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Observations on the Reform of the French Law on Contractual Interpretation

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Professor John Bell has been instrumental in developing my interest in comparative law and in my career generally. He taught me comparative law when I was an LLM student at the University of Cambridge and then became the supervisor of my doctoral thesis on comparative English and French contract law. Although many of his writings focus on public law, the breadth of his knowledge in comparative private law is immense. His kindness and generosity with his time has continued after I finished my PhD and as I spread my wings as an academic. He has quite simply always been there to guide and support me, something for which I am very grateful.

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After more than 200 years of being almost completely untouched, the entire section of the French Civil Code on contract law was revised in October 2016.[1] This was the first re-examination of French contract law since the Code was enacted as long ago as in 1804. It marked the culmination of several attempts at reform that began more than 100 years previously and intensified over the last 15 years.[2] The result is that

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

[2] Avant-Projet de Réforme du Droit des Obligations (Art. 1101 à 1386 du Code civil) et du Droit de la Prescription (Art. 2234 à 2281 du Code Civil) under the direction of P. Catala, 22 September 2005 (Paris: Documentation française, 2006) translated into English by Professors John Cartwright and Simon Whittaker: www.justice.gouv.fr/art_pix/rapportca

French contract law is now governed by a more comprehensive body of over 150 new articles.[3] In many respects, these articles simply codify rules that had been developed and applied in cases over the previous two centuries but, in a number of others, there are real innovations.[4]

A key reason for the 2016 reforms was that many articles of the original 1804 Code had, over their 200-year lifetime, been developed so extensively by judicial interpretation as no longer to state the law applied by French courts with any degree of accuracy. There was also a perception that French contract law was falling in influence overseas and attractiveness to international businesses as a possible governing law to be chosen for their contracts. One of the main aims of the reforms was to reverse this trend. They were meant to signal the beginning of a new era and establish a modern framework for contractual relationships that would be more attuned to the challenges of the twenty-first century and a globalising world. Other objectives included making French contract law more certain, predictable, attractive to business and credible as an alternative to the major common law systems, but also fairer. This chapter considers whether, in the context of contractual interpretation, which requires the court to ascertain the meaning of the contract, these lofty objectives have been achieved.

Perhaps surprisingly, the topic of contractual interpretation has generally drawn little attention in France. For one French academic lawyer, 'the articles of the Civil code on interpretation are without a doubt those that have left commentators most indifferent'.[5] For another, 'these articles are well-known but seldom used and relatively little studied'.[6] This apparent lack of interest did not, however, deter the authors of the 2016 reforms, who identified the prevailing French approach to interpretation

tatla0905-anglais.pdf; see also Ministère de la Justice, Projet de réforme du droit des contrats, July 2008; and the new version from 2009; lastly F. Terré, *Pour une réforme du droit des contrats* (Paris: Dalloz, 2008).

[3] Arts. 1101–1231-7 relate to contract law but there have also been reforms in other areas (the 'general legal regime of obligations' and the 'proof of obligations'); in total 353 new articles were introduced. The focus of this chapter is solely on the new rules on contractual interpretation.

[4] See S. Rowan, 'The New French Law of Contract' (2017) 66 *International & Comparative Law Quarterly* 805.

[5] P. Simler, 'Art 1188 à 1192 – Fasc 10: Contrat – Interprétation du contrat – L'instrument: notion, normes, champ d'application', *JCL*, 4 May 2017, [3].

[6] O. Deshayes, 'Les directives d'interprétation du Code civil: la cohérence des textes', *RDC* 2015.159, 159.

as requiring significant overhaul.[7] A key purpose was to 'clarify the rules relating to interpretation ... and abandon articles which have been seldom or never used by the courts and whose usefulness has not been demonstrated'.[8] This overhaul has resulted in the number of articles on interpretation in the Code being reduced from nine to five. New Articles 1188–92 replace Articles 1156–64 of the original 1804 Code.[9] A number of the reforms were inspired by various international contract instruments including the Principles of European Contract Law[10] and the Unidroit Principles.[11]

In this chapter, consideration will be given to four principal aspects of the law of contractual interpretation that were affected by the 2016 reforms. These are the dichotomy between the subjective and objective approaches to interpretation; the codification of the *dénaturation* power of the Cour de cassation to quash interpretations of lower courts that have the effect of distorting the clear and precise meaning of a contract term (*dénaturation des clauses claires et précises*); the relationship between 'creative interpretation' (*interprétation créatrice*) and 'explanatory interpretation' (*interprétation explicative*); and the application of the *contra proferentem* rule in the specific context of the interpretation of standard-form contracts.

My view is that the reforms that relate to contractual interpretation are positive and should be welcomed. Certain innovations in particular are an improvement upon the previous set of rules. These include the formalisation of the long-established practice of the courts taking account of subjective and objective considerations as aids to interpretation; the clarification of the relationship between creative and explanatory interpretation; and the introduction of a rule for standard-form contracts that seeks to bring uniformity to the way in which they are interpreted. Each of these developments has drawn a line under debates

[7] See paragraph 5 of Art. 8, *Loi d'habilitation de l'ordonnance n°2016-131 portant réforme du droit des contrats du 10 février 2016*.

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

[9] Old Arts. 1158, 1159, 1160, 1163 and 1164 have not been kept in the new Code.

[10] O. Lando and H. Beale (eds.), *Principles of European Contract Law Parts I and II* (The Hague: Kluwer, 2000); and O. Lando, E. Clive, A. Prüm and R. Zimmermann (eds.), *Principles of European Contract Law Part III* (The Hague: Kluwer, 2003).

[11] UNIDROIT Principles of International Commercial Contracts (PICC) 2016 (Italy, UNIDROIT, 2016).

and controversies that were live before the reforms. However, there are some issues that the reforms stopped short of addressing. One notable such issue is the uncertainty that is inherent in the French approach as a consequence of interpretation being a question of fact in which the Cour de cassation has historically been reluctant to intervene. This has the effect that whatever decision is made by the lower courts is likely to survive any appeal, provided that, in reaching its determination, the court ostensibly searched for the subjective intention of the parties.

6.1 The Tension between Subjective and Objective Interpretation

Whilst French law has traditionally taken a subjective approach to contractual interpretation, the 2016 reforms have formally recognised that the courts can have regard to both subjective and objective considerations when interpreting a contract. As a result, French law can now be said to take a mixed approach to interpretation, although there is clearly a deeply entrenched attachment to identifying the subjective intention of the parties as the primary approach, which has a number of consequences.

6.1.1 The Starting Point: The Subjective Intention of the Parties

In the first paragraph of new Article 1188 of the reformed Civil Code, it is stated that 'a contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms'.[12] This amounts to a clear rejection of literalism as the exclusive method of interpretation, which French commentators have sought to explain as a manifestation of the principle of good faith.[13] This would be defeated in the event that contracting parties were able to rely upon a literal interpretation in order to escape from the intended effect of a provision.[14] As will be shown, a more contextual and purposive approach to interpretation has long been taken by the courts. They willingly depart from the literal meaning where, from an examination of the context in

[12] This is almost identical to old Art. 1156 of the 1804 Code.

[13] The principle of good faith is now formally recognised at new Art. 1104 of the Code.

[14] M.-H. Maleville, *Pratique de l'interprétation des contrats: étude jurisprudentielle* (Rouen: PU de Rouen, 1995), at [281]; P. Simler, 'Art 1188 à 1192 – Fasc 20: Contrat – Interprétation du contrat – La mise en oeuvre: rôle respectif des juges du fond et de la Cour de cassation', *JCL*, 4 May 2017 at [23]–[24]; M. Fabre-Magnan, *Droit des obligations, Contrat et engagement unilatéral* (Paris: PUF, 2019), at p. 485.

which the term was agreed, it is apparent that such an interpretation would not accurately reflect what the parties intended to achieve.

In the search for the common intention of the parties, at least as a starting point, the French courts take a subjective approach. The aim of the exercise is to ascertain their real and actual intention at the time of the formation of the contract.[15] This is based on the theory of party autonomy (*théorie de l'autonomie de la volonté*), which is central to French contract law.[16] Contractual obligations are born out of the consent of the parties, who ought only to be bound if, and to what, they truly intended to be bound.[17]

This subjective approach to interpretation is regarded as being fairer and achieving better outcomes than simply ascertaining the declared intention of the parties. One important difference is that it seeks to eliminate the possibility of obligations that do not reflect their actual intention and to which they did not agree being imposed on them. This search for the actual intention has been described as the most fundamental and essential principle of interpretation[18] and its effect as being that the court is the 'servant of the will of the parties'.[19]

A corollary of the exercise of interpretation being focused on the common subjective intention of the parties is that, unlike in other legal systems, a good example being England, French law does not have any formal and separate doctrine of rectification.[20] To the extent that there

[15] Ass Plén 12 May 1989, *JCP* 1989.II.21322 noted by G. Lyon-Caen; Civ 1, 2 March 1982, GP 1982. 2. Pan. 245. Of course, it is questionable whether there can ever be a 'subjective' intention of both of the contracting parties as opposed to a subjective intention of one party. If there is no actual common intention, the law on mistake can become relevant if one party wants to get out of the contract. If a party has made a mistake that 'bears on the essential qualities of the act of performance owed or the other contracting party', this is a ground of nullity. However, the mistake cannot be about 'mere (subjective) motive' or the value of the pact of performance (Arts. 1132–6).

[16] F. Terré, P. Simler, Y. Lequette and F. Chénédé, *Droit civil, Les obligations*, 12th ed. (Paris: Dalloz, 2018), p. 606.

[17] A. Bénabent, *Droit des obligations*, 15th ed. (Paris: LGDJ, 2018), p. 281.

[18] Maleville, *Pratique de l'interprétation*, 272; B. Gelot, *Finalité et méthodes objectives d'interprétation des actes juridiques* (Paris: LGDJ, 2003); Simler, 'Art 1188 à 1192 – Fasc 10', [24].

[19] Terré et al., *Droit civil*, 606.

[20] Maleville, *Pratique de l'interprétation*, 310 ff. and 544 ff.; S. Vogenauer, 'Interpretation of Contracts: Concluding Observations', in A. Burrows and E. Peel (eds.), *Contract Terms* (Oxford: Oxford University Press, 2007), pp. 136–42; N. Jansen and R. Zimmermann (eds.), *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), pp. 750–1; C. Valcke, 'On Comparing French and English Contract Law: Insights from Social Contract Theory' (2009) 4 *Journal of Comparative Law* 69.

are mistakes in the language of the contract or in how the intended terms are recorded in it, this can be corrected through interpretation. Where French courts give effect to the contractual intention in a way that would be regarded by an English lawyer as rectification, they characterise the exercise as one of interpretation and refer in their judgments to the articles of the Code on interpretation.[21] Provided that the subjective intention of the parties is clear, the scope for the court to correct the language that they have used in the contract is unfettered.

The evidence that can be admitted to assist the court in ascertaining the common subjective intention of the parties is similarly without any limitation.[22] It can include what the parties said or did before[23] or after[24] the contract was formed, whether between themselves or to third parties. Any pre-contractual correspondence,[25] even if only containing subjective statements of intent, is admissible. This is also true of other contracts between the parties[26] and contracts made by one of them with a third party,[27] and of documents that were generated by the parties themselves or third parties at the time that the contract was formed. Indeed, the Cour de cassation positively encourages reliance on evidence of the pre- and post-contractual conduct of the parties in the interest of painting the fullest possible picture of their subjective intention.[28] This is regarded as being probative to the meaning that should be given to the terms that they used, achieving a more precise form of justice than would otherwise be achievable.

[21] Vogenauer, 'Interpretation of Contracts', 136–42.

[22] This is subject to the relatively narrowly confined new Art. 1359 (old Art. 1341) of the Civil Code, which does not apply to commercial contracts and concerns evidence that the contract has been entered into but not evidence as to the extent of the obligations agreed by the parties.

[23] Civ 1, 18 February 1986, No. 84-12.347; Bull civ I, No. 31.

[24] Civ 1, 9 November 1993, Bull civ I No. 317.

[25] Com 15 May 1972, *JCP* 1974.II.17864; Civ 1, 21 April 1976 Bull I No. 135, p. 108.

[26] Aix 18 April 1978, Bull Aix 1978/2, p. 60.

[27] Com 8 December 1987 Bull IV No. 262, p. 97; Maleville, *Pratique de l'interprétation*, 409.

[28] See the cases cited in Maleville, *Pratique de l'interprétation*, 403; T. Ivainer, 'La lettre et l'esprit de la loi des parties', *JCP* 1981.I.3023; Simler, 'Art 1188 à 1192 – Fasc 10', [2]. I am grateful to Professor Whittaker for commenting that there is a key irony in that whilst French courts seek to identify the actual intentions of the parties rather than what was written, the courts in practice do not take direct evidence of this intention. There are no witness statements by the parties as to what one or other (or both) intended. Civil decisions are made on the basis of a *dossier* of documents. In other words, the nature of the French civil process leads to a fundamentally objective set of evidence of intention.

6.1.2 *Objective Methods of Interpretation to Ascertain the Parties' Common Intention*

When interpreting a contract, the approach of French courts, where it is not possible to ascertain the common subjective intention of the parties, has for a long time been to take account of objective considerations. Such considerations can include the nature of the contract,[29] commercial usage, and practices and customs in the relevant trade or profession.[30] The articles on interpretation in the Civil Code itself refer to the following objective factors: the purpose of the contract; other terms of the contract; and common sense. Paragraph 1 of new Article 1189 provides that 'terms should be interpreted in the light of the other terms of the contract and in a way that is consistent with the spirit and purpose of the contract as a whole'.[31] This principle is stated in paragraph 2 also to apply where 'several contracts contribute to a single operation'. They are to be interpreted by reference to the 'purpose of the whole operation'. Similarly, new Article 1991 provides that 'where a term is capable of bearing two meanings, a meaning which gives the term some effect should be preferred over one which does not'.[32] The principles of coherency and effectiveness are integral to both of these articles and the interpretation given to the contract must be coherent, make sense, render the words used by the parties effective and accord with their purpose.[33]

This is neatly illustrated by a case involving a non-compete clause, by which the director of a business agreed not to take 'similar employment' in a competing business in a specific region for a period of one year. The Cour de cassation affirmed the lower court decision that this meant he could not take the same position in a company that he had newly set up. In order to give full effect to the purpose of the clause, the court held that

[29] *CA* Paris 30 September 1983, *GP* 1984.1 Som 176; *CA* 2 December 1985, *GP* 1986.1.214 noted by A. Piedelièvre.

[30] Com 9 February 1976, *JCP* 1977.II.18598. See also the relationship between the articles on interpretation and new Art. 1194 (old Art. 1135) of the Code in the section below on *Interprétation créatrice* and *Interprétation explicative*.

[31] Reproducing Art. 1161 of the 1804 Code.

[32] See Art. 1157 of the 1804 Code.

[33] For illustrations of the application of these factors, see Com 29 November 1965, Bull III No. 612, p. 550.1; *CA* Paris 2 December 1985; Soc 5 January 1984, *BRDA* 1984/7, p. 12, and, for further examples, Gelot, *Finalité et méthodes objectives d'interprétation*, 147–8 and 157.

the word 'employment' should not be interpreted narrowly so as to apply only where the individual was 'employed by a third party business'.[34]

Another illustration is a case concerning a loan agreement that contained a term providing for 'an exemption (*franchise*) of one year' from the payment of interest. A dispute arose as to whether interest was payable in respect of that year. It was argued by the borrowers that the effect of the term was that no interest was due in respect of that year at all. This was resisted by the bank, which argued that interest accrued during the year in the usual way but only became payable following the end of the year. The Paris Court of Appeal found in favour of the bank. It reasoned that, from the perspective of the bank, the very purpose of the loan was to generate revenue, which it did by charging interest. That being the case, it could not realistically have been expected by the borrowers that no interest would be charged.[35]

6.1.3 *Recognition in the 2016 Reforms of Objective Considerations in the Interpretation Process*

Whilst it is common for French courts to take account of objective considerations such as the purpose of the contract, other clauses of the contract and common sense, in many instances when doing so, they have characterised them not as objective considerations but instead as going to the parties' subjective intention.[36] This relies upon a usually unspoken presumption that the parties would have intended to achieve coherency and effectiveness in their contract. Through the device of this presumption, the courts claim to search for the subjective intention of the parties while actually looking beyond it.[37]

Commentators had, prior to the 2016 reforms, railed against the artificiality of these judicial denials that objective considerations are

[34] Soc 5 January 1984, *BRDA* 1984/7, p. 12.

[35] *CA* Paris 2 December 1985. For other examples, see Gelot, *Finalité et méthodes objectives d'interprétation*, 147–8. Note the relationship with the 'essential qualities of the act of performance' in the context of mistake (Arts. 1132–6 of the Code) or the 'essential obligation' of the substance of a term (Art. 1170 of the Code) and the 'main-subject of the contract' (Art. 1171) in the context of unfair terms.

[36] See the cases referred to in Gelot, *Finalité et méthodes objectives d'interprétation*, 1–19; Maleville, *Pratique de l'interprétation*, 443 ff.; Deshayes, 'Les directives d'interprétation', 163–5; Simler, 'Art 1188 à 1192 – Fasc 10', [29].

[37] See previous note.

taken into account.[38] Their criticisms were heeded by the drafters of the reforms, who gave formal recognition to the role of objective considerations. Newly inserted paragraph 2 of Article 1188, immediately following the statement of principle at paragraph 1 that the court should ascertain the common intention of the parties, provides that, 'where the intention cannot be discerned, a contract is to be interpreted in the sense which a reasonable person placed in the same situation would give it'. This is a clear statement that, in circumstances where the subjective intention of the parties cannot be ascertained, the contract should be interpreted objectively.[39]

This is a welcome addition to the Code, achieving greater coherency and alignment with the long-standing practice of the courts. There is no longer any need for the courts somewhat unconvincingly to disclaim having taken account of objective considerations and it should bring an end to debate about the artificiality of the French approach. The practical reality that the subjective approach to interpretation does not always work and therefore sometimes needs to be supplemented by objective analysis is now openly recognised. Similarly, the fiction that in all cases the parties have a common intention that is capable of ascertainment can be abandoned. It is inevitable that, where a subjective approach falls short, there will be a need to draw upon objective factors and this occurs on a regular basis. Denying that this is happening makes no sense, and formally recognising that the approach to interpretation in French law draws upon a combination of subjective and objective factors can only serve to mean greater transparency and certainty, which were two of the avowed aims of the reforms.

6.1.4 *The Influence of International Contract Law Instruments and a Rapprochement with English Law?*

Some commentators consider that new paragraph 2 of Article 1188 was inspired by, and brings the French approach to interpretation closer to, English law,[40] where the objective intention of the parties must be

[38] Gelot, *Finalité et méthodes objectives d'interprétation*, 1–19; N. Martial-Braz, 'L'objectivation des méthodes d'interprétation: la référence à la 'personne raisonnable' et l'interprétation *in favorem*', *RDC* 2015.193.

[39] G. Chantepie and M. Latina, *Le nouveau droit des obligations* (Paris: Dalloz 2018), p. 503.

[40] E.g. Martial-Braz, 'L'objectivation des méthodes d'interprétation', 2: 'ce standard du raisonnable . . . est directement importé de nos amis anglo-saxons'.

ascertained and given effect. In ascertaining this intention, the English courts seek to establish what a reasonable person in the position of the parties would have understood by the disputed term.[41] The search for this meaning is undertaken by reference to the intention that can be distilled from the contract, rather than any enquiry into their real intention as in France. It is fundamentally objective in nature[42] and believed to bring about greater predictability and consistency; the absence of any attempt to ascertain what the parties actually meant is said to give rise to greater certainty as to how the contract will be interpreted. One incidental advantage is that third-party assignees who come to the contract after its formation and therefore were not privy to what the parties truly intended should nonetheless be able to ascertain its meaning.[43]

Factors balanced in each case to determine reasonable intention include the natural and ordinary meaning of the disputed term, the context, facts and circumstances known to the parties when the contract was formed, other terms of the contract, the overall purpose of the term and the contract, and business common sense.[44] The weight to be given to these factors depends on the nature, formality and quality of the drafting, and in particular whether the contract has been negotiated and drafted by skilled professionals who have carefully considered the words used.[45]

A corollary of the objective approach to interpretation is that evidence of subjective intention is seen as irrelevant to ascertaining the intention of the parties. This means that the courts do not have regard to evidence of pre-contractual negotiations.[46] It is considered that such evidence is 'unhelpful'[47] since only in the final agreement is the common intention of the parties recorded.[48] Other justifications for the exclusion include that taking pre-contractual negotiations into account would add to the cost of litigation since negotiations generate a significant volume of

[41] *Investors Compensation Scheme* v. *West Bromwich Building Society* [1998] 1 WLR 896, 912–13 (Lord Hoffmann); *Deutsche Geonossenschaftbank* v. *Burnhope* [1995] 1 WLR 1580 at 1587 (Lord Steyn).
[42] *Deutsche Geonossenschaftbank* v. *Burnhope*, 1587 (Lord Steyn).
[43] Ibid., 40 (Lord Hoffmann).
[44] *Investors Compensation Scheme* v. *West Bromwich* [1998] 1 WLR 896; *Rainy Sky SA* v. *Kookmin Bank* [2010] EWCA Civ 582; *Arnold* v. *Britton* [2015] UKSC 36, [2015] AC 1619; *Wood* v. *Capita* [2017] UKSC 24, [2017] AC 1173.
[45] *Wood* v. *Capita* [2017] UKSC 24, [2017] AC 1173, [10]–[13] (Lord Hodge).
[46] *Chartbrook Ltd* v. *Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101.
[47] *Prenn* v. *Simmonds* [1971] 1 WLR 1381 at 1384 (Lord Wilberforce).
[48] Ibid.

potentially relevant documentation that might need to be reviewed by the parties' solicitors and before the court.[49] The admissibility of pre-contractual negotiation evidence is also perceived as creating uncertainty. It would be more difficult for practitioners to advise on what a reasonable outside observer would take to have been the intentions of the parties.[50]

In reality and as openly acknowledged by the drafters, new paragraph 2 of Article 1118 was directly 'inspired by the Principles of European Contract Law, the Draft Common Frame of Reference and the Unidroit Principles'.[51] It is in almost identical terms to these instruments. This is exemplified by Article 4.1 of the Unidroit Principles, which provides that:[52]

> (1) A contract shall be interpreted according to the common intention of the parties.
> (2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

These instruments establish a hierarchy between the different approaches to interpretation.[53] Priority is given to ascertaining the actual intention of the parties. In this way, their subjective intention takes precedence. If this cannot be ascertained, only then does the court turn to objective factors.

This hierarchy, and more generally the perceived tension between the objective and subjective approaches to interpretation, is regarded by some commentators as having no real practical significance. Vogenauer, for instance, has said that 'the conflict between [the objective and subjective approaches] rarely matters in practice . . . it is more or less irrelevant once it is acknowledged that the same interpretative criteria must be employed in establishing the "subjective" intention of the parties as well as the "objective" understanding of reasonable persons'.[54] For him, 'the priority rule [of article 4.1(1) of the Unidroit Principles is confined to a very narrow group of cases [where] . . . both parties . . . intend to employ words in a distinctive sense which does not correspond

[49] *Chartbrook Ltd* v. *Persimmon Homes Ltd* [2009] 1 AC 1101, [41] (Lord Hoffmann).
[50] Ibid., [39] and [41] (Lord Hoffmann).
[51] *Rapport au Président de la République*.
[52] Art. 5:101 of PECL and Art. II. 8:101 of the DCFR.
[53] Official Comments to Art. 4.1; see S. Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed. (Oxford: Oxford University Press, 2015), pp. 578 ff.
[54] Vogenauer, *Commentary*, 580, [15].

to the meaning which the words reasonably bear … the application of Art. 4.1(2) is the rule, whilst Art. 4.1(1) is the exception'.[55]

Whilst it is true that, in many cases, both the subjective and objective methods would lead to the same outcome, that is, to the interpretation of ambiguous terms in the same way, the differences of approach remain relevant in several respects. First, the formal bias in France towards the subjective approach explains why French law has a wide conception of 'interpretation' that covers not only the ascertainment of express terms but also rectification and, as will be explained shortly,[56] the implication of terms in fact. Giving meaning to, correcting and supplementing the express terms of the contract all form part of a single, unified exercise that strives to ascertain and give effect to the actual intention of the parties, whether expressed or otherwise. The search for this intention is the common thread running through these processes. Second, the difference in approach helps explain why evidence of pre- and post-contractual behaviour is admissible in French law but not in some systems that adopt an objective approach, including English law. The exclusion of such evidence in England has been said to follow 'from the objective character of all contractual construction. The course of the negotiations cannot tell us what the contract objectively meant. It can tell us only what one or other or both of the parties subjectively thought or assumed or hoped that I meant'.[57] Third, and as will be explained in the next section, it follows from the predominantly subjective approach in French law that issues of interpretation are questions of fact, whereas the objective approach taken in England renders them questions of law.

More generally, there is a deep theoretical attachment amongst French lawyers to interpretation as a subjective enquiry. A number of commentators have opined that new paragraph 2 of Article 1188 respects this attachment and serves to entrench the primacy of the actual intention of

[55] See also Vogenauer, 'Interpretation of Contracts': 'mere programmatic points of departure from which European legal systems attempt to develop solutions that are predictable and … fair'; H. Kötz, *European Contract Law*, 2nd ed. (Oxford: Oxford University Press, 2017), pp. 109–10 and 112: 'hardly matters at all today'. H. Beale, B. Fauvarque-Cosson, J. Rutgers and S. Vogenauer, *Ius Commune Casebook on European Contract Law*, 3rd ed. (Oxford: Hart, 2019), p. 727: the distinction is 'largely irrelevant, particularly since it is well established that the same criteria must be employed in establishing both the "subjective" intention of the parties and the "objective" understanding of reasonable persons'.

[56] See Section 6.3 on *Interprétation créatrice* and *Interprétation explicative*.

[57] Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2017) 17 *Oxford University Commonwealth Law Journal* 301, 309–10.

the parties over their declared intention.[58] The simple requirement in old Article 1156 for the court to establish the subjective common intention of the parties did not have any greater importance than the other principles of interpretation in the 1804 Code. In contrast, the drafters of the reforms have symbolically positioned its successor, new Article 1188, as the first article in the section of the Code on interpretation and as overarching all of the others.[59]

There has not been any suggestion that new paragraph 2 of Article 1188 casts doubt on the primacy of the subjective approach. On the contrary, French commentators have variously remarked that 'to abandon the subjective approach of interpretation ... which has an essential role, has never seriously been considered';[60] 'nothing has supplanted the classical search for the subjective intention of the parties';[61] 'the search for the common intention continues to reign ... and this is not to be regretted';[62] 'Article 1188 gives real primacy to the search for the common intention of the parties ... this hierarchy would not make sense if the court could freely choose his preferred method of interpretation'.[63] The subjective approach has even been described as 'sacrosanct'[64] and the 'one and only mandatory principle' of interpretation.[65] Whilst it might be contended that French lawyers 'cling to the ideal of autonomy

[58] O. Deshayes, T. Génicon and Y.-M. Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations*, 2nd ed. (Paris: LexisNexis, 2018), pp. 417–19; Chantepie and Latina, *Le nouveau droit des obligations*, 502–3; Terré et al., *Droit civil*, 608.

[59] Ibid.

[60] Simler, 'Art 1188 à 1192', [3] and [9].

[61] Ibid., [24].

[62] Deshayes, 'Les directives d'interprétation', 162: see also C. Grimaldi, 'Paradoxes autour de l'interprétation des contrats', *RDC* 2008.207; A. Cermolacce 'L'article 1159 du Code civil', *RLDC* 2004/7 No. 302.

[63] Terré et al., *Droit civil*, 607 ff.; A. Etienney-de Sainte Marie, 'Les principes, les directives et les clauses relatives à l'interprétation', *RDC* 2016.384 at 388.

[64] P. Simler, 'Propos introductifs – A la recherche des frontières de l'interprétation' *RDC* 2015.146; Deshayes, 'Les directives d'interprétation', 165; D. Mazeaud, 'L'encadrement des pouvoirs du juge: l'efficacité des clauses relatives à l'interprétation', *RDC* 2015.187.

[65] Gelot, *Finalité et méthodes objectives d'interprétation*, 315; Deshayes, 'Les directives d'interprétation', 163–5; A. Etienney-de Sainte Marie, 'Les principes'; D. Mazeaud, 'L'encadrement des pouvoirs du juge'; Deshayes et al., *Réforme du droit des contrats*, 417–19. E. Rawach, 'La portée des clauses tendant à exclure le rôle des documents précontractuels dans l'interprétation du contract', *D* 2001.223 14–16. Supporting this view: Civ 1, 20 January 1970 Bull civ I. No. 24.

of the will',[66] which sits uneasily with what happens in practice, it confirms the importance that they attach to this subjective conception.[67] To dismiss this attachment and its consequences as irrelevant is to deny the French conception of the interpretation process.

6.2 Rewriting Contracts and Distorting Terms

Another novel feature in the 2016 reforms is the inclusion of an express provision relating to *dénaturation*. This is the power of the Cour de cassation to review on appeal the decision of a lower court on contractual interpretation that distorts the meaning of a term or terms which are clear and precise. In practice, however, the Cour de cassation rarely exercises this review power, which has the effect of leaving the final determination of issues of interpretation almost exclusively in the hands of lower courts. It will be shown that the limited intervention of the Cour de cassation, and corresponding latitude that lower courts enjoy in the interpretation process, can be a source of uncertainty and has been the subject of criticism. One step that would have been conducive to greater certainty, particularly for commercial parties, would have been to give formal recognition to 'interpretation clauses', which are terms included in the contract by the parties for the purpose of directing the court as to how to construe its terms. Regrettably the drafters of the reforms opted not to do so.

6.2.1 The Codification of Dénaturation by the 2016 Reforms

Ascertaining the subjective intention of the parties is a factual question,[68] and is a matter for the courts of first instance and lower appeal courts. The Cour de cassation does not review findings of fact. Its appellate jurisdiction is confined to ensuring that legal principles have been applied properly. Therefore, as long as the aim of a lower court is to ascertain the actual intention of the parties (which is almost invariably the case), the manner in which it goes about applying the principles of interpretation in the Civil Code and its resulting determinations on the meaning of the words that

[66] Vogenauer, 'Interpretation of Contracts', 127; Valcke, 'On Comparing French and English Contract Law', 87.
[67] Valcke, 'On Comparing French and English Contract Law'.
[68] 'Une question de fait tranchée souverainement par les juges du fond': Terré et al., *Droit civil*, 616.

they have used are seldom overturned on appeal. It is for this reason and due to the absence of any defining decisions or significant guidance from the Cour de cassation on the principles on interpretation[69] that the subject has not generated nearly the same interest in France as in common law jurisdictions.[70]

Only where a lower court interprets a contract term in a way that distorts a meaning that is clear and precise (*dénaturation des clauses claires et précises*) will the Cour de cassation exercise its jurisdiction and review the decision. New Article 1192, which was introduced by the 2016 reforms, codifies this jurisdiction in the following words: 'clear and unambiguous terms are not subject to interpretation as doing so would risk their distortion'. Such terms are regarded as being in no need of interpretation since the intention of the parties is self-evident and admits of no other meaning. It is not for the court to seek to interfere with the way that the parties have allocated risk or impose a different bargain to the one that they intended.[71] The jurisdiction of the Cour de cassation protects against any decision that strays into this terrain, thereby giving the parties greater confidence that the clear and unambiguous meaning of the terms that they have used will be given effect.[72]

However, the Cour de cassation very rarely exercises the jurisdiction to quash lower court decisions.[73] In most cases that come before court, some degree of ambiguity can be identified, particularly when regard is had to the context, surrounding circumstances and other clauses of the contract. As a consequence, only occasionally is the power engaged.[74] This is likely to mean that the impact of the codification of *dénaturation* is minimal.

It is difficult to know whether and to what extent lower courts take advantage of the Cour de cassation's narrow remit in order to rewrite or distort contract terms. Any proper analysis is prevented by interpretation issues ultimately turning on the subjective intention of the parties, which is very much fact-specific and hard to second-guess from the brief

[69] Cass, sect réun, 2 February 1808, S chron, *GAJC*, t 2, No. 160; D. Tricot, 'Le juge: le contrôle de dénaturation et la liberté d'interprétation des conventions', *RDC* 2015.149.

[70] See, however, the series of papers on 'L'interprétation: une menace pour la sécurité des conventions?' in *RDC* 2015.1.

[71] Vogenauer, 'Interpretation of Contracts', 131; Simler, 'Art 1188 à 1192 – Fasc 10', [5].

[72] *Rapport au Président de la République*; Civ 4 May 1942 dc 1942.131, noted by J. Besson; see also the many cases cited by Maleville, *Pratique de l'interprétation*, 241–3.

[73] Simler, 'Art 1188 à 1192 – Fasc 20', [51].

[74] Ibid., [61]–[72].

judgments that are given by French courts. This itself can give rise to uncertainty and has been the subject of criticism.[75] Some have called for the Cour de cassation to be more vigorous in its use of the *dénaturation* jurisdiction to review lower court interpretation decisions[76] but, at least prior to the reforms, this had not caused any change of approach.[77] Perhaps more powerfully, the calls were echoed by the drafters of the reforms[78] in their comments on the new interpretation articles, which must raise at least a slight prospect that they will be heeded.

6.2.2 *Interpretation Clauses to Provide Commercial Certainty?*

A possible means of enhancing transparency and certainty in the interpretation process in French law would be for contracting parties to be able to contract out of, or adapt, the principles of interpretation in the Civil Code. This would be effected through the insertion into the contract of an interpretation clause to direct or influence how the words used are understood and applied.[79]

It is clear from decisions of the Cour de cassation that the interpretation principles contained in the Code do not bind but instead serve as 'mere advice to judges . . . without mandatory character and not imposing absolute rules';[80] they should be seen as akin to a 'tool box',[81] there to assist the court in identifying what the parties sought to achieve.[82] It is therefore not open to the Cour de cassation to quash a decision simply because the lower court has failed to apply or incorrectly applied the

[75] See Tricot, 'Le juge: le contrôle de dénaturation', and other papers in a special issue on 'L'interprétation: une menace pour la sécurité des conventions?' in *RDC* 2015.1.

[76] E.g. Tricot, 'Le juge: le contrôle de dénaturation', 150–1 and 153.

[77] Ibid.

[78] F. Ancel, B. Fauvarque-Cosson and J. Gest, *Aux sources de la réforme du droit des contrats* (Paris: Dalloz, 2017), pp. 33–6.

[79] See Rawach, 'La portée des clauses'; Mazeaud, 'L'encadrement des pouvoirs du juge'; Gelot, *Finalité et méthodes objectives d'interprétation*, 258 ff.; C. Helleringer, 'Quand les parties font leur loi. Réflexion sur la contractualisation du pouvoir judiciaire d'interprétation', in M. Xifaras and G. Lewkowics (eds.), *Repenser le contrat* (Paris: Dalloz, 2009), p. 277; B. Fauvarque-Cosson, 'Les Nouvelles règles du Code civil relatives à l'interprétation des contrats: perspective comparative et internationale', *RDC* 2017.363.

[80] Req 18 March 1807, S 1807, 1, 367; Req 16 February 1892, S 1893.1.409; Civ 1 19 December 1995, Bull civ 1995, I, No. 466.

[81] P. Simler, 'Propos introductifs – A la recherche des frontières de l'interprétation', *RDC* 2015.146.

[82] C. Grimaldi 'La valeur normative des directives d'interprétation', *RDC* 2015.154 at [4].

principles.[83] One perceived benefit of enabling the parties to contract out of the principles of interpretation of the Code and include interpretation clauses is that it would enable the broad powers of the lower courts over the interpretation process to be limited or even excluded. This would curtail the court's scope to depart from the meaning intended by the parties.[84]

The reforms to the Civil Code are silent in relation to interpretation clauses. There should not, however, be any fundamental objection to their use or enforceability, given that they are simply an expression of the will of the parties and, after all, the process of interpreting a contract is but a search for their intentions. Any other analysis would be at odds with the fundamental principle of freedom of contract.

The academic discussion in France has focused mainly on two types of interpretation clause. First, the entire agreement clause (*clauses d'intégralité*), which typically provides that the obligations of the parties are entirely contained in the contractual document, excluding any collateral or oral agreements or pre-contractual statements from having contractual or any other effect. The aim is to stop evidence of such agreements or statements from being taken into account in ascertaining the obligations of the parties. Second, the so-called priority clause (*clauses de priorité*), which seeks to create a form of hierarchy between the terms of the contract and/or other documents between the parties whether from before, during or after the formation of the contract. Such clauses can be particularly helpful in the context of complex contracts or other instruments that have legal effect where there is an increased risk of terms being in contradiction. By establishing an order of priority, they direct the court as to how the contradiction should be resolved.

There has been little coverage of priority clauses in the case law but in a few cases they have been held to be valid.[85] Seemingly only in one case – a decision of the Paris Court of Appeal – has consideration been given to the impact of an entire agreement clause on the interpretation. In that case, it was held that, in order to be effective, the clause must contain an express exclusion of evidence of pre-contractual negotiations and other extraneous documents from being admissible to *interpret* the

[83] Simler, 'Art 1188 à 1192 – Fasc 20', [37].
[84] Mazeaud, 'L'encadrement des pouvoirs du juge'.
[85] CA Paris 15 June 2005, RTD civ 2006 p. 111 noted by J. Mestre; see also the cases cited by Mazeaud, 'L'encadrement des pouvoirs du juge'; and Rawach, 'La portée des clauses'; Gelot, *Finalité et méthodes objectives d'interprétation*, 258 ff.

contract. A statement that they are excluded from evidencing the *content* of the contract is not sufficient as this does not necessarily disqualify them from being used in the interpretation process.[86]

This silence of the 2016 reforms in relation to interpretation clauses is in contrast with the international contract law instruments that have served as the inspiration for some of the other articles on interpretation in the 2016 reforms. An example is Article 2:105 of PECL, which states that:[87]

> (1) If a written contract contains an individually negotiated clause stating that the writing embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the writing do not form part of the contract. . . .
> (3) The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.

Under this provision, unless there is an express exclusion, evidence of pre-contractual negotiations is admissible in the interpretation process, which achieves a similar effect to the Paris Court of Appeal decision.

It is regrettable that the 2016 reforms did not tackle interpretation clauses and bring an end to the doubt as to their enforceability.[88] This would have been conducive to transactional certainty[89] and, as regards entire agreement clauses, which are commonly incorporated in international commercial contracts,[90] it would have helped to fulfil one of the stated objectives of the reforms of increasing the attractiveness of French law to the international business community. As it is, the uncertainties that existed before the reforms persist, and this can only be regarded as a missed opportunity.

6.3 *Interprétation explicative* and *Interprétation créatrice*

The 2016 reforms also addressed the distinction between 'creative interpretation' (*interprétation créatrice*) and 'explanatory interpretation'

[86] CA Paris 4 March 1980, Expertises, No. 17, April 1980, p. 8.
[87] See also Art. 2.1.17(2) and Art. II.4:104(3)(2) *DCFR*.
[88] Terré et al., *Droit civil*, 603; A. Bénabent, *Droit des obligations*, 15th ed. (Paris: LGDJ, 2018), p. 284; Deshayes et al., *Réforme du droit des contrats*, 417–19.
[89] Mazeaud, 'L'encadrement des pouvoirs du juge'; and B. Fauvarque-Cosson, 'L'interprétation du contrat: observations comparatives', *RDC* 2007.481.
[90] Ibid.

(*interprétation explicative*).[91] In essence, *interprétation explicative* involves ascertaining the meaning of terms that are unclear and *interprétation créatrice* is the process of filling gaps where the contract does not address a significant issue.

It has traditionally been understood in France that what English lawyers would consider as implying terms 'in fact' and 'in law'[92] is not a distinct exercise[93] but instead is part of a broader process of interpretation in which the unifying purpose is to ascertain and give effect to the common subjective intention of the parties. This is because both interpretation and implication share the common purpose of ascertaining this intention.[94] Where a term that the parties have agreed upon is unclear, that process is confined to ascertaining their intended meaning for that term. If, however, the parties have not addressed an issue at all, such that there is no relevant term capable of being interpreted, it is open to the court to consider whether or not to imply one. In doing so, the court must determine their hypothetical common intention or alternatively the intention that they would have formed in the event that they had addressed their minds to the issue.

There has been no real debate in France on whether it is appropriate for what an English lawyer would consider as the implication of terms 'in fact' to be regarded as part of a broader exercise of contractual interpretation. It has, however, been contended by a number of commentators that, where terms are implied 'in law', this is not truly in the nature of interpretation and must instead be seen as a distinct process. Some commonly cited

[91] Ibid.; A. Etienney-de Sainte Marie, '"L'interprétation créatrice": l'interprétation et la détermination du contenu du contrat', *RDC* 2015.166.

[92] French lawyers do not distinguish between the express and implied terms of the contract in the way that English lawyers do. As summarised by Professor Whittaker, 'while from time to time French lawyers do distinguish between the express and implied agreement of the parties, this is not as pervasive a distinction as is found in English law in relation to express and implied contract terms nor does it have the latter's significance', in J. Bell, S. Boyron and S. Whittaker, *Principles of French Law*, 2nd ed. (Oxford: Oxford University Press, 2008), p. 329.

[93] Terré et al., *Droit civil*, 608–14.

[94] Ibid., 608–14; P. Malaurie, L. Aynès and P. Stoffel-Munck, *Droit des obligations*, 10th ed. (Paris: LGDJ, 2018), p. 772; Professor Whittaker added that, 'instead, the French starting point in determining the effects of a contract is to look into what was the common ("subjective") intention of the parties and in this respect no distinction needs to be drawn between what they expressly and what they impliedly agreed. Questions of what the parties agreed are treated as ones of interpretation, whether this relates to determining what was included within their agreement or what meaning should be attributed to words which they clearly did include': Bell et al., *Principles of French Law*, 329.

examples are the implication of an obligation of safety (*obligation de sécurité*) in contracts for transportation and the obligation of information (*obligation d'information*) in the context of contracts for professional services.[95] On no view can the implication of these obligations be attributed to any common subjective intention of the parties, and indeed the process does not involve ascertaining the meaning of terms that they have chosen.[96] To the contrary, it is usually indisputable that the parties did not intend or even think about such obligations, which are implied for policy reasons and often based on fairness. The exercise of implying such obligations is also entirely objective in nature. It has even been described as 'forcing the contract' (*forçage du contrat*),[97] reflecting that it occurs independently of the subjective intentions of the parties.

One reason that the implication of terms in law has been understood as a species of interpretation is that that some provisions in the section on interpretation in the 1804 Civil Code dealt with *interprétation créatrice*. One often-cited example is old Article 1160, which provided that 'the contract must be supplemented by clauses which comply with usages'. Whilst this could be linked to the parties' intention, in substance this amounts to the implication of terms.

The objection that *interprétation créatrice* should be regarded as a distinct process was heeded as part of the 2016 reforms with the removal of reference to *interprétation créatrice* from the section of the Code on interpretation.[98] The five surviving articles in that section relate principally to *interprétation explicative*. It is later in the Code that references to usages can be found and that *interprétation créatrice* is addressed. Article 1194 provides that 'contracts create obligations not merely in relation to what they expressly provide, but also to all the consequences which are given to them by equity, usage or legislation'.[99] This is consistent with the approach in a number of international contract law instruments such as

[95] Terré et al., *Droit civil*, 614 ff.

[96] Etienney-de Sainte Marie, '"L'interprétation créatrice"', 4; Simler, 'Art 1188 à 1192 – Fasc 10', [13] ff.; Terré et al., *Droit civil*, 612 ff.; Deshayes, 'Les directives d'interprétation'; Chantepie and Latina, *Le nouveau droit des obligations*, 500; P. Catala 'Interprétation et qualification dans l'avant-projet de réforme des obligations', in *Etudes offertes à G Viney* (Paris: LGDJ, 2008), p. 243; G. Viney, P. Jourdain and S. Carval, *Traité de droit civil, Les conditions de la responsabilité* (Paris: LGDJ, 2013), pp. 458 ff.

[97] L. Josserand, obs. under CA Lyon 7 December 1928: *DP* 1929.II.17; Etienney-de Sainte Marie, '"L'interprétation créatrice"'.

[98] Old Art. 1160 of the 1804 Civil Code.

[99] Old Art. 1135 of the Code.

the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR), which deal with the implication of terms separately from interpretation.[100] This development achieves greater certainty and coherency through the formal distinction of the two processes in their objectives and how they operate.

6.4 Standard-Form Contracts and the *Contra proferentem* Rule

Prior to the 2016 reforms there was thought to be a pressing need for regulation of how standard-form contracts are interpreted, with two issues giving rise to particular consternation. First, whether it is realistically possible to ascertain any common subjective intention of the parties from standard terms. Many argued that this simply could not be done,[101] since, by definition, standard terms are not negotiated and indeed characteristically are simply imposed by the stronger party in the relationship. An approach to interpretation that is appropriate in the context of negotiated contracts is unlikely to be suitable for standard terms, so the argument went. Second, on some occasions, the courts have interpreted the same clause in a standard-form contract in different ways, causing considerable uncertainty.[102]

These issues were addressed in the 2016 reforms by the *contra proferentem* rule being applied to standard-form contracts. New Article 1190 states that 'in case of ambiguity, a bespoke contract is interpreted against the creditor and in favour of the debtor, and a standard form contract is interpreted against the person who put it forward'. It is an objective approach to interpretation that does not look to the actual

[100] International contract law instruments have taken different approaches to this question: Art. 6:102 PECL and II.–9:101 DCFR is in the section on the contents and effects of contract; note, however, that Art. 4.8 of the Unidroit Principles addresses the implication of terms but in the section on interpretation.

[101] E.g. T. Revêt, 'L'uniformation de l'interprétation: contrats types et contrats d'adhésion', *RDC* 2015.199.

[102] Terré et al., *Droit civil*, 616, citing Civ 28 January 1907, two decisions DP 1908.5, S 1912.1.22. See also for the absence of intervention of the Cour de cassation in this area: Com 24 March 1965 Bull civ III No. 230; Civ 1, 21 May 1969 Bull civ I No. 169; Civ 1, 28 October 1970 Bull civ I No. 285; Chantepie and Latina, *Le nouveau droit des obligations*, 508; B. Nicholas, *The French Law of Contract*, 2nd ed. (Oxford: Oxford University Press, 1992), pp. 48–9; Revet, 'L'uniformation de l'interprétation', has shown that, through *dénaturation*, the Cour de cassation has on occasions imposed its own interpretation of clauses in standard form contracts but without ever acknowledging that it was doing so.

intention of the parties or the true meaning of their words but instead is concerned with rebalancing their obligations.[103]

The *contra proferentem rule* was already familiar in French law prior to the 2016 reforms, having been provided for in the 1804 Civil Code[104] and also applying to sale contracts pursuant to Article 1602 of the Civil Code and consumer contracts under Article L211–1 of the Consumer Code.[105] It is commonly justified on grounds of fairness, equity and the protection of the weaker party, and also as incentivising the party drafting the contract to do so with precision and clarity.[106]

With the inclusion of this provision, the section of the Code on interpretation now gives specific mention to standard-form contracts (in line with one of the stated aims of the 2016 reforms of designating specific provisions 'which only apply to standard form contracts'[107]). It also specifically requires the contract to be interpreted against the party that introduced the standard terms, rather than against the creditor.[108] In common with several other innovations in the reforms, this reflects the approach taken in a number of international contract instruments. For instance, Article 5:103 of PECL states that 'where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred'. There is a similar rule in Article 4.6 of the Unidroit Principles and Article II-8:103(1) of the DCFR, albeit that its scope extends to all unclear terms rather than being confined only to those that are contained in a party's standard terms.

The introduction of the *contra proferentem* rule in the context of standard-form contracts has had a mixed reception in France; some commentators have responded more favourably than others.[109] What is clearly a positive development is the recognition that standard-form

[103] It is therefore objective in a different sense from Art. 1188 of the Civil Code.

[104] Old Art. 1162 of the 1804 Civil Code.

[105] Though, the impact of the rule differs in the consumer context as the *most* favourable interpretation for the consumer is to be adopted.

[106] Fauvarque-cosson, 'Les Nouvelles règles du Code civil' and 'L'interprétation du contrat'; Martial-Braz, 'L'objectivation des méthodes d'interprétation'; Terré et al., *Droit civil*, 610 ff.

[107] *Loi d'habilitation de l'ordonnance n°2016-131.*

[108] It has long been recognised by the Cour de cassation that in some circumstances, the creditor is not the person who drafts the contract and that protection should be against the latter, whose responsibility it is to draft a contract in clear and precise terms: Civ 1 22 October 1974 Bull civ I No. 271 and Simler, 'Art 1188 à 1192 – Fasc 10', [62]–[67].

[109] Revêt, 'L'uniformation de l'interprétation'; Etienney-de Sainte Marie, '"L'interprétation créatrice"', 14–15, 26 and 29.

contracts have unique characteristics which mean that any attempt to ascertain the subjective intention of the parties is likely to be unproductive. To the extent that the reforms achieve greater consistency in how standard terms are interpreted, this will also be helpful. There is equally much to be said for an approach that puts the risk of ambiguity onto the party who drafted the standard terms and was therefore able to prevent it.[110]

An alternative that would have mitigated the need for reform was for the Cour de cassation, rather than confining its appellate interventions to *dénaturation*,[111] to show greater readiness to rule definitively on recurrently contentious terms in standard-form contracts.[112] This has been the approach of the appellate courts in England, which have sought to establish uniform interpretations of standard terms in commercial contracts and generally avoided disturbing established constructions.[113] In the words of Lord Diplock in *Pioneer Shipping Ltd* v. *TP Tioxide Ltd*,[114] 'it is only if parties to commercial contracts can rely on a uniform construction being given to standard terms that they can prudently incorporate them in their contracts without the need for detailed negotiation or discussion'.[115] There are no separate rules for standard-form contracts, which are subject to the same principles as terms that have been negotiated, and the *contra proferentem* rule itself has fallen out of favour, being perceived to be unreliable and capable of leading to potentially arbitrary outcomes.[116]

This approach has much to commend it. Clear rulings that establish definite meanings for clauses that are widely used and susceptible to dispute can only be helpful in bringing certainty to contractual relationships[117] and,

[110] Jansen and Zimmermann, *Commentaries*, 773.
[111] Tricot, 'Le juge: le contrôle de dénaturation', 150–1.
[112] Simler, 'Art 1188 à 1192 – Fasc 10', [82] ff.; Tricot, 'Le juge: le contrôle de dénaturation'; Revet, 'L'uniformation de l'interprétation'.
[113] K. Lewinson, *The Interpretation of Contracts*, 5th ed. (London: Sweet & Maxwell, 2014), p. 4.08.
[114] *The Nema (No. 2)* [1982] AC 724.
[115] Ibid., 737 (Lord Diplock).
[116] *K/S Victoria Street* v. *House of Fraser (Stores Management)* [2011] EWCA Civ 904; [2012] Ch 497 at [68] (Lord Neuberger). On *the contra proferentem rule* and its relevance and role, see, recently, J. McCunn, 'Contra Proferentem Rule: Contract Law's Great Survivor' (2019) 39 *Oxford Journal of Legal Studies* 1, who argues that the rule still has a role to play. Note that English courts also take the view that terms (and even exemption clauses) should be given effect as representing the allocation of risk by the contracting parties, even if they are in a standard form.
[117] I am grateful to Professor Simon Whittaker for pointing out that it may be difficult to find evidence of the 'clear rulings' approach in the sort of commercial context in which it

where it is thought to be appropriate, prompting amendments to contract terms. It is doubtful that the *contra proferentem* rule will cure all of the difficulties that arise with the interpretation of standard-form contracts in France. The rule could potentially be applied inconsistently and the risk of the same terms being interpreted differently remains. There is also still no mechanism for bringing about a definitive ruling on specific clauses.[118]

6.5 Conclusion

The avowed aims of the 2016 reforms were to make French contract law more certain, predictable and fair while at the same time attractive to business and credible as an alternative to the major common law systems. There can be no doubt that the codification of principles that have been developed over time in the case law has brought the Civil Code much more up to date with the law as applied by the courts. In the context of contractual interpretation, a number of long-running controversies and debates have been addressed, in particular the dichotomy between the subjective and objective approaches to interpretation and the relationship between *interprétation créatrice* and *interprétation explicative*. The *dénaturation* power of the Cour de cassation has also been formally recognised and the *contra proferentem* rule is now used in the specific context of the interpretation of standard-form contracts. The reforms also bring a more modern and international approach to French contract law, which in part can be attributed to the extent to which the drafters were inspired by and drew upon a number of the international contract instruments. On any view, the increased clarity and certainty that have resulted are welcome.

It is, however, difficult to say whether the reforms will make French law more predictable and attractive to business. Despite the drafters having openly recognised that the courts can interpret a contract as would a reasonable person placed in the same situation as the parties, the French approach remains ideologically wedded to subjective interpretation. This has important consequences, particularly from a procedural perspective. Notably, interpretation remains a question of fact to be

is found in English law (for example, standard-form insurance contracts). As he pointed out, there may be less need in the French context to have recourse to standard terms as so many contracts are highly regulated by legislation, as is the case in the insurance context.

[118] Tricot, 'Le juge: le contrôle de dénaturation'.

decided by lower courts, which exercise broad powers but say little as to their reasons in their short judgments, making it difficult to know how the principles of interpretation are actually applied in practice. As long as there is ostensibly a search for the subjective intention of the parties, the Cour de cassation is unlikely to disturb the first-instance finding and the practical reality is that relatively few decisions on interpretation are overturned.

Whether the changes made by the reforms to the law of interpretation will help French law be a more credible alternative to common law systems in this area of contract law is also hard to tell. This chapter has sought to show that, as with many other areas of contract law which have also been reformed,[119] the 2016 reforms have brought some sensible changes while leaving some issues unresolved. In England, the search for the declared intention of the parties and the exclusion of evidence of pre-contractual conduct as aspects of a strictly objective approach are thought to promote certainty, help contract planning and limit legal costs. However, while the process might be more transparent, the many high-profile cases on interpretation, divergences between appellate courts and powerful dissents in the judgments of those courts[120] show that England has also struggled to achieve stable and workable principles of interpretation. Ultimately, neither approach seems unarguably more attractive than the other.

[119] Rowan, 'The New French Law'.

[120] The most significant modern decisions on contract interpretation are *Investors Compensation Scheme* v. *West Bromwich* [1997] UKHL 8, [1998] 1 WLR 896; *Chartbrook Ltd* v. *Persimmon Homes* [2009] UKHL 38, [2009] 1 AC 1101; *Rainy Sky SA* v. *Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold* v. *Britton* [2015] UKSC 36, [2015] AC 1619; *Wood* v. *Capita* [2017] UKSC 24, [2017] AC 1173.