

The *Code Napoléon* Rewritten

French Contract Law after
the 2016 Reforms

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• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2017

Hart Publishing

An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

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First published 2017

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-50991-160-8
ePDF: 978-1-50991-159-2
ePub: 978-1-50991-161-5

Library of Congress Cataloguing-in-Publication Data

Names: Cartwright, John, 1957- editor. | Whittaker, Simon, editor.

Title: The Code Napoléon rewritten : French contract law after the 2016 reforms /
edited by John Cartwright and Simon Whittaker.

Description: Oxford ; Portland, Oregon : Hart Publishing, 2017. | Series: Studies of the Oxford Institute
of European and Comparative Law ; volume 25 | Includes bibliographical references and index.

Identifiers: LCCN 2017038057 (print) | LCCN 2017038300 (ebook) |
ISBN 9781509911615 (Epub) | ISBN 9781509911608 (hardback : alk. paper)

Subjects: LCSH: Contracts—France. | Standardized terms of contract—France. |
Clauses (Law)—France. | Obligations (Law)—France. |
France. Code civil. | Law reform—France.

Classification: LCC KJV1668 (ebook) | LCC KJV1668 .C63 2017 (print) | DDC 346.4402/2—dc23

LC record available at <https://lcn.loc.gov/2017038057>

Typeset by Compuscript Ltd, Shannon

Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

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author information, details of forthcoming events and the option to sign up for our newsletters.

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Introduction

SIMON WHITTAKER AND JOHN CARTWRIGHT

For many French citizens, and particularly for French lawyers, the Code civil (often called the Code Napoléon after the First Consul when it was promulgated in 1804)¹ has a central role in French society as well as in French law and enjoys a cultural and not merely a legal significance. In their eyes, the Code civil marks the first modern legislative codification of private law,² played a decisive role in the legal unification of France,³ and put into effect the enlightened and revolutionary aim that French citizens should be able to read and understand their rights under the civil law for themselves.⁴ For its drafters, the Civil Code was not merely a vehicle of technical law reform, for as Jean-Etienne-Marie Portalis observed in his famous *Preliminary discussion on the draft of the Civil Code*:

Good civil laws are the greatest good which men can give and receive; they are the source of morals, the *palladium*⁵ of prosperity, and the guarantee of all peace, public and individual: if they do not provide the foundations of government, they maintain it; they moderate power and contribute to making it respected, as if it were justice itself.⁶

¹ When promulgated it was called the *Code civil des français*, during the two French empires it was officially termed the *Code Napoléon* and it is now properly termed simply the *Code civil*.

² The best-known codification of civil law prior to the Code civil was the *Allgemeines Landrecht für die Preußischen Staaten* first promulgated in 1794, but, according to K Zweigert and H Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford, Oxford University Press, 1998) 137–38, this code remained rooted in the class structure of Prussia and was ‘extremely hard going, almost impossible for either professor or practitioner to master’.

³ J Bart, ‘Le Code Napoléon, un code à vocation européenne’ in J-P Dunand and B Winiger, *Le Code civil français dans le droit européen* (Bruylant, Bruxelles, 2005) 65, 67.

⁴ See, in particular, J-E-M Portalis, ‘Essai sur l’utilité de la codification’ in F Portalis (ed) *Discours, rapports et travaux inédits sur le Code civil part Jean-Etienne-Marie Portalis* (Joubert, Paris, 1844) reprinted by Centre de Philosophie politique et juridique (Université de Caen, 1990) i at iv, who argues that, where a systematic approach to the codification of civil law is adopted, ‘a simple and easy way is open to citizens who need to know the provisions of legislation [*la loi*]; everyone can go directly to what interests them, and instruct themselves on the step which they must take for the preservation of their rights’.

⁵ This refers to the Greek word naming the image of the goddess Pallas (Athene) in the citadel of Troy, whose presence was believed to guarantee the safety of the city.

⁶ *Discours Préliminaire sur le Projet de Code Civil* (1799), reproduced in J-E-M Portalis, *Ecrits et Discours Juridiques et Politiques* (Presses Universitaires d’Aix-Marseille, 1988) 21, 23. The *Discours Préliminaire* was signed by all four members of the Commission but was written by Portalis. English translation by the authors. For an introduction to the political background of the enactment of the Code civil see J-L Halpérin, *L’impossible Code civil* (Paris, PUF, 1992) esp Ch 9.

Moreover, while French constitutions (republican, royal and imperial) have come and gone, the Code civil represents an element of continuity in the 200 years or so since it was promulgated. However, this very historicity of the Code civil increasingly opened it to criticism either on the basis that it could no longer give effect to the requirements of justice in civil law or on the basis that it *could* give effect to these requirements but only at the cost of an interpretation which ‘denatures’ the words of the provisions themselves.

In the case of the law of obligations (traditionally comprising the law of contract, the law of delict⁷ and the law of ‘quasi-contract’), the Code as enacted was very Romanist in character and many of the provisions were derived (sometimes almost word-for-word) from the French civil law writers, Domat⁸ or Pothier.⁹ In fairness, the majority of these provisions have stood the test of time remarkably well, but in some respects the courts (typically on the suggestion of legal scholars) have circumvented the rules which the Code set out. In the case of the general law of contracts, this is particularly visible in the case of the perceived need for a range of pre-contractual duties and liabilities, the development of the effects of contracts between the parties (with the ‘forcing’ of contracts by imposing ‘obligations as to the safety’ of the other contracting party) and beyond them (notably, as regards contracts for the benefit of third parties), and ‘sanctions’ for contractual non-performance.¹⁰ In the case of the law of delict, the ‘general law’ of liability for fault was given full rein, allowing the development of a wide range of liabilities in particular contexts (such as the abuse of rights or unfair competition); and two more general principles of liability were discovered by the courts: liability for the actions of things in one’s keeping and liability for the actions of persons in one’s control.¹¹ Even that relative legal backwater (in French law), the law of quasi-contracts, saw its own innovation in the judicial recognition of a general ground

⁷ The terminology used to describe ‘delictual liability’ (*la responsabilité délictuelle*) changed significantly in the course of the 20th century. While, before its reform in 2016, the Code itself used to refer to ‘delicts and quasi-delicts’ (*des délits et des quasi-délits* being the title of Chapter II of Title IV of Book III of the Code), in the latter part of the 20th century, French lawyers started instead to refer to *la responsabilité civile* instead of *la responsabilité délictuelle*. There has been a further change in recent years as many scholars use *la responsabilité civile* to encompass both contractual and ‘extra-contractual’ liability. This way of thinking is reflected in the French Ministry of Justice’s *Projet de réforme de la responsabilité civile* (March, 2017).

⁸ J Domat, *Les Lois civiles dans leur ordre naturel* (first published 1689–94). The influence is particularly obvious in the provisions governing the effects of contracts in former arts 1134 and 1135 (on the effects between the parties) and on the interpretation of contracts in former arts 1156 and 1164 whose origins can be seen in *Les Lois civiles*, Pt 1, Book 1, Title 1, Section II, paras VII, X–XVIII and Section III, para 1.

⁹ R J Pothier, *Traité des obligations* (first published 1761). The provisions on obligations also reflected the earlier drafts of the Code civil during the revolutionary period itself: Halpérin (n 6) 279 and 290.

¹⁰ For an overview of these topics in English see J Bell, S Boyron and S Whittaker, *Principles of French Law*, 2nd edn (Oxford, Oxford University Press, 2008) 314–18, 334–35, 337–39. See also the essays in J Cartwright, S Vogenauer and S Whittaker (eds), *Reforming the French Law of Obligations* (Oxford, Hart Publishing, 2009) chs 6–11.

¹¹ For an introduction in English see Bell, Boyron and Whittaker, *ibid*, 354–91.

of recovery for unjustified enrichment (*enrichissement sans cause*).¹² By the middle of the last century, it could properly be said that there had been a ‘revolt’ of the law [*le droit*] against the Code civil.¹³

In this way, to a remarkable extent, the French private law of obligations has been updated without any major reform to the Code civil: a lively scholarly community and a corps of judges willing to be creative (even while long denying it) took up the baton of law reform in place of the legislature. Certainly, the absence of legislative change is particularly marked in the case of the general law of contract formerly contained principally in articles 1101–84 of the Code civil, since only four new provisions were inserted¹⁴ and only a very few provisions were amended and those often slightly.¹⁵ In adopting their ‘creative’ interpretations of the Code, French legal actors answered with enthusiasm the call made by François Gény at the beginning of the twentieth century to undertake a ‘free scientific research’ to ensure that the law meets the changing needs of society.¹⁶ Moreover, while the Civil Code’s provisions on obligations remained all but untouched by legislative amendment, the legislature did not fail to intervene outside its framework, whether by ‘special laws’ [*lois spéciaux*] governing particular topics (such as the law of leases¹⁷ or liability for motor-vehicle accidents)¹⁸ or by the development of provisions in the Code de commerce or for consumer law, the latter subsequently being codified in the Code de la consommation. Nonetheless, as explained in more detail later in this work,¹⁹ by the end of the last century and especially by the time of the bicentennial celebrations of the Code civil in 2004, there was an increasingly

¹² *ibid.* The first recognition of a general law of *enrichissement sans cause* by the courts was in the *arrêt Boudier* Req 14 June 1892, S 1893.281 note Labbé. See Bell, Boyron and Whittaker (n 10) 413–20.

¹³ G Morin, *La révolte du droit contre le code, La révision nécessaire des concepts juridiques* (Contrat, responsabilité, propriété) (Paris, Sirey, 1945).

¹⁴ Former arts 1108-1 to 1108-2 Cc were inserted to implement aspects of Dir 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (‘Directive on electronic commerce’); former art 1125-1 Cc was inserted to invalidate contracts made by the elderly or those in need of mental care in certain circumstances; and former art 1153-1 was inserted to provide further for awards of interest.

¹⁵ On 30 September 2016, the eve of the coming into force of the *Ordonnance* in 2016, the following articles had been amended: arts 1124–1125 (governing adult incapacity); art 1130 (recognising exceptions under other legislation to the general rule as to the renunciation of an ‘open succession’ (ie after the decease)); art 1137 (replacement of ‘all the care of a good father of the family’ [*tous les soins d’un bon père de famille*] with ‘all reasonable care’ [*tous les soins raisonnables*]); art 1139 (amendment of means of effecting ‘notice to perform’ [*mis en demeure*]); art 1144 (allowing the court to order a debtor to pay for substitute performance in advance); art 1146 (further reference to means of effecting ‘notice to perform’); art 1152 (creating a judicial power to moderate or increase sums payable on non-performance); and art 1153 (amending the rules as to damages and interest on non-payment of monetary debts).

¹⁶ François Gény, *Méthode d’interprétation et sources en droit privé positif: essai critique*, 1st edn (Paris, A Chevalier-Marescq, 1899).

¹⁷ eg as regards residential and ‘mixed’ leases: *loi no 89-462 du 6 juillet 1989 tendant améliorer les rapports locatifs et portant modification de la loi no 86-1290 du 23 décembre 1986*.

¹⁸ *Loi no 85-677 du 5 juillet 1985 tendant à l’amélioration de la situation des victimes d’accidents de la circulation et à l’accélération des procédures d’indemnisation*.

¹⁹ See Ch 2 (B Fauvarque-Cosson, J Gest and F Ancel).

widespread sense that the Code civil's provisions governing obligations (and especially contracts) should themselves be reformed. After more than a decade of academic projects, debates, further projects, further debates, official drafts and even more debates, in 2016 the final work on the general law of contract, the general regime of obligations and proof of obligations was achieved and put into law by special executive enactment, an *ordonnance*.²⁰ As a matter of the intention of the Ministry of Justice, this is, however, not the end of its programme of law reform, as it has already put forward a second draft of a legislative reform of the law of 'civil liability', reforming the old law of delict and placing it within a new framework, together with rules on damages for contractual non-performance.²¹

As will be explained, the reforms to contract law, the general regime of obligations and proof of obligations were effected by *ordonnance* authorised by parliamentary legislation, rather than being enacted by parliamentary legislation directly.²² Apart from attracting a considerable degree of criticism as a matter of constitutional propriety,²³ this mechanism deprives us of the normal range of legislative *travaux préparatoires*, including (and especially) the special reports produced by parliamentary committees in the course of the progress of a parliamentary bill. In their absence, all we have instead officially to explain the thinking and discussion behind the reform in both in general and as regards individual provisions are the various drafts which the Ministry of Justice itself published, the terms of the legislation which authorised the *Ordonnance*²⁴ and the Report to the President of the Republic by the Minister of Justice to accompany the *Ordonnance*, which runs to some 30,000 words of text.

In this respect, article 8 of the parliamentary legislation which authorised reform by way of *Ordonnance* is worth quoting in full, as it sets out both the purposes and the scope of the new law:²⁵

Subject to the conditions provided by article 38 of the Constitution, the Government is empowered to take by way of *ordonnance* measures belonging to the domain of parliamentary legislation [*la loi*]²⁶ which are necessary to modify the structure and the content

²⁰ *Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*.

²¹ Ministère de la justice, *Projet de réforme de la responsabilité civile* (March 2017). This further round of legislative reform explains why the former provisions of the Code civil governing damages for contractual non-performance (arts 1146 to 1155) were re-enacted without major change by the *Ordonnance* as arts 1231 to 1231-37.

²² See Ch 2 below (B Fauvarque-Cosson, J Gest and F Ancel). The authorising legislation was *Loi no 2015-177 du 16 février relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures*, art 8; below, pp 4–5 and 24–25.

²³ See Ch 2 below (B Fauvarque-Cosson, J Gest and F Ancel) and see Conseil constitutionnel décision 2015-710 DC.

²⁴ *Loi no 2015-177 du 16 février relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures* art 8.

²⁵ Authors' translation into English.

²⁶ The Constitution of the 5th Republic divides the power to make laws between Parliament (art 37, in a series of enumerated but important areas, the laws being called *lois*) and the executive (art 34, in all other areas, the laws being called, broadly, *règlements*). Exceptionally, art 38(1) provides

of Book III of the Code civil in order to modernise, simplify, improve the readability, and reinforce the accessibility of the general law of contracts, the regime governing the law of obligations and the law of proof, to guarantee legal certainty [*la sécurité juridique*]²⁷ and the effectiveness of the norms which they set and, to this end:

- (1) to affirm the general principles of the law of contract such as good faith and contractual freedom; to enumerate and to define the principal categories of contracts; to detail the rules concerning the process of conclusion of contracts, including those concluded by electronic means, in order to clarify the provisions applicable in the area of negotiation, offer and acceptance of contract, notably as regards the date and place of its formation, of promises to contract and pre-emption agreements;
- (2) to simplify the rules applicable to the conditions of validity of contracts, including those concerning consent, capacity, representation and the content of contracts, by formally recognising in particular a duty to inform and the notion of unfair contract term and by introducing provisions which allow the sanctioning of behaviour of a party who abuses the other party's situation of weakness;
- (3) to affirm the principle of consensualism²⁸ and to present its exceptions by indicating the main rules governing the form of contracts;
- (4) to clarify the rules concerning nullity and lapse, which sanction the conditions as to the validity and form of contracts;
- (5) to clarify the provisions concerning the interpretation of contracts and specify those special to standard-form contracts;
- (6) to detail the rules concerning the effects of contracts between the parties and as regards third parties, by formally recognising the possibility for the former to adapt their contract in the situation of an unforeseeable change of circumstances;
- (7) to clarify the rules governing the duration of contracts;
- (8) to regroup the rules applicable to non-performance of contracts and to introduce the possibility of unilateral termination by notice;
- (9) to modernise the rules applicable to management of another's affairs and undue payments and to give formal recognition to the notion of enrichment without a legal ground [*enrichissement sans cause*];²⁹
- (10) to introduce a general regime governing the law of obligations and to clarify and modernise its rules; to detail in particular those concerning the different modalities of obligations, by distinguishing obligations which are conditional, time-delayed, cumulative, alternative, optional, joint and several and whose acts of performance are indivisible; to adapt the rules on satisfaction and to make explicit the rules applicable to other forms of extinction of an obligation resulting from the release of debts, set-off and merger;
- (11) to regroup all the operations intended to modify the relationship of obligation; to recognise formally, in the main actions available to a creditor, the direct actions for

that '[i]n order to carry out its programme, the Government may ask Parliament for authorisation to take measures by *ordonnance*, for a limited period, that are normally within the sphere of legislation [*la loi*]'.

²⁷ See the discussion on this concept in Ch 3 below (S Whittaker).

²⁸ This is found in art 1172, which states that '[o]n principle contracts require only the consent of the parties'.

²⁹ Interestingly, the *Ordonnance* itself does not use the expression *enrichissement sans cause*, but instead refers to 'unjustified enrichment' (*l'enrichissement injustifié*): see arts 1300(2), 1303 to 1303-04 Cc.

- satisfaction provided by legislation; to modernise the rules concerning assignment of rights arising from obligations, novation and delegation; to recognise formally assignment of debts and assignment of contracts; to detail the rules applicable to restitution, notably in the situation of the destruction of a contract;
- (12) to clarify and to simplify all the rules applicable to proof of obligations and, as a result, to announce first those concerning the burden of proof, legal presumptions, the authority of *res judicata*, agreements relating to proof and admission of proof; then to detail the conditions of admissibility of kinds of proof of facts and juridical acts; to detail, finally, the regimes applicable to the different kinds of proof;
- (13) to organise and to modify all the provisions of a legislative nature which allow the implementation and the drawing of consequences of the changes brought in by way of application of numbers 1 to 12 above to be ensured.

This catalogue, expressed as a list of aims of the new law, gave the Government a mission to legislate on a host of legal issues using a host of legal concepts. In doing so, it demonstrates very clearly the breadth of scope of the reforms foreseen by this legislative authorisation and it also illustrates for a person from outside the civil law world the variety of issues falling within a reform not merely of the general law of contract, but also of the ‘general regime of obligations’. Having said this, however, the authorisation which article 8 gave to the Government is remarkably unfettered in terms of the purposes which it set out in relation to these various concepts. So, in many cases, the Government is instructed simply to modernise, simplify, detail, formally recognise, or re-group concepts or rules, without any guidance as to *how* to do so, let alone as to the *content* of the resulting rules pertaining to the subjects which it lists. Moreover, it is only rarely that we can see an explicit authorisation of any substantive changes which may be thought of as controversial, the exceptions being article 8’s reference to the need for the ‘general principles of the law of contract such as good faith and contractual freedom’ to be ‘affirmed’;³⁰ the ‘formal recognition’ of ‘the notion of unfair contract term’ (which is a decidedly round-about way of authorising new law governing the control of unfair contract terms in civil contracts generally);³¹ the introduction of a new law governing the effect of unforeseeable supervening circumstances [*imprévision*]; the recognition of a right in the creditor to terminate a contract unilaterally by notice on the ground of non-performance; and the abolition of *la cause*, in this respect by passing in silence over this traditionally central concept itself and by referring, rather shyly, to the new idea (for French law) of the ‘content of a contract’.³²

³⁰ As will be seen, the new arts 1102–04 Cc, which affirm these principles, do so without using the language of principle: see Ch 3 below, pp 44–46 (S Whittaker).

³¹ See new art 1171 Cc and below Ch 3, pp 49–50 (S Whittaker) and Ch 8 (P Stoffel-Munck). It is to be noted that the reference to unfair contract terms in art 8 is not tied to the introduction of the concept of a standard-form contract [*contrat d’adhésion*]. While the draft *Ordonnance* issued by the Ministry in 2015 art 1169 did not tie the new controls to standard-form contracts, the *Ordonnance* as promulgated, art 1171 did do so.

³² On the content of contracts see arts 1162–71 and the critical remarks of L Aynès, below in Ch 7.

Nor is article 8 very much more forthcoming as to the overall purposes of the legislation as set out in its opening words. We see again the aim of modernisation and simplification, but there are three further aims with a little more real content. First, the new law should ‘improve the readability, and reinforce the accessibility’ of the law. This aim seeks to align the new law with the classical aim of a codified civil law, that is, that it should be understandable and therefore usable by ordinary (ie non-lawyer) citizens. However, there is a further point: the law should be stated in the Civil Code rather than be found in the case-law. In a number of respects, therefore, existing case-law should be restated (‘detailed’ or ‘formally recognised’—the French verb used for the latter is *consacrer*) or, though rarely in practice, formally rejected.³³ Beyond this aim of the consolidation of existing interpretations of the historical text, the new law must ‘guarantee legal certainty [*la sécurité juridique*]’ and the ‘effectiveness/efficiency of the norms [*l’efficacité des normes*]’. Legal certainty is a traditional and widely recognised legal virtue—and one having a constitutional significance in France—but, as we will see again and again in relation to the new law, it is also a relative virtue. Indeed, one could even say that ‘legal certainty’ is in the eye of the beholder, as the same rule in the new law may be viewed by different scholars as reflecting a proper balance of the interests of the contracting parties and thereby providing them with the security/certainty which they need to contract with confidence, or as generating an unacceptable degree of legal and, therefore, transactional uncertainty to the detriment of the practice of contracts. This is indeed the case as regards the law’s new controls on unfair terms in standard-form contracts.³⁴ All-in-all, therefore, article 8 will give interpreters of the new law very little help.

Nevertheless, when a reference was made to the French Constitutional Council, the Conseil constitutionnel, challenging the constitutionality of article 8 on the basis that it did not fall properly within the special rule provided by article 38 of the Constitution which it intended to invoke, the Conseil held:

that, on the one hand, article 34 of the Constitution places the fundamental principles of civil obligations in the domain of legislation [*la loi*];³⁵ that, on the other, the authorisation conferred by the provisions [in art 8] to reform by *ordonnance* the general law of contract, the regime of obligations and the law of proof is precisely defined in its field and its purposes; consequently, this authorisation does not infringe the requirements under article 38 of the Constitution.³⁶

While the authorisation given to the Government to reform such an important area of civil law may seem extraordinarily broad to an outsider, as a matter of French constitutional law both its scope and purposes were held to be sufficiently defined.

³³ An example of the rejection of the case-law of the Cour de cassation may be found in the remedies available to enforce a unilateral promise: see art 1124 and the discussion below in Ch 4, pp 74–75 (R Sefton-Green).

³⁴ Arts 1110 and 1171 Cc; and see below Ch 3, pp 49–50 (S Whittaker) and Ch 8 (P Stoffel-Munck).

³⁵ See above n 26 on the Constitution’s division of law-making powers in arts 34 and 37.

³⁶ CC decision, above n 23. And see below in Ch 2, p 25 (B Fauvarque-Cosson, J Gest and F Ancel).

In terms of our potential sources for the thinking behind the *Ordonnance*, the Report to the President of the Republic is a more promising document, being much longer, more discursive and at least a little more forthcoming both in terms of the general purposes of the reform and also of the particular purposes and/or thinking behind particular provisions. It is therefore understandable that considerable weight is already placed on this Report in scholarly discussions of the reform (including in the essays in this book) and in two main ways.

First, the Report is often referred to when assessments are made as to whether the provisions do in fact give effect to the declared general purposes of the reform, ie improved legal certainty, a more balanced and fairer contract law and enhanced legal effectiveness/efficiency. In this respect, legal certainty is mentioned again and again by the Report as an aim of the new law in general or as the justification for the design of particular provisions.³⁷ In particular, the Report stresses the need to provide better legal certainty in contrast to the former law's reliance on case-law which it describes as 'by its very nature fluctuating [*par essence fluctuante*]:³⁸ as a result, 'the Code civil, almost unchanged since 1804, no longer reflects in its wording the state of the law'.³⁹ Second, the Report refers both generally and in relation to particular legal concepts, to the need to ensure the protection of the weaker party or otherwise ensure contractual justice or fairness [*la justice contractuelle*].⁴⁰ On the other hand, third, the Report considers that the new law (and certain provisions in particular, such as those governing the sanctions for contractual non-performance) will contribute to the effectiveness or economic efficiency of the law.⁴¹ As will be seen, the Report does not see its aims of achieving legal certainty, contractual justice, economic efficiency as competing, but rather as complementary.⁴²

Finally, the Report acknowledges a much wider aim in terms of 'reinforcing the attractiveness of French law, at a political, cultural and economic level'.⁴³ In economic terms, one of the aims of the new law was to counter arguments that France is not friendly to commerce and that French law is not attractive as a choice of law for international commercial contracts, arguments which are associated in many French minds with the World Bank Reports on 'Doing Business'.⁴⁴

³⁷ Legal certainty or legal uncertainty is mentioned 22 times by the Report.

³⁸ Report to the President of the Republic, 1 and repeated at 2.

³⁹ *ibid* 2.

⁴⁰ *ibid* 2.

⁴¹ *ibid* 3. *Efficacité* or *efficace* are used, in total on eight occasions. The French word is ambiguous as between the English 'efficient' and 'effective', the former having strong associations with *economic* efficiency. Indeed, on one occasion the Report makes this significance explicit, for it observes (at 3) that '[f]rom a perspective of the economic efficiency of the law [*efficacité économique du droit*] the *ordonnance* also offers to contracting parties new powers allowing them to avoid or to settle litigation without necessarily having recourse to the court (a power of unilateral termination [for non-performance] by notice, the defence of non-performance, a power to accept an imperfect act of performance in exchange for a reduction in price.'

⁴² See below in Ch 3, pp 30–33 (S Whittaker).

⁴³ Report to the President of the Republic, 2.

⁴⁴ See www.doingbusiness.org/.

The intended impact of the reform is more easily seen in relation to competitiveness of French law as a chosen applicable law in international contracts, for here, the Report argues, the greater degree of legal certainty and accessibility of the new law will contribute to its greater attractiveness.⁴⁵ However, while this is not spelt out in the Report, it was clearly also intended that the new, reformed and ‘modernised’ French law would provide a more accessible and more attractive model for any future European contract law instruments and a more accessible means of influencing those other national laws whose own law of obligations are tied historically and/or culturally to French law. The hope clearly is that the new law will provide a more effective vehicle for the continuing influence of French legal culture across the globe. In this respect, though, there is clearly a tension. At times the new law retains features that reflect a distinctively French position,⁴⁶ but it has also abandoned the *concept* of ‘the cause’ of a contract or of an obligation (*la cause*),⁴⁷ which for some represents a betrayal of the French legal tradition. The new law may indeed reinforce France’s cultural influence on laws within the so-called ‘Romanistic family’,⁴⁸ but the ‘legal culture’ of France will to an extent have changed. Indeed, given that many laws within the Romanistic family retain codified laws of obligations following closely the provisions in the original Code civil, the new French law has created a textual disjunction between the mother code and its offspring. What may happen, of course, is that the French law reform may inspire a wave of re-codification of the ‘offspring’ codes (such as the Belgian Civil Code) in its own image.

Secondly, the majority of the Report to the President of the Republic consists of a discursive guide to the provisions of the new law, and the comments which the Report makes are already consulted to see if they throw light on the intentions or the purposes of the (executive) legislator in relation to individual provisions. So, for example, the Report explains in relation to the three general principles of contractual freedom, the binding force of contracts and good faith that the abandonment of the earlier title of ‘guiding principles’ in favour of the ‘introductory provisions’ was intended to make clear that,

the general rules posed in this way, ... even though they are intended to give guiding lines to the law of contract, do not, however, constitute rules of a higher level than those which follow and on which the courts would be able to use as the basis for an increased interventionism: they are rather principles intended to facilitate the interpretation of all the rules applicable to contracts, and if need be to fill in the gaps.⁴⁹

Another, much more particular example may be found in the case of the new provision governing precontractual liability. Here, article 1112 itself provides a

⁴⁵ Report to the President of the Republic, 2.

⁴⁶ This is true, in particular, of the approach of the new law to the effects of contracts on third parties: see below Ch 12 (J-S Borghetti).

⁴⁷ See eg L Aynès in Ch 7 below, p 141, referring to *la cause* as ‘a peculiarity of French law’ [*une particularité du droit français*].

⁴⁸ Zweigert and Kötz (n 2) Ch 6.

⁴⁹ Report to the President of the Republic, 4.

rule governing the measure of damages in the case of fault committed during negotiations, without specifying whether this liability is contractual or extra-contractual. In this respect, the Report to the President of the Republic observes that '[t]his liability will in principle be of an extra-contractual nature, except where there is provision made by agreement for this phase of negotiation or its breaking-off.'⁵⁰ A third example may be found in the reversal of earlier case-law of the Cour de cassation on the remedy available to enforce a promise of contract, the case-law allowing only a remedy in damages.⁵¹ Here, the text of article 1124 itself is not completely clear as it provides merely that 'Revocation of the promise during the period allowed to the beneficiary to exercise the option does not prevent the formation of the contract which was promised'.⁵² As Ruth Sefton-Green observes, the *formation* of the contract does not specify that the sanction of its non-performance can be enforced performance in kind rather than merely damages.⁵³ However, in this respect, the Report notes the earlier 'much criticised case-law' of the Cour de cassation, the fact that the new law conforms to the European instruments of harmonisation and then clarifies that the new law provides a sliding-scale of sanctions reflecting the 'intensity of the promise':

a revocation of an offer is sanctioned by an award of damages which do not cover the loss of the advantages expected from the contract which is not concluded, and revocation of a unilateral promise is sanctioned by the 'forced conclusion' of the contract.⁵⁴

In this way, the Report clearly sees the earlier case-law of the Cour de cassation as overturned.

At first sight, therefore, the creation of the new legislative text, coupled with the likely resort to the intention of the legislator as revealed (sometimes and more or less) by the Report to the President of the Republic as well as in the background (legislative or judicial) to the provisions themselves, may be thought to invite a renaissance of the 'exegetical approach' to the interpretation of the new legislation, an approach so criticised by Gény and so long out of favour with French scholars and French courts. Certainly, one could surely think that constitutional propriety demands a certain deference by courts (if not by scholars) to the choices made by the reforming legislator, especially where these choices differ substantively and significantly from the earlier provisions of the Code civil or their interpretation by the case-law. On the other hand, in our view, this is very unlikely to lead to the abandonment of the freedom which both French scholars and the courts have long enjoyed in relation to the development of the law of contract and the law of obligations more generally. First and foremost, this is because many of the new provisions themselves *invite* creative development either because of the breadth

⁵⁰ Report to the President of the Republic, 5.

⁵¹ Cass civ (3) 15 December 1993, no 91-10199, confirmed by Cass civ (3) 11 May 2011, no 10-12875, which reject the 'forced realisation of the sale' subject to the promise.

⁵² See Ch 4 below, p 51 (R Sefton-Green) pp 73–75.

⁵³ *ibid*, p 73.

⁵⁴ Report to the President of the Republic, 7.

of the legal propositions which they set out (and by no means merely in relation to the three principles of contractual freedom, the binding force of contracts and good faith which immediately spring to mind) or the breadth of the adjudicative discretion which the provisions give to the courts, as can be seen very clearly in relation to the assessment of the fairness of the terms of standard-form contracts or the revision of contracts by the courts as a possible outcome of an unforeseeable change of circumstances.⁵⁵ As Portalis famously explained in relation to the original Code civil:

The function of legislation is to fix, from broad perspectives, the general maxims of the law; to establish principles rich in their generation of consequences, and not to descend into the detail of questions which can arise in each matter. It is for the judge and the jurist, with their profound insight into the general spirit of the laws, to guide their application.⁵⁶

Moreover, where there remains a significant body of opinion within the French legal academy overtly hostile to some of the important choices apparently made by the *Ordonnance* (for example, as regards the ‘abolition’ of *la cause*, the re-organisation of the sanctions of non-performance or, again, the control of unfair contract terms), it is likely that interpretations will be suggested by scholars which either reduce the impact of the changes or, in the case of *la cause*, undermine it altogether.⁵⁷ Clearly, for some commentators, the enactment of provisions by the *Ordonnance* contrary to their views is seen as the loss of a battle rather than the loss of the war.

There are two further general observations which we would like to make by way of general introduction. The first concerns what remains *outside* the Code civil. Here, the new law remains faithful to the existing French pattern and leaves consumer law and special provisions governing commercial contracts outside the codification. As a result, the law specific to consumer contracts remains collected (for the most part) in the Code de la consommation. This differs from the position in German law whose Civil Code (the *Bürgerliches Gesetzbuch* or BGB) has, since its ‘modernisation’ in 2002, included provisions special to consumer contracts.⁵⁸ Similarly, provisions of French law special to commercial contracts also remain outside the Code civil, in their case collected in the Code de commerce, here unlike

⁵⁵ Arts 1195 and see below Ch 10 (B Fauvarque-Cosson).

⁵⁶ Portalis (n 6) 26. ‘L’office de la loi est de fixer, par de grandes vues, les maximes générales du droit: d’établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière. C’est au magistrat et au juriconsulte, pénétrés de l’esprit général des lois, à en diriger l’application.’

⁵⁷ Although the concept of *la cause* is not found in the new provisions, the notion of *la contrepartie* (what is agreed in return) may be seen as its homologue. Moreover, several of the earlier applications of the notion of *la cause* in the case-law are set by the reform into the law (notably, in arts 1169 and 1170, as noted below in Ch 3, p 51 (S Whittaker)) and these ‘examples’ of *la cause* could be used to form the basis of a new general doctrine.

⁵⁸ On this see R Zimmermann, *The New German Law of Obligations, Historical and Comparative Perspectives* (Oxford, Oxford University Press, 2005) esp Ch 5.

the approach adopted by Italian law whose *Codice civile* of 1942 included special rules governing commercial law.⁵⁹ Moreover, of course, not all the rules governing ‘civil law contracts’ are found in the *Code civil*, as many rules governing particular types of contract (as defined by reference to their subject-matter) are found in non-codified legislation.⁶⁰

The second set of observations concern the form of the new law. On first reading the new law, one is struck by the increased elaboration of its structure when put beside Title III of the old *Code civil*, with many more sub-divisions of the provisions, each with their own heading. Moreover, the new structure abandons the earlier one almost entirely, not least because from the point of view of a modern lawyer it appeared to reflect a fundamental confusion between the notions of contract and of obligation.⁶¹ In this respect, the Report to the President of the Republic explains its general thinking:

The *Ordonnance* proposes to simplify the plan of Book III of the *Code civil* by adopting a more didactic plan. The ... plan [of the earlier *Code civil*], which rests in particular on some long-discussed distinctions, must be entirely rethought and restructured in order to confer on each provision a well-determined scope of application and to reinforce its clarity.⁶²

In the case of the law of contract, this led to the adoption of a chronological plan, from the formation of the contract to its end—the ‘life of the contract’. Here, therefore, the new legislation follows the long-established approach to the exposition of the law in French scholarly treatises as well as, for example, the *Principles of European Contract Law* (PECL).⁶³

Secondly, the linguistic style of the original *Code civil* has been much admired both within and outside France. In this respect, French lawyers (if not, perhaps, all French literary critics) are fond of citing the apparent praise of Stendhal, who records in a letter to Balzac from Italy in 1840 that in writing his book, *The Charterhouse of Parma* [*La Chartreuse de Parme*] ‘in order to take its tone, [he] read every morning two or three pages of the *Code civil*, so as to be always natural’.⁶⁴ For example, for Gabriel de Broglie of the *Académie française*, who gave one of the formal speeches at the Bicentenary celebrations of the *Code civil* in 2004, the style of the *Code civil* is celebrated for its conciseness and its clarity, but also for the ‘strength, sparseness and abstractness’ of its expression.⁶⁵

⁵⁹ The *Codice civile* of 1939–1942 thereby replaced an earlier civil code of 1865 and a Commercial Code of 1882 (*Codice di Commercio*): See below Ch 16 (P Sirena) p 354.

⁶⁰ See below Ch 3 (S Whittaker) p 35.

⁶¹ This appeared to be the case as regards Chapter III ‘On the Effect of Obligations’ which was entirely concerned with the effects of *contractual* obligations.

⁶² Report to the President of the Republic, 2.

⁶³ O Lando and H Beale, *Principles of European Contract Law*, Pts I and II (2000), Pt III (2003) (The Hague, Kluwer Law International).

⁶⁴ Stendhal (real name Marie-Henri Beyle), Letter 30 October 1840 to Honoré de Balzac.

⁶⁵ G de Broglie, ‘La langue du *Code civil*’, address presented at the Bicentenaire du *Code civil*, formal session of 15 March 2004 at 3, available at www.asmp.fr/fiches_academiciens/textacad/broglie/code_civil.pdf.

However, despite the existence of this sort of attachment to the language and style of the original Code civil, an attachment which is certainly aesthetic and possibly even emotional, the authors of the *Ordonnance* did not feel bound to emulate it, principally so as to enhance the accessibility of the new text. In the words of the Report to the President of the Republic,

The style of the Code civil, whose elegance is incontestable, is not always easily understandable to all citizens, and some of its expressions are out of use today. The *Ordonnance* renders these provisions more accessible by using contemporary vocabulary and simpler and more explicit expressions, while preserving the conciseness and precision which characterise the Code civil.⁶⁶

In this respect the *Ordonnance* is, in our view, both successful and unsuccessful. The new provisions *are* considerably clearer, more explicit and readily comprehensible, and their style does attain the virtues of concision and, indeed, at times elegance which is so much admired in French codification, even where they depart from the earlier, historic text. However, the idea that the new provisions are understandable to the average French citizen (ie a non-lawyer) is hardly sustainable: first, because they are expressed (as they must be) in the technical language of lawyers; and, second, their very virtue of conciseness renders them highly allusive. To read the new provisions of the Code civil, as with the old, one needs a working knowledge of the language of French private law and not merely French as spoken and read by most of the citizens of France; and one needs a good understanding of the former law on which it builds and from which it at times derogates. In this respect, the reformed provisions follow squarely the model of the original Code civil, whose provisions on the law of obligations reflected the scholarship of the *ancien régime*, itself rooted in Roman law, as much as the enlightenment ideas so prominent in post-revolutionary France.

The present work focuses on the effects of the reforms of 2016 on the general law of contract: here, it is indeed true that the Code Napoléon has been rewritten and not merely tidied up and repackaged. Rather, however, than attempting to provide a general account of the changes, this volume consists of a series of essays by scholars on particular topics, earlier presented and discussed at a workshop at St John's College, Oxford in September 2016. Most of the contributors are French legal scholars working very much within the tradition of French civil law, but some are more external, being comparative lawyers writing in part from a perspective of 'foreign' (ie non-French) laws. The topics and the approaches of the writers differ considerably. Some topics are broad, seeking to make very general observations about the thinking behind the reform (as in the essay by Simon Whittaker on 'Contracts, Contract law and Contractual Principles')⁶⁷ or issues which recur throughout the new law (as in the essay by Cécile Pérès on 'Mandatory and Non-mandatory Rules in the New Law of Contract',⁶⁸ or on how the reform looks to a

⁶⁶ Report to the President of the Republic, 2.

⁶⁷ Below, Ch 3.

⁶⁸ Below, Ch 9.

civil lawyer from a non-French system, as in the essays by Esther Arroyo Amayuelas, Birke Häcker and Pietro Sirena from the Spanish, German and Italian points of view respectively).⁶⁹ Most of the essays are more narrowly focused in terms of subject, explaining, considering and assessing the new law in relation to particular substantive topics: on the creation of a valid contract (formation of contract (Ruth Sefton-Green), mistake and obligations to inform (Carole Aubert de Vincelles), and *la violence* [improper pressure] (Ciara Kennefick));⁷⁰ the content of contracts, including the control on unfair contract terms (Laurent Aynès and Philippe Stoffel-Munck);⁷¹ the effects of contracts (their proprietary effect (Geneviève Helleringer), their effect on third parties (Jean-Sébastien Borghetti) and the effect of unforeseeable supervening circumstances (Bénédicte Fauvarque-Cosson));⁷² and the various ‘sanctions’ for non-performance (‘forced performance in kind’ (Yves-Marie Laithier), the defence of non-performance (Thomas Genicon) and termination for non-performance (Solène Rowan)).⁷³ Some of the essays are therefore entirely French in their perspective, placing the new law in the context of the old and offering critical observations; others are comparative either with the various European ‘soft-law’ instruments affecting contract law or with other national laws. In this way, we hope to offer a variety of perspectives, some internal and some external, to the first general legislative reform of the French law of contract since the promulgation of the Code civil itself.

⁶⁹ Below, chs 17, 18 and 16 respectively.

⁷⁰ Below, chs 4–6 respectively.

⁷¹ Below, chs 7 and 8 respectively.

⁷² Below, chs 11, 12 and 10 respectively.

⁷³ Below, chs 13–15 respectively.