asked by the court is whether the silent of the parties on unforeseen circumstances means that they wanted to exclude them. If, by extraordinary, this reasoning applies in French law, the scope of the provision will be even more reduced.

This show us that, if the French Government wants to ensure that this provision will not be strictly applied, it could be a good idea to write that the silence of the contracting parties on an event means that they did not expected it to occur.

Role of the courts

As we saw when looking at the article 1196 of the project, the judge cannot change the contract if the parties refuse to. This contrast with Dutch law were a general provision (article 6:258 BW) permits the court to change or terminate the contract, even though when looking at case law it appears that they rarely use this provision.

Therefore, we can say that French law is not giving so much power to the judge, when allowing him to intervene in the contract when a change of circumstances occurs. It must also be said that the power will probably not be often used. Indeed, most of the time, neither of contracting parties wants the termination of the contract, whose subject matter is often to secure raw materials and energy supplies. Thus the fear to see the judge becoming part of the contract seems unfounded.

Conclusion on the unforeseen circumstances

The reform is actually shy on the powers given to the court to modify the contract. Comparative law shows us that even when the law grants the judge with wider powers, they are used with parsimony. Therefore we should probably not fear the introduction of the "Imprevision doctrine" (change of circumstances) in our civil Code.

General conclusion

Looking at the project of ordinance through foreign experiences show us, that with this reform the judge will gain more power in contract law, even if it is likely, unless maybe for unfair clause, that he will restrain his use of these powers.
In the first part of this text we have seen that the disappearance of the cause seems to be mainly useful to promote French law, making it more understandable from abroad. Indeed the cause can easily be replaced by the public order or the good faith. Thus, it is an illusion that the suppression of the cause will suppress some of the power of the judge.

In the second part, we demonstrate that the judge will be given new powers by this project : suppressing unfair terms in *every* contract and terminating contracts in some cases of change of circumstances. Concerning change of circumstances, the power given is not so dangerous because it is actually limited and foreign experiences enlighten the judges restrain themselves. But on the unfair terms we cannot predict the French judge attitude.

~~As a conclusion, the uncertainty will come from the appropriation of these tools by the courts.~~