THE FRENCH AND THE GERMAN REFORMS OF CONTRACT LAW

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ABSTRACT. *L'articolo commenta la riforma francese, comparandola con quella tedesca. L'esame dimostra come, dopo le riforme, Francia e Germania siano più aperte alle dinamiche internazionali e vicine tra di loro che in precedenza. La "grande réforme francaise" va intesa più come un passaggio verso un modello comune europeo che come un momento di brillante isolamento nazionale.*

This paper comments the French reform by comparison with the German one. The essays shows that after the respective reforms, France and Germany seem to be more internationally oriented and closer to each other in their grand Civil Codes. The 'grande réforme française' – rather a step towards a common European model than one of splendid national isolation.

1. Introduction

After roughly a decade of debates and proposals, France has enacted its contract law reform with a presidential order concerning the law of contract, the general regime of obligations, and proof of obligations.[1] Some would have preferred an act of parliament.[2] This reform was a milestone and a more solemn adoption procedure would have underscored the reform's significance better – or to formulate it from a private law perspective, a more solemn act would have put it more at the centre of what constitutes society.[3] The reform is a grand step indeed,[4] as it finalizes what started with a series of other proposals. Four major reform proposals preceded the one enacted –[5] which, in turn, largely profited from the others and took them into account quite deeply.

In virtually all respects, the French reform shows astonishing parallels to the German reform some 15 years ago, through the *Schuldrechtsmodernisierungsgesetz* of 2002[6] (to which in the French reform,

[1] Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations. For an English version of the new French Civil Code (commissioned by the French Ministry of Justice): B. FAUVARQUE-COSSON, J. CARTWRIGHT and S. WHITTAKER, The Law of Contract, the General Regime of Obligations, and Proof of Obligations (English translation of new provisions in French Civil Code) (Ministry of Justice, French Republic, 2016), available at http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf (last visited 25 July 2017). A translation of the German Civil Code is available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf (last visited 12 August 2017). Both translations will be used throughout this paper.

[2] Pointing out the heavy criticism: J. CARTWRIGHT and S. WHITTAKER, 'The Transformation of French Contract Law by Government Decree – and Translated into English' (University of Oxford, Faculty of Law, Latest News, 2 November 2015), at https://www.law.ox.ac.uk/news/2015-11-02-transformation-french-contract-law-government-decree-—-and-translated-english (last visited 2 August 2017); A. DOWNE, 'The Reform of French Contract Law: A Critical Overview' (2016) *Revista da Faculdade de Direito UFPR* 43-68, 45. Calling the procedure 'surprising' out of a German perspective: V. MOLL and A. LUKE, 'Die französische Vertragsrechtsreform – Möglichkeiten und Risiken' (2017) *Zeitschrift für Internationales Wirtschaftsrecht* 43-45, 43. Anyhow, it needs to be kept in mind that the government was appointed by an act of parliament (loi n° 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures à prendre) and was bound by a time limit as well as by a detailed specification of content. Justifying this procedure by the fact that a parliamentary procedure 'would have endangered the whole process': B. FAUVARQUE-COSSON, 'Towards an important reform of the French Civil Code' (2015) *Montesquieu Law Review* 2-15, 4. For more details on the procedure of adoption, see H. J. SONNENBERGER, 'Die Reform des französischen Schuldvertragsrechts, des Regimes und des Beweises schuldrechtlicher Verbindlichkeiten durch Ordonnance Nr 2016-131 vom 10.2.2016' (2017) *Zeitschrift für Europäisches Privatrecht* 6-67, 14.

[3] From a German perspective, two of the most important private law scholars of the last 70 years (after World War II) come readily to mind. Franz Böhm sees public interest order (which nowadays is so much more at the centre of the political debate) as a tool only, as the tool for a private law society where parties can freely shape their affairs (and this would be via contract law to a large extent): F. BÖHM, 'Privatrechtsgesellschaft und Marktwirtschaft' (1966) 17 *ORDO* 75-151; partial translation into English: F. BÖHM, 'Rule of Law in a Market Economy', in A. Peacock and H. Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (London: Macmillan, 1989) 46-67; on the context and development of this idea: S. GRUNDMANN, in S. Grundmann, H.-W. Micklitz and M. Renner, *New Private Law Theory* (forthcoming, 2017) chapter 6. Conversely, Ludwig Raiser, one of the pioneers of a socially enhanced private law in Germany, sees contract law as the playing ground on which it is decided how much social justice and establishment of social values takes place in a society: L. RAISER, 'Vertragsfunktion und Vertragsfreiheit' *Deutscher Juristentag* 1960, 101-131. On both private law scholars see now the contributions by E. MESTMÄCKER respectively to: S. Grundmann and K. Riesenhuber (eds), *Private Law Development in Context – German Law and Scholarship in the 20th Century* (Antwerp/Cambridge: Intersentia, 2017) 31-56.

[4] Overall descriptions can be found, inter alia, in J. M. SMITS and C. CALOMME, 'The Reform of the French Law of Obligations – Les Jeux Sont Faits' (2016) *Maastricht Journal of European and Comparative Law* 1-12, 3. The importance of the step is highlighted, mostly with a rather positive appreciation, by S. ROWAN, 'The New French Law of Contract' (2017) *International & Comparative Law Quarterly* 1-27, 1, calling it a 'major event in France' and highlighting its relevance 'far beyond France's borders'.

[5] The two first major preliminary drafts from academia were both called after their initiators. For the 'Catala project' from 2005 visit: http://www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf (last visited 1 August 2017). The 'Terré project' was published in three volumes: F. TERRÉ, *Pour une réforme du droit des contrats* (Paris: Dalloz, 2009); F. TERRÉ, *Pour une réforme du droit de la responsabilité civile* (Paris: Dalloz, 2011); F. TERRÉ, *Pour une réforme du regime general des obligations* (Paris: Dalloz, 2013). Based on this academic work, the Chancery initiated two preliminary projects: The first in 2008 for law of contract and the second in 2011 for the general regime of obligations, and proof of obligations: http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/reforme-du-regime-des-obligations-et-des-quasi-contrats-22199.html (last visited on 1 August 2017). In the end, this reform seems rather balanced, as it is the result of more than 300 consultations. Calling it a 'collective work from the whole legal community': N. MOLFESSIS, 'Droit des contrats: Que vive la réforme' (2016) *La Semaine Juridique* 321-322, 322.

[6] Gesetz zur Modernisierung des Schuldrechts of 26 November 2001, *Bundesgesetzblatt* (German Official Journal) 2001 I, 3138. Today, the law is subject of all standard commentaries on the *Bürgerliches Gesetzbuch* (German Civil Code). Some of the most important early contributions, in part also influencing the law itself, can be found in S. GRUNDMANN, D. MEDICUS and W. ROLLAND (eds), *Europäisches Kaufgewährleistungsrecht – Reform und Internationalisierung des deutschen Schuldrechts* (Cologne: Heymanns, 2000); W. ERNST and R. ZIMMERMANN (eds), *Zivilrechtswissenschaft und Schuldrechtsreform – zum Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetzes des Bundesministeriums der Justiz* (Tübingen: Mohr-Siebeck, 2001); C.-W. Canaris,

some reference was made, but moderately only).[7] This is all the more interesting as the two Codes – for codified systems – can be seen as the two most paradigmatic and the most influential ones. The French reform has aroused interest well beyond that, namely also in England with its common law system.[8] Also in Italy, some thought is given whether this should not serve as an invitation to their own reform. The multi-facetted comparison of the two contract law reforms in France and Germany forms the subject of the following; one point has to be made clear from the outset, however: The German reform also, even though made as a response to the EC Sales Directive of 1999,[9] was by no means conceived in three years only. It would not have been possible had there not been a long-term project of reform already in the 1980[ies] – with extensive reform proposals and discussion well into the 1990[ies].[10] The German legislator strongly profited from these proposals during the legislative process of the *Schuldrechtsmodernisierung* because the model to be transposed – the EC Sales Directive of 1999 – was so strongly modelled on the international model – the Convention on the International Sale of Goods (CISG) of 1980 –,[11] which the 1980[ies] reform proposals had mainly taken as their point of reference. While it may sound astonishing at first sight that an EC consumer law act takes an international commercial law act as its model, this is not so astonishing at further analysis[12] and certainly helped the German reform legislature a lot.[13]

'Die Reform des Rechts der Leistungsstörungen' (2001) *Juristenzeitung* 499-524; H. Schulze and R. Schulte-Nölke (eds), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Tübingen: Mohr-Siebeck, 2001); then surveys on the first years, for instance: S. Lorenz, 'Fünf Jahre "neues" Schuldrecht im Spiegel der Rechtsprechung' (2007) *Neue Juristische Wochenschrift* 1-8; S. Lorenz, 'Schuldrechtmodernisierung - Erfahrungen seit dem 1. Januar 2002', in E. Lorenz (ed), *Karlsruher Forum 2005* (Karlsruhe: Versicherungswirtschaft, 2006) 5-138; B. Dauner-Lieb, 'Drei Jahre Schuldrechtsmodernisierungsgesetz' (2004) *Anwaltsblatt* 597-601; I. Saenger and U. Klockenbrink, 'Das "neue" Kaufrecht in der Rechtsprechung 2002-2005' (2006) *Zeitschrift für das Gesamte Schuldrecht* 61-65. In this journal, see already S. Grundmann, 'Germany and the Schuldrechtsmodernisierung 2002' (2005) 1 *European Review of Contract Law* 128-147; S. Grundmann and F. Ochmann, 'German Contract Law Five Years After the Fundamental Contract Law Reform in the *Schuldrechtsmodernisierung*' (2007) 3 *European Review of Contract Law* 450-467.

[7] For general references to the German reform: 'Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations' (2016) 35 *Journal officiel de la République française*, text n°25, available at https://www.legifrance.gouv.fr/eli/rapport/2016/2/11/JUSC1522466P/jo/texte (last visited 4 August 2017); Fauvarque-Cosson, n 2 above, 3. Briefly referencing the German reform and calling the French Ordonnance a '*Professorenrecht* à la française': N. Rontchevsky, 'Les objectifs de la réforme: accessibilité et attractivité du droit français des contrats' (2016) *Actualité Juridique Contrats d'affaires, Concurrence, Distribution* 111-115, 112. Pointing out that the French CC moved 'in the direction of the German legal tradition': Smits and Calomme, n 4 above, 10. Questioning the influence of other European reforms (such as the German reform of 2002): F. Limbach, 'Die französische Reform des Vertragsrechts und weitere Rechtsgebiete' (2016) 4 *Zeitschrift für das Privatrecht der Europäischen Union* 161-164, 161.

[8] See namely: J. CARTWRIGHT, S. VOGENAUER and S. WHITTAKER (eds), *Reforming the French Law of Obligations – Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription ('the Avant-projet Catala')* (Oxford: Hart, 2009); J. CARTWRIGHT and S. WHITTAKER (eds), *The Code Napoléon Rewritten – French Contract Law after the 2016 Reforms* (Oxford: Hart, 2017); P. ROSHER, 'French Contract Law Reform' (2016) 17 *Business Law International* 59-72.

[9] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJEC* 1999 L 171/12; from the literature on this measure, see M. BIANCA and S. GRUNDMANN (eds), *EU Sales Directive - Commentary* (Cologne: Schmidt, 2002); G. de CRISTOFARO, *Difetto di conformità al contratto e diritti del consumatore - l'ordinamento italiano e la direttiva 99/44/CE sulla vendita e le garanzie dei beni di consumo* (Padova: Cedam, 2000); S. PELLET, *La garantie légale des biens de consommation - étude comparée des droits français, anglais et communautaire* (Villeneuve d'Ascg: Presses universitaires du Septentrion, 2003); A. ORTI VALLEJO, *Los defectos de la cosa en la compraventa civil e mercantil. El nuevo régimen jurídico de las faltas de conformidad según la Directiva 1999/44/CE* (Granada: Ed Comares, 2002); T. REPGEN, *Kein Abschied von der Privatautonomie - die Funktion zwingenden Rechts in der Verbrauchsgüterkaufrichtlinie* (Lübeck: Schöning, 2001).

[10] The most influential, the two volumes and reform proposals on breach of contract and sales law (with its orientation on the CISG or ist forerunner as a model): U. HUBER, '*Leistungsstörungen – Empfiehlt sich die Einführung eines Leistungsstörungsrechts nach dem Vorbild des Einheitlichen Kaufgesetzes? Welche Änderungen im Gesetzestext und welche praktischen Auswirkungen im Schuldrecht würden sich dabei ergeben?*', in *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol I (Bonn: Verlag Bundesanzeiger, 1981) 647-910; U. HUBER, '*Kaufvertrag – welche Ergänzungen und Fortentwicklungen sind im Kaufrecht im Hinblick auf die technischen, wirtschaftlichen und juristischen Weiterentwicklungen der Rechtswirklichkeit geboten? Sollten Sonderentwicklungen außerhalb des BGB (Abzahlungsgesetz, Handelskauf, kaufrechtliche Bestimmungen des AGBG) in die Kodifikation eingearbeitet werden?*', in *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, vol I (Bonn: Bundesanzeiger, 1981) 911-950.

[11] UN Convention on Contracts for the International Sale of Goods of 11 April 1980, United Nations, Vienna, *Official Records*, 1981, 178. For a list of the states that have ratified the convention (87 as of 12 July 2017), see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited on 3 August 2017); see also J. HONNOLD, *Documentary History of the Uniform Law of International Sales* (Boston: Kluwer, 1989); C. M. BIANCA and M. BONELL (eds), *Commentary on the International Sales Law—the 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987); P. SCHLECHTRIEM and I. SCHWENZER (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed, Oxford: Oxford University Press, 2016).

[12] On this similarity and on the conclusions which can be drawn from this similarity with respect to the relationship between consumer and commercial contract law, see more extensively S. GRUNDMANN, '*Consumer Law, Commercial Law, Private Law –*

The comparison between the two reforms proceeds from a more general to a more specific perspective (concentrating only on steps highly relevant and not even covering them all). First, overall histories are compared and namely the main thrust which inspired the legislatures (see section II below). Then, those features, which can be seen as the architectural framework, are discussed (see section III below), and finally important single aspects, first relating to the formation of contracts (see section IV sub 1 below), followed by their 'implementation', ie execution, breach or also transfer etc (see section IV sub 2 below). Such a reform – and perhaps even more a comparison of reforms – brings to the European scene what in times of mere judicial development – ie as a less striking and slower path of development – largely remains at the level of national observation only.

2. Scope and Ideas

2.1. Revitalisation of Old Codes and Re-Integration of Scattered Small Acts

It has often been highlighted that the *French Civil Code* (CC) had virtually not been reformed in its regime on contracts and obligations since 1804 or only at the margins.[14] This was different with respect to the law of property, wills and estates and family law.[15] It has also frequently been highlighted that the grand Code therefore remained at the margin of developments in contract law and law of obligations – practically important development often being pushed into smaller legislation. The Code remained elegant, but thereby – and to a certain extent – also became 'dead law'.[16] The French reform thus opens a new area.

The *German Civil Code*, being younger by one century, had shared this destiny before the 2002 reform to some, though to a lesser extent. Especially socially loaded contracts – such as lease contracts – had been subject of frequent and far-reaching reform,[17] but some other interventions had occurred as well.[18] For many decades, France and Germany shared the tendency of de-codification, namely EC Directives being transposed into single small acts and decrees.

One important difference was, however, that France, with the *Code de la consommation*,[19] already went into the direction of a certain re-codification – followed later by so many others. Thereby, France developed its role as a forerunner in codification again – albeit, however, at the expense of the old Napoleonic codification and a potentially desirable unity of contract law (on this issue, the split or unity between contract and consumer law, see section III sub 2 below). Without the enactment of a Code de la consommation, the French

how can the Sales Directive and the Sales Convention be so similar?' (2003) 14 *European Business Law Review* 237-257.

[13] For the influence of the 1980[ies] reform proposals inspired by the CISG on the *Schuldrechtsmodernsisierung* 2002, see: U. BÜDENBENDER, '*Das Kaufrecht nach dem Schuldrechtsreformgesetz (Teil I)*' (2002) *Deutsches Steuerrecht* 312-318, 313; see also W. ROLLAND, 'Schuldrechtsreform - Allgemeiner Teil' (1992) *Neue Juristische Wochenschrift* 2377-2384, 2380.

[14] For an official statement concerning the 'Genèse de la réforme' consult the 'Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations' (2016) 35 *Journal officiel de la République française*, text n°25. Furthermore see C. KLEIN, '*Die Vertragsrechtsreform in Frankreich*' (2016) *Recht der internationalen Wirtschaft* 328-331, 328; Molfessis, n 5 above, 321. For a pre-reform perspective see Fauvarque-Cosson, n 2 above, 2.

[15] See C. ASFAR-CAZENAVE, '*La réforme du droit français des contrats*' (2015) *Revue juridique Thémis de l'Université de Montréal* 717-755, 725; SONNENBERGER, n 2 above, 7; Moll and Luke, n 2 above, 43.

[16] In this sense, namely Smits and Calomme, n 4 above, 3 *et seq*.

[17] The social character of German lease law has been put into place through several reforms, namely the 'Lücke Plan' of 1960, Third Lease Law Amending Law of 1967 ('Drittes Mietrechtsänderungsgesetz'), the First and Second Residential Space Termination Protection Law of 1971 and 1974 ('Erstes und Zweites Wohnraumkündigungsschutzgesetz') and the Lease Law Reform of 2001 ('Mietrechtsreformgesetz'): M. HÄUBLEIN, in F. J. Säcker, R. Rixecker, H. Oetker and B. Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 3* (7th ed, Munich: Beck, 2016) Vor § 535 para 41-49, especially 41-48; B. Markesinis, H. Unberath and A. Johnston, *The German Law of Contract - A Comparative Treatise* (2nd ed, Oxford: Hart, 2006) 533 *et seq*. For a detailed explanation of the impact of the 2002 reform on German lease law: F. G. von WESTPHALEN, 'Mietrecht und Schuldrechtsreform' (2002) *Neue Zeitschrift für Miet- und Wohnungsrecht* 368-377, 368.

[18] Other important reforms for German contract law – apart from lease law – were the Act on Unfair Contract Terms of 1976 ('Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen') or the Package Travel Contract Law of 1979 ('Reisevertragsgesetz') for instance. Other areas of law of the German Civil Code underwent reforms as well, especially German family law. For more information consult: F. J. Säcker, in F. J. Säcker, R. Rixecker, H. Oetker and B. Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 1* (7th ed, Munich: Beck, 2015) Introduction 15-23; Markesinis, Unberath and Johnston, n 18 above, 533.

[19] Code de la consommation, originating from Loi n°78-22 du 10 janvier 1978 relative à l'information et à la protection des consommateurs dans le domaine de certaines opérations de crédit. On this development, from today's perspective, see Fauvarque-Cosson, n 2 above, 2; from a German perspective C. Szönyi, 'Das französische Werbe- und Verbraucherrecht – Bemerkungen zum Code de la consommation' (1996) *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* 83-98, 83.

Civil Code might well have been reformed earlier. To a lesser extent, Germany saw some similar development. With the enactment on the *(German) Act on Unfair Contract Terms* – despite the fact that this Act was *not* conceived as a genuine consumer act in Germany –,[20] also in Germany there had been a more consistent act for at least one new and practically highly relevant area with a strongly 'social' dimension. In practical importance, this Act soon reached Civil Code contract law; in fact, the number of cases decided in 25 years of its existence was comparable to the one concerning the (remaining) contract law in the Civil Code as a whole.[21] The most important step of the *Schuldrechtsmodernisierung*, the integration of consumer law into the Civil Code in 2002, will be dealt with separately (see below section III sub 2).

2.2. Innovative and Divers Answers to International Developments

The two reforms *both respond to international developments*, despite the fact that some see a retreat from a harmonization, unification or Europeanisation agenda in this national reform movement.[22] The point of reference, however, is a different one.

While the *German reform* was characterized by generalizing the then existing most important international or supranational legal acts – a remarkable step as such –, the French reform has a more diffuse international model and a more ambitious goal. The German *Schuldrechtmodernisierung* transposed the EC Sales Directive of 1999 in the general part of the law of obligations / contracts – thus extending the scope of application in two ways: from consumer contracts to all contracts, and from sales contracts to all types of contracts.[23] This step did not only extend the scope of application of the EC Sales Directive, but brought the CISG indirectly into play. Not only was this Convention, while being designed for (commercial) sales, meant to serve as an international model for contract more generally, but at the same time, the German *Schuldrechtmodernisierung* achieved a strange kind of reintegration. While the EC Sales Directive was mainly coined on models to be found in the CISG, it had completely changed the personal scope of application by being confined to consumer sales. By extending the scope of application to all contracts, the *Schuldrechtsmodernisierung* made the model apply to commercial contracts as well, ie the subject matter of the CISG. In fact, it generalized and extended the model even (a bit) more (also to all C2C and P2P contracts).

The *French reform* has other international models, more from the range of soft law measures ('principles') developed on the basis of the CISG and the EC Sales Directive, ie a progressing development and adaptation to more modern trends of thinking. This refers to the so-called Lando Principles, Unidroit Principles, and also PECL/CESL[24] – even though the French reform is far from being a mere adaptation of these principles. In fact, the French reform explicitly wants to *enter the competition of legislatures*.[25] Hence, it also makes sense to

[20] The rationale of unfair contract terms law is still diverging in Germany and in France. Whie in France, there is still the image of unequal bargaining power and even overreaching which justifies in favour of consumers, in Germany, the rationale is rather that one party structurally is strongly disadavantaged with respect to information and information costs. See M. Adams, 'Ökonomische Begründung des AGB-Gesetzes – Verträge bei asymmetrischer Information', 1989 *Betriebsberater*, 781-788, 787; E. G. FURUBOTN / R. RICHTER, *Institutions and Economic Theory – The Contribution of the New Institutional Economics* (2nd ed., Ann Arbor, University of Michigan Press, 2005), pp. 241-246; H.-B. SCHÄFER / C. OTT, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (4th ed., Berlin, Springer, 2005), pp. 513-515 – which, inter alea, justifies protection also of businesses. See as well below section III sub 2.

[21] Pointing out the masses of judgments and comparing them to other parts civil law: H. HEINRICHS, '*Die Entwicklung des Rechts der Allgemeinen Geschäftsbedingungen im Jahre 1993*' (1994) *Neue Juristische Wochenschrift* 1380-1432, 1380. In EU law, the EC Unfair Contract Terms Directive is the basis of even more than half of the contract law cases, see case law survey in H. MICKLITZ and B. KAS, 'Overview on cases before the CJEU on European Consumer Contract Law (2018-2013) Part I and II' 10 (2014) *European Review of Contract Law* 1-63 and 189-257.

[22] Noting that – 'between the lines' – France seeks to influence Europe and the world (rather than being influenced by Europe and the world): M. G. CASAS, '*Die causa-Lehre in der französischen und argentinischen Privatrechtsreform*' (2017) *Zeitschrift für Europäisches Privatrecht* 68-101, 75. Pointing out the important fact that the French CC has immensely lost influence (but characterising the importance of this fact in the course of the French reform as regrettable): M. SÉJEAN, 'The French Reform of Contracts: An Opportunity to Tie Together the Community of Civil Lawyers' (2016) 76 *Louisiana Law Review* 1151-1161, esp 1151-1154.

[23] The German reform was therefore considered to follow a 'large solution' approach ('große Lösung'): B. DAUNER-LIEB, '*Die Schuldrechtsreform - Das große juristische Abenteuer*' (2001) *Deutsches Steuerrecht* 1572-1576, 1572; H. DÄUBLER-GMELIN, '*Die Entscheidung für die so genannte Große Lösung bei der Schuldrechtsreform - Zum Entwurf eines Gesetzes zur Modernisierung des Schuldrechts*' (2001) *Neue Juristische Wochenschrift* 2281-2289, esp 2281-2284.

[24] Naming these in the context of a general movement of harmonisation of contract law: 'Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations' (2016) 35 *Journal officiel de la République française,* text n°25. Acknowledging the influence of European and international fora on the French reform: Asfar-Cazenave, n 16 above, esp 717 and 728.

[25] Referring to the 'Doing Business in 2004: Understanding regulations' report of the World Bank, in which the French re-

try to draw on the most modern, convincing (or what is seen as such), and international sources – also with a view to make French law more easily understandable and compatible with international practice (which is meant to be prompted into using French law more often). Thus while not sticking to these sources of inspiration, the French reform clearly takes them as a guideline always worth very serious consideration.[26] In substance, the main features for increasing attraction were seen in a better readability (reorganising the substance and codifying core parts of long-standing case law) and – still more principled – in the insistence on tools fostering substantive equality of contract parties.[27]

An overarching question in this development would seem to be how these developments have to be interpreted with respect to the development of a *European contract law*. Two interpretations seem plausible. It could be seen as a step toward more particularism again – after the failure of CESL as a legislative proposal –[28] that both leading Codes have been reformed independently now, each taking its own path. It can, however, also be seen that – while the European more general contract law measure failed to be adopted – the two leading jurisdictions / Code in style and content not only got closer to each other, but both drew their inspiration and thrust of reform from international models, which are all strongly linked with each other.

3. Features of Architectural Structure

On the level of features that are overarching and influence contract law as a whole, one seems outstanding for the French (see sub-section 1 below) and another one for the German reform (see sub-section 2 below). The difference in choice is revealing as it is clearly in line with some main features of both Codes / jurisdictions. Moreover – also 'overarching' – both reform legislatures have quite substantially reformed their regime on breach – not always the same way either, but in parallel ways (see sub-section 3 below).

3.1. The Overarching Role of Good Faith

As the old French Civil Code dated from a revolutionary, but also liberal time, and as most 'social' content of modern contract law were rather integrated into other laws – most prominently, of course, into the Code de la consummation –, one development is particularly significant. This is the development of the good faith principle (*principe de bonne foi*) from a limited device of contract execution to an overarching principle in contract law as a whole. Thus, once the Code was to be reformed, the main thrust quite logically had to be that of the main development in the 20th Century. This is towards more 'social oil' (Otto von Gierke) or 'social justice'.[29]

Before the reform, the Code foresaw a duty of good faith in the phase of execution. This, however, is not really much more than a principle of 'pacta sunt servanda' combined with the idea that contracts should not be read too literally– an idea universally accepted in all major jurisdictions on the continent. Thus, French civil law did by no means push far with respect to good faith in a comparative law perspective in Europe.[30] This is still in line with

gime was only ranked 44th in an international comparison: Smits and Calomme, n 4 above, 4. Discussing the background of (non-) competitiveness of the French regime in much detail: Sonnenberger, n 2 above, 17.

[26] See Limbach, n 7 above, 161. Determining three sources of inspiration 'from above', 'from below' and 'from the "sides"': Downe, n 2 above, 44.

[27] Naming as main aims those of 'intelligibility, predictability, and attractiveness': Séjean, n 23 above, 1153. Pointing out three objectives of the reform, namely 'simplicity, efficacy and protection': Downe, n 2 above, 45 *et seq*. Acknowledging the aim of readability ('lisibilité'), but considering the impact and importance of legal interpretation on new provisions of the French CC: T. MASSART, '*Le droit des sociétés et la réforme du droit des contrats*' in T. Massart, M. Caffin-Moi, E. Schlumberger, M. Buchberger, J.-F. Hamelin, S. Bahbouhi and S. Docq, (2016) 147 *Actes pratiques et ingénierie sociétaire* 1-110, 2.

[28] The proposal was officially withdrawn by the EU Commission (in its annual Work Programme for 2015) on 16 December 2014. For background information see: http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law (last visited 12 August 2017).

[29] For the famous critique that the German Civil Code when enacted was lacking the necessary 'sip of social/socialist oil', see O. VON GIERKE, *Die soziale Aufgabe des Privatrechts* (Berlin/Heidelberg: Springer, 1889). On social values and protection of weaker parties and against market failure as the main thrust of the civil law development in Europe, see S. GRUNDMANN, 'The Future of Contract Law' (2011) 7 *European Review of Contract Law* 490-527.

[30] On the French 'principe de bonne foi' being the genuine source of the German principle of 'Treu und Glauben': Sonnenberger, n 2 above, 19 *et seq*. For a (rather detailed) overview on good faith in a European and international context: C. Schubert, in F. J. Säcker, R. Rixecker, H. Oetker and B. Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2* (7th ed, Munich: Beck, 2016) § 242 para 151-168. Investigating into the role of good faith in European contract law while considering PECL, UNIDROIT and CISG: O. LANDO, '*Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?*' (2007) 15 *European Review of Private Law* 841-853. Acknowledging the broad and general character of art 2 CESL ('Good faith and fair dealing'): S. WHITTAKER and K. RIESENHUBER, 'Conceptions of Contract', in G. Dannemann and S. Vogenauer (eds), *The Common Euro-*

the liberal position that state order should namely not or little interfere with contract formation and definition.

The reform changed this approach both in art. 1104 and 1112 new French CC.[31] The good faith principle now concerns contract formation, interpretation, and the whole pre-contractual phase with its problems. This constitutes a significant departure from the old liberal model, because more in depth control of parties' agreements is legitimized by such an overarching principle's application to contract formation, and more reinterpretation of the parties' will is possible.[32] The German abundant case law on the application of good faith to the formation and interpretation of contracts beautifully illustrates this claim.[33] Also, the 'codification' of a law concerning the pre-contractual phase and duties therein constitutes a seminal step –[34] again, however, not really reaching beyond the state of the art already reached under the German Civil Code. Yet another instance, which in Germany had been based on the good faith principle as long as it was not codified, the theory of *clausula rebus sic stantibus*, points into the same direction – but, because of its importance, will be taken up separately (see section IV sub 2 b) below). Overall, the powerful upgrading of the good faith principle in the French reform did not only entail the thrust of a 'socially enhanced' private law of the 20th Century to a Civil Code which had been formulated a century before. It also led to a situation, in which the two paradigmatic Codes are so similar that a pan-European common approach in this important question is clearly emerging (the Italian Code being very similar as well).[35]

3.2. The Unity of Contract Law

The development in the German reform, that – both in importance and in substance – is most comparable to the upgrading of the good faith principle in the French reform, is the integration of the (then still scattered) consumer contract rules into the German Civil Code – and one should add: and not into a Consumer Law Code (also advocated by some authors).[36]

The main discussion at that time was, however, not about the adoption of a Consumer Law Code – or not –, but about integration or not.[37] Integration was not mandated by the task of transposing the EC Sales Directive. Thus, this step – together with the generalization of the model of breach (see section II sub 2 above) – constitutes the truly innovative and

pean Sales Law in Context: Interactions with English and German Law (Oxford: Oxford University Press, 2013) 120-159, 156 *et seq*. For a European pre-CESL perspective see: M. W. HESSELINK, '*The Concept of Good Faith'*, in A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak and C. E. du Perron (eds), *Towards a European Civil Code* (4th ed, Nijmegen and The Hague, London, Boston: Kluwer Law International, 2010) 471-498 (Chapter 27), esp 476-478.

[31] Art 1104 new French CC reads as follows: *Les contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d'ordre public. (Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy.)* Art 1112 new French CC (para 1) reads in this way: *L'initiative, le déroulement et la rupture des négociations précontractuelles sont libres. Ils doivent impérativement satisfaire aux exigences de la bonne foi. (The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith.)* For literature on both provisions, see references in the next footnotes, for the good faith concept in the French reform more generally, see Asfar-Cazenave, n 16 above, 729 *et seq*.

[32] Pointing out that some authros fear that the discretion of the courts may even be too broad (especially due to the fact that the French CC does not contain a definition of good faith): Rowan, n 4 above, 10. For more literature on art 1104 new French CC: M. Buchberger, in Massart, Caffin-Moi, Schlumberger, Buchberger, Hamelin, Bahbouhi and Docq, n 28 above, 51; Klein, n 15 above, 328.

[33] On the density of case law (due to the provision's role as a 'starting point' for judicial engeneering and institution building): Schubert, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2*, n 31 above, § 242 para 24-29. Linking 10 % of all German Supreme Court cases to art 242 new German CC: D. Looschelders and D. Olzen, in J. von Staudinger, D. Looschelders and G. Schiemann (eds), *Staudinger BGB – §§ 241-243* (15th ed, Berlin: Sellier - De Gruyter, 2014) § 242 para 79.

[34] There had been considerable case law already, the codification therefore is less novel in substance than expected at first sight and integrates into the general intention to make the Code more readable by codifying core case law. For an overview of art 1112 new French CC see: N. Dissaux and Ch. Jamin, *Réforme du droit des contrats, du régime général et de la preuve des obligations, Art. 1112 Code Civil* (Paris: Dalloz, 2016); Moll and Luke, n 2 above, 44.

[35] For the prominent role the good faith principle plays in Italian private law as an overarching and general concept, see, for instance, M. BARCELLONA, *Clausole generali e giustizia contrattuale. Equità e buona fede tra codice civile e diritto europeo* (Giappichelli: Turin, 2006).

[36] On the discussion about the integration of consumer law into the German CC, see H.-W. Micklitz, T. Pfeiffer, K. Tonner and A. Willingmann (eds), *Schuldrechtsreform und Verbraucherschutz* (Baden-Baden: Nomos, 2001). A more recent attempt was unsuccessful: H.-W. Micklitz, 'Gutachten [main report] Teil A: Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts?' *69th German Lawyers' Association Conference (Deutscher Juristentag – DJT)*, vol I (Munich: Beck, 2012) A1-A129, esp A25, A117.

[37] Advocating such integration, for instance, W.-H. ROTH, 'Europäischer Verbraucherschutz und BGB' (2001) *JuristenZeitung* 457-490, 487 *et seq*; and Grundmann (next footnotes). Opposed to this move, for instance, H. DÖRNER, 'Die Integration des Verbraucherrechts in das BGB' in H. Schulte-Nölke, R. Schulze (eds), *Die Schuldrechtsreform vor dem Hintegrund des Gemeinschaftsrechts* (Tübingen: Mohr-Siebeck, 2001) 177-188, esp 179 *et seq*.

autonomous move of the German legislature. During the first phase of considerations concerning the transposition, such an integration was not yet on the agenda. However, it was then powerfully advocated at a first (small) conference on the Directive and its transposition, namely on the international background of the reform, in Halle-Wittenberg.[38] Probably the most powerful arguments and those most positively received were the following three (see literature of last two footnotes). (i) By integrating consumer law into the Civil Code, it is rendered more accessible and thus 'upgraded', being treated in the most important commentaries and probably also by the most important commentators. In addition, this forces to consider – more directly, each and every time – whether a certain rule should favour only consumers indeed or be one of general private law. (ii) Consumer law – in substance – is not so different – in models – from general contract law, as is shown by the mere fact that both the CISG and the EC Sales Directive are 'so similar'. The main differences probably lie, on the substantive law side, in the lower level of information of consumers and hence the much higher importance of information duties (but not substantive duties and rules), and, of course, also in procedural remedies. (iii) Not integrating consumer law would imply that most of the development of the last decades – namely the one triggered by EU law acts – would happen outside the (German) Civil Code, thus leaving it outdated and devoid of dynamics.

The integration of consumer law into the German Civil Code – in contrast to the Code de la consommation and its prominent role left intact in the recent French reform again – seems significant also for the overall characteristics of civil law development in both countries. In France, there is, of course, not the feeling known in US consumer law that consumer contracts do not really constitute proper 'contract law'.[39] There is, however, much more the view that consumer protection is strongly needed because consumers are fundamentally different from other private law subjects – in their capacities and their need of protection.[40] Conversely in Germany, core institutions – as control of unfair contract terms – apply to all private law subjects (albeit in a differentiated way)[41] and similarly (from the beginning) the clause of good faith. Therefore, the overall perception is more one of different shades of protection, not of fundamental difference. Given that these two models are now prominent in the European arena, once again, the developments cannot be considered only nationally and as a retreat to the national. They should rather be seen as an impressive laboratory of design ideas visible in the European arena – especially, if one considers the Italian model as well, where a grand Code contained civil, commercial and consumer aspects (in addition even to company and labour law), but later was split up in order to establish a Codice del Consumo.[42]

3.3. The Basic Regime on Breach of Contract

It would require an entire article to compare the new French regime on breach of contract in detail with the one introduced in Germany by the *Schuldrechtsmodernisierung* in 2002. The regime on breach of contract is an overarching part of any con-

[38] See Grundmann, Medicus and Rolland, n 6 above; on other conferences later on, see also references n 6 above; for my own contribution then published in English in a version specifically focusing on the issue discussed here and considerably extended: see Grundmann, n 13 above, 237-257; highly influential on this topic a large monograph published just a few years before: J. Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers: eine Studie zum Privat- und Wirtschaftsrecht unter Berücksichtigung gemeinschaftsrechtlicher Bezüge* (Tübingen: Mohr-Siebeck, 1998); see also J. Drexl, 'Verbraucherrecht, Allgemeines Privatrecht, Handelsrecht', in P. Schlechtriem (ed), *Wandlungen des Schuldrechts* (Tübingen: Mohr-Siebeck, 2002) 97-151, 105.

[39] See, for instance: K. GUTMAN, 'The Development of Consumer Law in the US: Comparisons with the EU Experience' (2012) *Journal of European Consumer and Market law* 212-223, 213 *et seq*. This view in the US may, however, be influenced by the strong assumption that in contract law any information given then exempts from liability on this issue, an assumption consumer lawyers want to avoid.

[40] For a classification of the consumer as one of the 'parties les plus faibles', in France, see, for instance: P. SIRINELLI, 'L'équilibre dans le contenu du contrat' (2016) *Revue Dalloz IP/IT (Droit de la propriété intellectuelle et du numérique)* 240-244. For a description of the French development of the role of a consumer (towards a subject in need of protection): Szönyi, n 20 above, 83 *et seq*.

[41] On the broad scope of application (and its historic background): J. Basedow, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2*, n 31 above, § 305 para 4; the broad scope of application has been justified mainly by the fact that also professional clients can be subject to problems of information asymmetries – as compared to the supplier of the terms. See namely See more in detail M. ADAMS, *'Ökonomische Begründung des AGB-Gesetzes – Verträge bei asymmetrischer Information*' *Betriebs-Berater* 1989, 781, 787; and from an economic perspective H. B. SCHÄFER and C. OTT, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (5th ed, Berlin/Heidelberg: Springer, 2012) 478-480.

[42] The genesis of the Codice del Consumo originated from significant disagreement about its relationship with the Codice Civile, also at the institutional level. See E. MINERVINI, *Dei contratti del consumatore in generale: Terza edizione* (Giappichelli: Turin, 2014) 28-30. For an example of doctrinal disagreement, see P. SIRENA, 'Il Codice civile e il diritto dei consumatori' 21(5-II) *Nuova giurisprudenza civile commentata* 2005, 277-281 and S. Patti, 'Il Codice civile e il diritto dei consumatori. Postilla' 21(5-II) *Nuova giurisprudenza civile commentata* 2005, 282-287.

tract law. Nevertheless, a very rough sketch must suffice in this context to give some comparison.

The remodelling of the regime on breach of contract was probably even more key to the *German legislature in 2002* than to the French reform project. The German regime was particularly complicated and unsatisfactory before.[43] With defining a multitude of forms of breach, which were then subject of a overly complex regime on prescription periods (ranging from 6 months to 30 years), it triggered numerous disputes, also in practice. These were mainly disputes on the delineation of these regimes – despite the fact that all these forms were functionally highly similar to each other, always containing a deviation from the original 'plan' of the agreement. Conversely, the model of the CISG was astonishingly simple. It effectively restricted the range of remedies and forms of breach to two: claim for damages and rescission. One remedy was calculated on actual harm and (could) require fault, the other constituted just a winding-up of the contract (restitution of all that had been received) and required no fault (with only an exception in unexpected – and rare – cases of force majeure). One major uncertainty that was left in this regime concerned defining prerequisite of rescission. The starting point is that rescission is costly, namely for the seller, who not only loses gain from the contract (often ca 30 % of the price), but receives the good / service back as well (often highly discounted in value because of usage) and may even have to carry costs of restitution (transportation, removing and reinstalling of substitute goods). Therefore, admitting rescission is both costly and a strong incentive for each party, namely the seller / provider of services, to comply with duties under the contract. Under Article 24 and 49(1)(a); Article 51; Article 64(1)(a); Article 72(1); Article 73 CISG, the triggering criterion is a 'fundamental breach', which traditionally is seen as a breach that in the largest part deprives the party harmed of the benefits the contract was meant to convey. While fixing the level for triggering rescission at such a high level may have been sensible for international contracts – with long distances – one question remains. This is whether a second route towards rescission should be opened, namely with a sufficiently clear 'warning' of the party in default. Article 3 EC Sales Directive (in its correct interpretation), and very clearly German law – for all contract law – answer this question in a positive sense (see Article 283 and 323 German CC). Unless the defect is 'minor' – a case which is not so difficult to delineate –, each party always has the right to set a 'sensible' term to the party in default – for any kind of breach – and to rescind the contract after this term has lapsed. The rationale behind the regime reads like this. It gives legal certainty to a large extent (the delineation both for the concept of a 'minor' breach and for what is 'sensible' are not so difficult) and adds strong incentives for the non-complying party to comply after all. This therefore renders full and proper performance more likely, clarifies the status of the contract and avoids the difficulties of proving (the exact amount of) damages to a large extent. As before mentioned, this regime – taken from the CISG, but updated in the core aspect named – was so important for the German legislature that it was formulated as a general regime for all contracts, the very heart of the whole regime on breach of contract.

The impact of the *French reform* can be illustrated by the changes made to the French regime of breach of contract. The legal pre-reform situation could be compared with a maze,[44] whereas today's legal situation clearly is more structured.[45] Section 5 ('L'inexécution du contrat') new French CC comprises all possible remedies in its Article 1217 to 1231-7. Even though this systematization allows more clarity, the German CC went even further, differentiating between all contracts and contracts with bilateral obligations.[46] The new French CC, however, lists all five sanctions in its Article 1217 and regulates them thereafter – a contractual party can now 'refuse to perform or suspend performance of his own obligations; seek enforced performance in kind of the undertaking; request a reduction in price; provoke the termination of the contract; claim reparation of the consequences of non-performance' (Article 1217 new French CC). In the context of this overview article, only two out of the five remedies can be discussed (rather shortly), the two with arguably the most paradigmatic changes. These are the remedies of price reduction and termination of contract. A much wider scope of application has been opened for the (unilateral and proportional) *price reduction* by the French reform (Article 1223 new

[43] See more in detail on the following, with ample references: S. GRUNDMANN, 'Regulating Breach of Contract - The Right to Reject Performance by the Party in Breach' (2007) 3 *European Review of Contract Law* 121-149; Grundmann (2005), n 6 above, 128-147.

[44] Pointing out the fragmentary and vague character of the pre-reform provisions concerning breach of contract: Sonnenberger, n 2 above, 54.

[45] Calling this part of the reform the 'most innovative' on: Rowan, n 4 above, 17. Welcoming the new clarity: Moll and Luke, n 2 above, 45; Fauvarque-Cosson, n 2 above, 10. Drawing an illustrative comparison between the French and the German regime of breach of contract, especially with regards to the CISG: J. SCHMIDT-RÄNTSCH, 'Das neue französische Schuldrecht' (2017) *IWRZ* 159-163, 161.

[46] See art 273-292 for all contracts and art 320-326 new German CC for contracts with bilateral, synallagmatic obligations.

French CC).[47] Whereas this remedy was reserved to sales contracts before the reform,[48] it now applies to all kinds of contracts – on the condition of a formal notification. Jurisprudence as to whether this sanction can be excluded in a contract needs yet to be awaited. Regarding *termination of contract* ('résolution unilatérale du contrat'), new options have been installed in Article 1224 new French CC. Even though all three options for terminating a contract had been stipulated before the French reform,[49] the regime concerning termination through unilateral notice by the creditor to the debtor has been fundamentally altered.[50] The legal pre-reform situation allowed for one party to terminate a contract unilaterally. However, this was only on condition of a serious violation of the debtor's contractual obligations and at the creditor's own risk.[51] The debtor could then challenge this unilateral termination before the courts, leaving the creditor with no legal certainty.[52] The French reform has introduced the option of termination on condition of a sufficiently serious non-performance by the debtor and a notice to the latter by the creditor. Even though the debtor can challenge a termination before the courts, the legal consequence is an automatic termination of the contract, allowing the creditor to conclude a new contract without having to await an uncertain lawsuit.[53] Nevertheless, legal certainty is not fully secured until the courts have given their interpretation and definition of a sufficiently serious breach of contract.

[47] For a (systematic) overview of art 1223 new French CC: Dissaux and Jamin, n 35 above; M. Buchberger, in Massart, Caffin-Moi, Schlumberger, Buchberger, Hamelin, Bahbouhi and Docq, n 28 above, 87 (point 276). Pointing out differences between the new French and German regimes of price reduction: Schmidt-Räntsch, n 46 above, 162.

[48] For more information on this long-established provision (art 1644 new French CC) and a reference to art 50 CISG: Asfar-Cazenave, n 16 above, 750 *et seq*. Moreover see: M. Mekki, 'Ordonnance du 10 février 2016 sur la réforme du droit des obligations' (2016) *Recueil Dalloz* 494-505, 504 (point 30).

[49] Termination may result from a termination clause, from notice by the creditor to the debtor (on condition of a sufficiently serious non-performance) or from a judicial decision. For further information see: Rowan, n 4 above, 19; Mekki, n 49 above, 504 (point 31).

[50] Compare with UNIDROIT Principles concerning the 'right to terminate the contract' (art 7.3.1) and esp the 'notice of termination' (art 7.3.2).

[51] Explaining the previous condition of a serious violation ('manquement grave'): Asfar-Cazenave, n 16 above, 751 *et seq*.

[52] For more background information (esp the role of the Cour de Cassation): Fauvarque-Cosson, n 2 above, 11.

[53] Calling this aspect the new provision's 'underlying idea': Asfar-Cazenave, n 16 above, 752. Stressing that this regime is of high economic efficiency: Rowan, n 4 above, 20.

4. A Number of the Most Important Single French Reform Solutions Compared

Overall, the French reform would seem to touch upon more points, constitute more of an overall reform of contract law and the law of obligations than the German reform. The grand features of the latter would rather seem to lie (only or mainly) in the integration of consumer law and in the generalisation of the model of breach of contract (see sections II sub 2 and III sub 2 above). It seems that 15 more years of preparation typically lead to a broader revision of the whole contract law and law of obligations. The following single reform issues can best be arranged along the life cycle of contracts – progressing from formation of contract (with its validity questions) to the implementation of the contract (with changes of its terms during the life span and changes of contract partners). The issues treated hereinafter seem to stand out in both reforms, even though they constitute only an (important) sample of the issues regulated.

4.1. Formation and Validity of Contract

The French reform is rich in new rules for the phase of formation of contract or even the pre-contractual phase (including issues of validity). The main thrust seems to be to give more weight to the real will of the parties and carry it through more consistently. This can take the form of abandoning a prerequisite that appeared to be too formal only, or of rendering binding also promises that do not yet form the contract as such, but are meant to induce reliance and to allow for planning by the parties (see sub-section a) below). This can also take the form of giving more weight to safeguards in the case of defects in the formation of will (see sub-section b) below). Finally, information is certainly key for fostering a meaningful exercise of the will of parties, and in this respect, a more meaningful control of the conditions for making standard contract terms part of the contract plays a major role (see sub-section c) below).[54]

a) Abandoning the Requirement of 'Cause' and Establishing a Denser Regime on the Pre-Contractual Phase

[54] On the role of information in a modern contract law (characterized by the focus on a meaningful and not only formal use of each party's will), see S. GRUNDMANN, 'The Future of Contract Law', *European Review of Contract Law* 7 (2011), 490-527; also id. 'Information, Party Autonomy and Economic Agents in European Contract Law', *CMLR* 39 (2002) 269-293.

For some authors, the abandoning of the requirement of 'cause' (former Article 1108, and also Article 1131 *et seq* French CC) was the most important – and arguably also the most detrimental – feature of the French reform.[55] In symbolic terms, this may be true, in practical terms, however, much less so. Therefore, abandoning this prerequisite was seen as being rather 'costless' and very important at the same time for globally rendering French law more attractive. The proponents pointed to two arguments in favour of the reform. The first function of the requirement of 'cause' – to subject those agreements to scrutiny that are problematic for their effects on weaker or third parties – was maintained anyhow. Indeed, the content of the old Article 1133 CC that regulated 'cause' as a tool for such scrutiny ('cause subjective') was taken up in the Article 1162 new French CC. Conversely, the second function of the prerequisite of 'cause' – to forbid those agreements where free consensus between the parties, but no concrete economic goal, could be shown – was practically not important anyhow … and moreover questionable.[56] For a comparison, German law is probably not the ideal candidate, as it subscribes to the idea of the validity of the so-called 'pactum nudum' – without a requirement of 'cause' – ever since the adoption of the Civil Code (and already before).[57] What German case law may, however, show is that even without such a requirement, not many sham contracts have come to court and were honoured when they had negative effects on affected (weaker or third) parties.[58] Italy (which maintains the requirement of 'causa') or England (with its parallel requirement of 'consideration') may be better candidates for comparison. On the other hand, however, they also show that the respective requirements' importance is strongly on the decline.[59]

Quite a few features of the reform concern the *pre-contractual phase*, more precisely: the phase before the contract properly is entered into. One such feature has already been named – the development of a fully-fledged regime on pre-contractual liability ('culpa in contrahendo') under the auspices of good faith (see section III sub 1 above). Two more of these features should at least be mentioned – both now in good part aligning French and German law (which is known for its particular emphasis on the regime on pre-contractual promises).[60] One feature is the introduction of a possibility to create an *option right* for the beneficiary via unilateral promise by the other party – to opt for the formation of a contract whose terms are fixed in the promise (offer). Indeed, Article 1124 new French CC now states that revoking such promise leaves the option right intact and does not hinder the formation of a contract once the beneficiary uses her option right.[61] The equivalent under German law would be the binding offer (the default solution in Germany anyhow, Article 145 new German CC) – which can be extended over a certain period of time by the proponent (see Article 148 new German CC).[62] However, Article 1124 (para 3) new French CC also conveys binding force of such an option right against third parties who know about the promise. The second feature is a *contract giving preference* on a certain object when a contract on the alienation of the exact object is later entered into (Article 1123 new French CC) – preference, in principle, also with effect against third parties.[63] German law

[55] See namely: D. MAZEAUD, '*Pour que survive la cause, en dépit de la réforme!*' (2014) 240 *Droit et Patrimoine* 39-40; T. GENICON, '*Défense et illustration de la cause en droit des contrats*' (2015) *Receuil Dalloz* 1551-1557. Even promoting an integration of the 'cause' into European contract law (before the reform): J. GHESTIN, '*Faut-il conserver la cause en droit européen des contrats?*' (2005) *European Review of Contract Law* 396-416. By contrast, demanding the suppression of the cause: L. AYNÈS, '*La cause, inutile et dangereuse*' (2014) 240 *Droit et Patrimoine* 40-41.

[56] See for these arguments speaking in favour of abandoning a formal requirement of 'cause': Fauvarque-Cosson, n 2 above, 6; Casas, n 23 above, 79 *et seq*; Rowan, n 4 above, 12 *et seq*. Calling the formal abandoning of the cause a 'trompe-l'œil' because its functions in the French regime on contracts are largely maintained: Rontchevsky, n 7 above, 112.

[57] See M.-P. WELLER, *'Das Privatrecht in Frankreich und Deutschland: Einflüsse und Resistenzen nach 50 Jahren Elysée-Vertrag*' (2013) 68 *JuristenZeitung* 1021-1030, 1025.

[58] In case of dubious contracts, efficient protection of a third party in German civil law is due to other provisions, such as art 117 new German CC concerning sham contracts ('Scheingeschäfte'). For a general overview on the latter, consult: C. Armbrüster, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 1*, n 19 above, § 117.

[59] For a comparative law perspective pointing out the downward movement, see: V. BASSANI and W. MINCKE, '*Europa sine causa?*' (1997) *Zeitschrift für Europäisches Privatrecht* 599-614.

[60] Comparing different regimes within the EU and highlighting the particular role of German law: M. LEHMANN, '*Die Zukunft der culpa in contrahendo im Europäischen Privatrecht*' (2009) *Zeitschrift für Europäisches Privatrecht* 693-715, 693 *et seq*.

[61] See for this rule (deviating from the former regime in that, before the reform, only damages could be claimed in case of revocation of such a promise): B. DESHAYES and I. BARSAN, 'Das neue französische Vertragsrecht – Die wesentlichen Züge' (2017) *Zeitschrift für Internationales Wirtschaftsrecht* 62-67, 66. Criticising the hesitation of the French legislator: Mekki, n 49 above, 498 (point 14).

[62] Differently, considering the (scarcely ever used) 'Optionsvertrag' as the equivalent in German law: Sonnenberger, n 2 above, 27; Deshayes and Barsan, n 63 above, 66.

[63] See for this rule, which mainly deviates from the former regime in the 'action interrogatoire' (para 3), a 'written notice to the beneficiary requiring him to confirm, within a period which the former fixes and which must be reasonable, the existence of a pre-emption agreement and whether he intends to take ad-

knows this solution under the term of 'Vorkaufsrecht', extensively regulated already for a century (Article 463 *et seq* new German CC). In all this, the traditional preference of German law for a pactum nudum can be sensed, while French law now powerfully deviates from a prerequisite of 'cause' and does so consistently (also with respect to such important moments as the 'pre-contractual' phase).

b) Pre-contractual Information Regime and Defects of Consent

Further focusing on the pre-contractual phase, three new rules need to be pointed out, the first two related to the giving and to the safeguarding of information. The first novelty, the introduction of a general *duty to inform* (Article 1112-1 new French CC), is an extension and expansion of French pre-reform jurisprudence that imposed duties of information in some cases.[64] The conditions for the newly codified general duty to inform are laid out in Article 1112-1 para 3 new French CC: the information needs to be of 'decisive importance', which requires a 'direct and necessary relationship with the content of the contract or the status of the parties'.[65] This wording is subject to interpretation by the courts. Once breach of this obligation is established, the consequence is liability, but the breach can also lead even to annulment of the contract (Article 1112-1 para 6 new French CC). The second notable provision is Article 1112-2 new French CC concerning an *obligation of confidentiality* for information gained during the pre-contractual phase.[66] Once again, the French legislator codified what the courts developed beforehand.[67] Article 1112-2 new French CC determines that a party is liable when it uses or discloses confidential information obtained in the course of negotiations (without the other party's permission). Contrary to the French regime, German contract law does not explicitly differentiate between an obligation to inform and an obligation of confidentiality during negotiations. These two obligations are both covered by 'culpa in contrahendo',[68] a legal concept developed by the German courts and then 'codified' in the German CC since the 2002 reform (Article 311 para 2 and Article 241 para 2 new German CC).[69] One of the most debated questions concerning this provision is whether a general obligation of information ('Aufklärungpflicht') exists as the German provision is not as explicit in this aspect as the new French CC.[70] As there is no broadly accepted answer to this question, German jurists distinguish between different kinds of contracts and situations.[71] Therefore, the explicit statement of a general duty to inform under the new French CC constitutes an important difference to the German regime and arguably French law now goes even further than the latter.

The third provision that needs to be treated in this regard is Article 1143 new French CC concerning the *exploitation of the other's state of dependence*, a defect of consent that the French legislator considers as duress.[72] Once again, the pathway for this provision was laid out by jurisprudence.[73]

vantage of it': V. VALAIS, '*La réforme du code civil: quels enjeux pour nos contrats?*' (2016) *Revue Dalloz IP/IT (Droit de la propriété intellectuelle et du numérique)* 229-232, 231; Sonnenberger, n 2 above, 27.

[64] Namely a duty to inform (with burden of proof) imposed on professional sellers: Cour de Cassation, Chambre Civ 1re, 29 April 1997, 94-21217. A broader duty to inform was imposed on a seller of a house that was later declared unfit for regular dwelling, as the buyer did not have easy access to this information before signing the contract: Cour de Cassation, Chambre Civ 3e, 29 November 2000, 98-21224. For more information see: Asfar-Cazenave, n 16 above, 731.

[65] For an overview on art 1112-1 new French CC and the prerequisites named in it, see: S. LEMARCHAND, '*Le devoir général d'information: un impact majeur dans la formation des contrats informatiques*' (2017) *Revue Dalloz IP/IT (Droit de la propriété intellectuelle et du numérique)* 233-235. Another overview (containing a legal comparison to English law) is given by: Rowan, n 4 above, 11.

[66] The French legislator has been criticized for not taking the opportunity to specify the nature or categories of information in need of protection by Asfar-Cazenave, n 16 above, 732.

[67] The use of information gained in the pre-contractual phase was characterized as an act of unfair competition by Cour de Cassation, Chambre Com, 3 October 1978, 77-10.915; Cour de Cassation, Chambre Com, 3 June 1986, 84-16.971.

[68] Latin expression for 'fault in the formation of a contract'.

[69] The initial idea for the 'culpa in contrahendo' dates back to R. von JHERING, *Jherings Jahrbücher für Dogmatik des bürgerlichen Rechts 4* (Jena: Fischer, 1861).

[70] The German CC is only explicit in its provisions concerning consumer contracts (due to art 5 Directive 2011/83/EU), even enumerating the necessary information owed by the business (art 246 para 2 Introductory Law to the German CC). For more information see: C. Wendehorst, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2*, n 31 above, § 312a para 6-43, esp para 6.

[71] Acknowledging an obligation of information in certain exceptional cases (eg agreements on advice), but refusing a general obligation of information: V. Emmerich, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2*, n 31 above, § 311 para 64-70, 66.

[72] For a general overview of this 'vice de consentement' see: H. BARBIER, '*La violence par abus de dépendance*' (2016) *La Semaine Juridique* 722-724; Asfar-Cazenave, n 16 above, 738 *et seq*.

[73] For pre-reform jurisprudence, which only acknowledged economic dependence, as a source of vitiated consent, see: Cour de Cassation, Chambre Civ 1re, 30 May 2000, 98-15.242 ('la *contrainte économique* se rattache à la violence et non à la lésion'); Cour de Cassation, Chambre Civ 1re, 3 April 2002, 00-12.932 ('seule l'exploitation abusive d'une *situation de dépendance économique*, faite pour tirer profit de la crainte d'un mal

However, the new rule goes further to the extent that its wording does not explicitly limit itself to economic dependence. Therefore, any kind of dependence could fall into the scope of application of Article 1143 new French CC – but once again, courts will need expose this provision's boundaries, especially with regard to psychological dependence (for instance unduly putting pressure on family members (as in the famous German Constitutional Court's case law).[74] Apart from exploitation, the French regime also presupposes a 'manifestly excessive advantage', which then leads to nullity of the contract. (Article 1142 new French CC).[75] This corresponds to two provisions of the German CC, whereas it seems closer to Article 138 para 2 new German CC (sanctioning usury with immediate nullity) than to Article 123 new German CC (sanctioning threat and fraud with nullity only once the victim has opted for it).[76]

c) Monitoring Adhesion to Standard Contract Terms

It may seem uninteresting to compare French and German laws with respect to general terms and conditions because of the EU Directive on unfair contract terms in consumer contracts.[77] However, the legal situation is still very diverse within the European Union due to the fact that a review of incorporation of terms was not covered by the Directive –[78] with an exception for the requirement of transparency (Article 5 Directive) that has some bearing on the question.[79]

In the French regime of standard contract terms, three new dispositions are remarkable. In all this, the French legislator has once again adopted what has been developed by the courts before.[80] Overall, the following dispositions are fairly similar to the German regime concerning standard business clauses,[81] which was integrated into the new German CC in the course of the 2002 reform.[82] Article 1119 para 1 new French CC deals with the effective integration of general conditions and requires that 'they have been brought to the latter's attention' and that 'that party has accepted them'. This corresponds to Article 305 new German CC, which necessitates for a using party to refer explicitly to standard business terms (unless these are clearly visible and noticeable) and to give the other party an 'opportunity to take notice'. Furthermore, the French rule stating that special conditions prevail over general conditions (Article 1119 para 3 new French CC) matches the German rule proclaiming the 'priority of individually agreed terms' (Article 305b new German CC).

It is, however, less clear in how far the two regimes also concur in the structure of and the reasons for nullity. Whereas the German regime codifies nullity of certain contract clauses right away,[83] the French regime treats nullity in a different section.[84] Regarding reasons for nullity, the first important provision is Article 1170 new French CC, proclaiming that 'any contract term which deprives a debtor's essential obligation of its substance is deemed not written'. Secondly, Article 1171 new French CC announces nullity of any term that creates a 'significant imbalance in the rights and obligations of the parties'.[85] Certainly, the German regime's underly-

menaçant directement les intérêts légitimes de la personne, peut vicier de violence son consentement').

[74] Going into the same direction: Barbier, n 74 above, 723; J.-F. Hamelin, in Massart, Caffin-Moi, Schlumberger, Buchberger, Hamelin, Bahbouhi and Docq, n 28 above, 7 (point 24); Moll and Luke, n 2 above, 44. Surprisingly, some French scholars do not even seem to consider this scope of art 1143 new French CC (possibly in part because the restriction to 'economic dependence' in former case law is still dominant as a paradigm, but as well in part because other parts of this provision were heavily criticized and thus eventually abolished, so that large parts of the discussion regarding art 1143 new French CC happened beforehand). See, for instance, Mekki, n 49 above, 498 (point 16).

[75] On the source of inspiration for this condition, art 3.2.7 UNIDROIT Principles, and on its background, the fear of a too extensive margin of appreciation of the courts: Smits and Calomme, n 4 above, 9.

[76] See in this sense Sonnenberger, n 2 above, 33.

[77] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJEC* 1993 L 95/29.

[78] Basedow, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2*, n 31 above, Vor §§ 305-310 para 18-21, esp para 20.

[79] Regarding art 5 directive, which was partly integrated into the German regime through art 305c new German CC (treating nullity of surprising clauses), see: Basedow, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2*, n 31 above, § 305c para 2. For a general overview on the transposition into German law (also with regard to differences between the German and French regime before the directive): H. Schulte-Nölke, in Schulze (ed), n 38 above, Vor §§ 305-310 para 6-8.

[80] Interesting pre-reform cases are, for instance, those corresponding to art 1170 new French CC: Cour de Cassation, Chambre Com, 22 October 1996, n° 93-18.632 ('Chronopost'); Cour de Cassation, Chambre Com, 29 June 2010, n° 09-11.841 ('Faurecia').

[81] See Sonnenberger, n 2 above, 25.

[82] Before the reform, this regime had its own law: 'Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGB-Gesetz)'. For a discussion of the integration into the German CC and the controversies this raised, see: Basedow, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2*, n 31 above, Vor § 305 para 10-17, esp para 16.

[83] Art 305c-309 new German CC (in this sequence of rules, the German legislature distinguishes between non-incorporation and ineffectiveness of clauses). See above notes 84 and 85.

[84] Sec 4 ('Sanctions') and sub-sec 1 ('Nullity') new French CC.

[85] Art 1171 new French CC was limited to 'contrats d'adhésion' due to the masses of new legal disputes elsewise. Refferring to

ing idea goes into the same direction; this can be seen in Article 307 new German CC that considers the reasonableness of contracts and is comparable to Article 1171 new French CC. However, differences exist as the German regime explicitly sanctions surprising and ambiguous clauses (Article 305c new German CC)[86] and contains an exact list of prohibited clauses (Article 308-309 new German CC).[87]

4.2. Implementation and Transformation of Contract

a) Execution and Breach

The phase of implementation of a contract and of its further development is complex, and at the same time one part of the regime clearly stands out: the regime on breach of contract. This part of the regime has been considered as being of such general thrust and importance in this paper that it was discussed as such – among other features spanning contract law as a whole (see section III sub 3 above). Therefore, only novelties of the two reforms other than those on the regime of breach of contract remain to be discussed for the phase of implementation. On the one hand, this is further development via a change of terms of the contract (see sub-section b) below), and via a change of partners to the contract or holders of rights deriving from the contract on the other hand (see section c) below). Only one specific feature of breach of contract will then be taken up in this context as well, the consequences of breach of contract for other members of a distribution chain (on this topic, see sub-section c) below).

b) Unforeseen Events – Imprévision

A concept of (need of) change in contracts because of unforeseen events is a particularly interesting topic of comparison between the two legal systems. Two things should be spelt out from the outset. First, the 'imprévision' is one of the French legislator's courageous innovations in this reform.[88] Article 1195 new French CC does – exceptionally – not codify a line of jurisprudence,[89] but introduces a completely new legal phenomenon to French contract law.[90] Secondly, this constitutes a considerable difference to the German regime, which has known a concept of change in contracts because of unforeseen events ('*imprévision*', '*Wegfall der Geschäftsgrundlage*') long before the concept has been codified (Article 313 new German CC). The concept has jurisprudential origins in Germany, which were mainly due to macroeconomic factors – the first and decisive one being the economic crisis of 1929, where the inflation was too dreadful to keep up the status quo.[91] The second major instance where the concept was broadly used (again) was the fall of the Berlin Wall in 1989.[92] This legal figure for unforeseen events was used even beyond these two events – however, only as an 'ultima ratio'.[93] Eventually, this led up to an (almost word by word) codification in the course of the German reform in 2002.[94] As earlier stated, the French codification did not follow preceding jurisprudence. The French courts only exceptionally allowed contract modification in the case of a contractual adaptation

art L.132-1 Code de la consommation, for instance: Sonnenberger, n 2 above, 41.

[86] Surprising (art 305c para 1) and ambiguous clauses (art 305c para 2) are dispensed in the first step, as part of the review of incorporation, and do not even become part of a contract. Therefore, no review of the fairness of the content is needed. See art 306 new German CC for the legal consequences of non-incorporation. As the new French CC does not include such a provision explicitly, it is up to the courts to consider whether such a rule should be developed.

[87] These clauses become part of a contract in the first step (review of incorporation), they are, however, void because of assumed unfairness (see art 306 new German CC for the legal consequences of such nullity). Conversely, the new French CC does not contain such a (black and grey) list.

[88] Courageous not in the sense that it is completely new within Europe where this legal concept can be found indeed in different legal orders: Fauvarque-Cosson, n 2 above, 9; Klein, n 15 above, 329. The French legal system contained such a concept only in administrative case law: Asfar-Cazenave, n 16 above, 733; Downe, n 2 above, 53.

[89] In the famous 'Canal de Craponne' case, the Cour de Cassation decided to uphold the binding force of contracts: Cour de Cassation, Chambre Civ 1re, 6 March 1876, 1876.1.193. For more information see: W. DORALT, '*Change of Circumstances – Old and New Elements of the French théorie de l'imprévision*' (2012) 76 *Rabel Journal of Comparative and International Private Law* 761-784.

[90] On this 'rigorous break with the past': Smits and Calomme, n 4 above, 7; Moll and Luke, n 2 above, 44; Limbach, n 7 above, 163.

[91] Overview on the development in the case law and its historic background: T. Finkenauer, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2*, n 31 above, § 313 para 23.

[92] See, for instance: J. PRÖLSS and C. ARMBRÜSTER, '*Wegfall der Geschäftsgrundlage und deutsche Einheit*' (1992) *Deutsch-Deutsche Rechts-Zeitschrift* 203-206; J. DREXL, '*Die politische und wirtschaftliche Wende in der DDR – ein Fall für den Wegfall der Geschäftsgrundlage*?' (1993) *Deutsch-Deutsche Rechts-Zeitschrift* 194-199; B. Janssen, 'Neue Aktualität für das alte Rechtsinstitut vom Wegfall der Geschäftsgrundlage im Zusammenhang mit der Wiedervereinigung' (1912) *Zeitschrift für Rechtspolitik* 418-419.

[93] The German legislator explicitly sought to maintain the concept's 'strict requirements': Finkenauer, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2*, n 31 above, § 313 para 26.

[94] Finkenauer, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Band 2*, n 31 above, § 313 para 26-27.

clause.[95] Article 1195 new French CC allows renegotiation of a contract in the case of a change of unforeseeable circumstances (para 1) and termination of a contract in the case of refusal or failure of renegotiations (para 2).[96] Differently from Article 313 new German CC, Article 1195 new French CC does not precise which kinds of circumstances may lay the grounds for a contract modification,[97] but some fundamental importance of the change is certainly needed. Furthermore, the German regime allows a judge more freedom to intervene and reformulate a contract.[98]

c) Plurality of Parties: Transfer of Contractual Rights and Chains/Networks of Contract

With respect to plurality of parties, the reforms both go into the direction of integrating more of current reality – namely that contracts often are not only relevant for a contract's two direct partners – and therefore no longer only bind these parties (privity of contract) with no significant impact outside this bilateral relationship. Instead, both reforms focus on aspects of third parties' involvement into contract. The prime attention is, however, on different aspects, namely the following two. While the French reform focuses on introducing a modern regime on transition of contract rights, of responsibilities under the contract or even of the contract as such, the German reform is most noteworthy for its rule on distribution chains (art. 4 of the EC Sales Directive), to a large extent because of subsequent case law.

In the *French reform*, two provisions of the 'transactions' chapter of the new French CC are noteworthy,[99] the first one being Article 1324 new French CC. This rule concerns the formal requirements of an assignment of claim ('cession de créance'). Whereas the legal pre-reform regime required a delivery of the assignment by a court bailiff or a receipt by a public deed,[100] today's legal regime only presupposes an agreement, an acknowledgment or even just a notification of the assignment (Article 1324 para 1 new French CC).[101] The second important rule is Article 1327 new French CC, which codifies an assumption of debt ('cession de dette') for the first time.[102] It requires – of course – a consent by the creditor. These changes have two major advantages. First of all, as assignments have grown more and more important and claims more fungible – eg due to securization –, there is more need for flexibility, which is guaranteed by simplified formal requirements.[103] However, the latest financial crisis has shown that at the same time there is a need for legal clarity exists, which the French legislator now satisfies in principle through express codification of the assumption of debt.

In the *German reform*, the decision was taken to integrate most of the EC Sales Directive into general sales and even general contract law, thus transforming rules on consumer sales that had to be transposed into general contract law rules. However, one exception concerned Article 4 Directive, which proclaims that any compensation or restitution to be made to the purchaser by the seller can, in principle, be claimed back by the latter from his partner upstream in the distribution chain and thus up the distribution chain (right to recourse, up to the producer).[104] This constitutes a rather revolutionary

[95] Moll and Luke, n 2 above, 44. On contractual hardship clauses (and a limited impact of the 'imprévision' due to the prevelance of the former): Rosher, n 8 above, 61 *et seq*.

[96] For an overview on the 'imprévision', see, for instance: P. STOFFEL-MUNCK, '*L'imprévision et la réforme des effets du contrat*' (2016) *Revue des contrats (Hors-série)* 30-38.

[97] The German regime specifies the main criteria according to which changes may be asked, namely refering to 'all the circumstances of the specific case, in particular the contractual or statutory distribution of the risk' (para 1) and clarifying that incorrect 'material conceptions that have become the basis of the contract' are equivalent to a change of circumstances (para 2). See Sonnenberger, n 2 above, 48.

[98] Art 313 para 1 new German CC allows the contractual parties to 'demand' adaptation (before the courts). Art 1195 new French CC only stipulates that one party may ask another to renegotiate the contract (para 1) and that the contractual parties may turn to the courts if renegotiation failed and the contract needs to be terminated (para 2).

[99] Title IV ('The General Regime of Obligations'), Chapter II ('Transactions relating to Obligations'): Section 1 ('Assignment of Rights arising from Obligations') and 2 ('Assignment of Debts'), art 1321 *et seq* new French CC. These provisions should not be confounded with an assignment of contract (art 1216 *et seq* new French CC). For the 'cession de contrat' (which is a topic not regulated explicitly in German, but only in French law), see L. Aynès, 'La cession de contrat' (2015) 249 *Droit & Patrimoine* 73-74; Mekki, n 49 above, 503 (point 27).

[100] See, for instance: R. DI PRATO, '*Die Forderungsabtretung nach dem neuen französischen Schuldrecht*' (2016) *Finanzierung Leasing Factoring* 235-238, 235; Moll and Luke, n 2 above, 45; T. Massart, in Massart, Caffin-Moi, Schlumberger, Buchberger, Hamelin, Bahbouhi and Docq, n 28 above, 42 (point 122).

[101] Criticising the blurred lines between acknowledgement and notification: T. Massart, in Massart, Caffin-Moi, Schlumberger, Buchberger, Hamelin, Bahbouhi and Docq, n 28 above, 42 (point 122).

[102] On this aspect see T. Massart, in Massart, Caffin-Moi, Schlumberger, Buchberger, Hamelin, Bahbouhi and Docq, n 28 above, 42 (point 123); Moll and Luke, n 2 above, 43.

[103] Acknowledging that this constitutes a 'distinguished contribution' for economic players: T. Massart, in Massart, Caffin-Moi, Schlumberger, Buchberger, Hamelin, Bahbouhi and Docq, n 28 above, 42 (point 121).

[104] On the rationale of this provision – very important in modern market societies with ample arrangements of split labour – and on the following, see more extensively (also with many further references to the literature): S. GRUNDMANN, '*Consumer*

rule responding to reality in modern market economies, where contracts are arranged in networks, for a long duration – these arrangements forming indeed a second pillar of contract law besides the simple exchange contract ('organizational contracts').[105] The model is convincing – because it installs a (mandatory or default) rule on the following core issues. It states (i) that the client who does not form part of the network with split labour should have a full claim for compensation / restitution against his contract partner whenever there is any defect created *anywhere* in the chain. It also states (ii) that the ultimate responsibility should then lie with the member of the chain responsible for such defect (via the right to recourse). The main question of the Putz-Weber case – submitted by the German Supreme court to the ECJ for preliminary ruling – concerned whether such compensation also includes costs of removal of defective goods and installation of substitute goods.[106] These can be substantial costs, in the case at hand the costs of removing and reinstalling tiles. When the ECJ ruled that such costs could be claimed as well, the core question for the German Supreme Court in the – much disputed – final decision was whether this should also apply for commercial sales. The German Supreme Court answered in a negative way. In our view, however, the model of chain responsibility (towards the client) and of ultimate responsibility of the originator of the defect within the chain is or should be universal – as it reflects the sensible response to ever increasing split of labour.

5. Conclusions

French is the only language of continental Europe that is still spoken Europe wide – of course, less than English. It is the language of the Code that is at the origin of a whole (continental) European movement of system and institution buiding, spreading later over large parts of the world. It was therefore always astonishing to many in Europe that the presence of French legal academia did not match this role in the legal discussion circles at the European level. Whoever still sees strong advantages in a codified system and whoever cares for a Euroean contract law development will very warmly welcome the reform development. The fact that French academia created this broad and deep reform – and did so very much in a joint and broadly shared effort – is a beacon for European contract law.

Sales: The Weber-Putz Case-Law – From Traditional to Modern Contract Law', in E. Terryn, G. Straetmans and V. Colaert (eds), *Landmark Cases of EU Consumer Law - in Honour of Jules Stuyck 2013* (Cambridge/Antwerp/Portland: Intersentia, 2013) 725-742.

[105] Path breaking on these aspects are the writings by: S. Macaulay. 'Non-Contractual Relations in Business – a Preliminary Study' 28 *American Sociological Review* 55-67 (1963); O. Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' 22 *Journal of Law & Economics* 233-261 (1979); W. POWELL, '*Neither Market nor Hierarchy – network forms of organization*' 12 *Research in Organizational Behaviour* 295-336 (1990); see for a broad survey on the state of the art by: S. Grundmann, F. Cafaggi and G. Vettori (eds), *The Organisational Contract* (Cheltenham *et al*: Ashgate, 2013).

[106] The three decisions referred to (the preliminary reference by the German Supreme Court, the decision by the ECJ, and the final decision by the German Supreme Court) are these: ECJ joined cases 65/09 (*Weber*) and 87/09 (*Putz*), *ECR* I-5257. The two cases decided, in all three respects, had the same case pattern. In both cases preliminary rulings had been asked for by German courts, in one case the German Supreme Court, the *Bundesgerichtshof*: Bundesgerichtshof (BGH) of 14 January 2009, *Official Reports (BGHReport)* 2009, 485-488 = *Neue Juristische Wochenschrift* 2009, 1660; on this judgment see, for instance, S. LORENZ, '*Die Reichweite der kaufrechtlichen Nacherfüllungspflicht durch Neulieferung*' *Neue Juristische Wochenschrift* 2009, 1633-1637; and parallel case (and preliminary reference) by the court of first instance (*Amtsgericht*) Schorndorf of 25 February 2009, *Zeitschrift für das Gesamte Schuldrecht* 2009, 525. The final decision by the German Supreme Court can be found here: Bundesgerichtshof (BGH) of 21 December 2011, *Official Reports (BGHZ)* 192 = *Neue Juristische Wochenschrift* 2012, 1073. For the German literature on the case, see n 3 in the contribution named in n 106 above.