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The Genesis of the New French Law of Contract

'My real glory is not to have won forty battles: Waterloo will erase the memory of all these victories. What nothing will erase, what will live eternally, is my Civil Code.'[1] So said Napoleon Bonaparte in a prophecy that on any view has been vindicated. Although enacted more than 200 years ago and one of the oldest codified laws still in force in the world, the French Civil Code remains the principal private law legislative instrument in France today.

Some parts of the Code have, however, been revised to keep pace with changing times. This book is concerned with the modernization of the section on the law of contract, which was comprehensively amended and restructured in 2016. The revised section came into force on 1 October 2016,[2] marking the end of the articles of the 1804 Code familiar to many generations of practitioners and scholars, and inaugurating a new era of 150 articles[3] that are a more extensive and contemporary statement of French contract law. These articles contain a host of rules that over the previous two centuries had been developed and applied in cases and also a range of significant innovations.

The reforms were a major event in France. Such an extensive overhaul of an important part of the Civil Code is a rare thing. Indeed, since its enactment in 1804, almost all of the articles on contract law had remained completely untouched, making this the first re-examination of the subject in over 200 years. It was also the culmination of several attempts at reform in this area that had begun more than 100 years previously and intensified over the preceding fifteen years.

The reforms are also relevant beyond France's borders, particularly in the many jurisdictions that over time have drawn upon the Code as a model to forge their

[1] C-F de Montholon, *Récits de la captivité de l'Empereur Napoléon à Sainte-Hélène* (Paulin: Paris, 1847) 401.

[2] '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 into English by J Cartwright, B Fauvarque-Cosson, and S Whittaker: <http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf> (2016 version) and <http://www.textes.justice.gouv.fr/art_pix/Translationrevised2018final.pdf> (2018 version) accessed 1 September 2021. The translations of the new articles contained in this book are theirs.

[3] Articles 1101 to 1231-7 regulate contracts but there have also been reforms in other areas (the 'general legal regime of obligations' and the 'proof of obligations') and in total 353 new articles were introduced. The focus of this book is solely on the new contract law regime.

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own laws. During the nineteenth and twentieth centuries, the 1804 Code had unparalleled reach, serving as a source of inspiration and even a template in many European countries and parts of Africa, Asia, Central and South America, and North America.[4] France became 'one of the few legal systems that exerted such a dominant influence on other jurisdictions that the country is generally regarded as the "lead jurisdiction" of an entire legal family that stretches from Chile to Vietnam'.[5] In many of these jurisdictions, law reformers and other members of the legal community followed the reforms closely.[6]

A The Reasons for the Reforms

Whilst the longevity of the Civil Code is generally seen as a strength, it had become apparent to many that the contract law section was overdue for modernization. The reforms were born from a realization that the Code had ceased to be an accurate statement of the law of contract applied by French courts, and had fallen in influence abroad and attractiveness to international business.

1 An outdated and incomplete statement of contract law

Until the reforms, most of the section of the Code on contract law had remained unaltered, even as society and technology changed almost beyond recognition. Instead, the courts progressively re-interpreted the articles, which as generally high-level propositions or statements of principle lent themselves to adaptation.

In itself, this was unremarkable. The original draftsmen had foreseen that the judiciary would have a prominent role in adjusting and developing the law. As Portalis noted:

[4] On the 'extraordinary influence' of the Civil Code in the world, see K Zweigert and H Kötz, *An Introduction to Comparative Law*, trans T Weir (3rd edn, OUP: Oxford, 2009) 98.

[5] S Vogenauer, 'The Avant-projet de réforme: An Overview' in 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* (Hart Publishing: Oxford, 2009) 7; The Civil Code was a global 'ambassador' for French law: B Fauvarque-Cosson and S Patris-Godechot, *Le code civil face à son destin* (La Documentation Française: Paris, 2006) 8–9.

[6] One such jurisdiction, Peru, announced soon after the French reforms that it would overhaul its own Civil Code: Ministerial Resolution no 0300-2016-JUS of 17 October 2016. Workshops on the new French law of contract were also organized in jurisdictions that have not used the Civil Code as a model. For example, there was a workshop at the University of Oxford in September 2017. Publications on the reforms in English include J Cartwright and S Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart Publishing: Oxford, 2017); S Rowan, 'The New French Law of Contract' (2017) 66 ICLQ 805; S Rowan 'The Reform of French Contract Law: The Struggle for Coherency' in TT Arvind and J Steele (eds) *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Hart Publishing: Oxford, 2020). A number of their findings and observations are reproduced or referenced herein.

> … the task of the legislator is to determine those principles most conducive to the common good.… The skill of the judge is to put these principles into action, to develop and extend them to particular circumstances by wise and reasoned application.[7]

However, over the course of two centuries, it had become excessive. Most articles had been substantially developed, extended, or limited. Many were interpreted by analogy, *a contrario*[8] or even *contra legem*.[9] On their own and without explanation of how they had been interpreted by the courts, a significant number were all but meaningless. Indeed in several areas the courts had shaped rules that were almost entirely new.

To read the Civil Code therefore did not give a clear or precise picture of French contract law. Instead, this was largely to be found in decided cases. In a jurisdiction with a tradition of codified law in which previous judicial decisions are not formally a binding source of law, this was regarded as ironic and unsatisfactory.

The growing body of cases interpreting the Civil Code also meant that knowledge and understanding of contract law became the preserve of lawyers, contrary to the original aim that the Code would be clear and intelligible to lawyers and non-lawyers alike. This was compounded by the separate development outside of the Code of supplementary rules applicable to particular types of contracts. For example, regulations on consumer law and insurance law were enacted through specific legislation, without being integrated into the Code.[10] In short, the Code had ceased to be a comprehensive, coherent, and self-contained legislative instrument; modernization had become essential.

2 Loss of international influence

There was also a realization that the international influence of the Civil Code had declined. This was felt acutely at the turn of the twenty-first century amidst the preparations for the Code's 200th anniversary. One sign of the times was that, when reforming their own civil codes, states that had once drawn upon the Code, such as the Netherlands and Quebec, actually chose to depart from it.

In parallel, there were moves within the European Union towards harmonizing contract law in Europe beyond simply the well-trodden terrain of consumer

[7] JEM Portalis, 'Discours préliminaire du premier projet de Code civil', in PA Fenet, *Receuil complet de travaux preparatoires du Code civil* (Vidocq: Paris, 1836).

[8] 'From the contrary', that is an interpretation that adopts the opposite solution to a rule contained in the Code where the conditions of that rule are not fulfilled.

[9] 'Against the law', that is an interpretation that contradicts the clear wording of a provision of the Code.

[10] For a detailed account of the process of 'codification, decodification and recodification' of French private law, see Vogenauer (n 5) 4–7.

protection. The European Parliament had advocated work being undertaken on a European civil code or contract code[11] and in 2001 the European Commission began a debate on the future of European contract law.[12] In France, these projects were met with anxiety and even hostility. This was partly because the input of French lawyers had at that stage been minimal and the projects were also feared to portend the creation of a rival to the Civil Code.[13] Some were concerned that the disconnect between the Code and the law as applied in practice would diminish its sway in these European level projects. If the Code was ever again to be a model or exert real influence over, or even serve as, a counter-weight to future harmonization proposals, it simply had to be modernized.

3 Lack of appeal to international business

A final important factor behind the reforms was a recognition that French contract law was materially less attractive as a choice of law for cross-border contracts than the equivalent regimes of some common law countries. When selecting their governing law, international businesses often preferred the laws of England or New York. There was a widely held view that these were more commercial and in tune with whether particular outcomes made economic sense. French law compared unfavourably on measures such as pragmatism and the promotion of transactional certainty, which have less prominence in France and were often counterbalanced by considerations of substantive fairness (*justice contractuelle*). Nowhere was this more apparent than in the extensive powers of the courts to interfere with the terms of the contract. This had become a source of real uncertainty, to which business is generally averse.

These perceptions were compounded by several reports on 'Doing Business' that were published by the World Bank between 2004 and 2006.[14] France was ranked in a very unhappy 44th place for ease of doing business, behind less developed countries such as Botswana and Jamaica amongst others. The reports were particularly critical of the 'French civil law tradition' and its restraining effect on commerce. It was portrayed as being economically inefficient, complex, and unpredictable, and as generally inferior to the main common law systems.

Although tendentious and based on a methodology that was contentious,[15] these reports were nevertheless 'electroshocks'[16] in France, adding to a growing

[11] See European Parliament Resolution A2-157/89 and Resolution A3-0329/94.

[12] 'Communication from the Commission to the Council and the European Parliament on European Contract Law' (COM (2001) 398 final) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0398:FIN:EN:PDF> accessed 1 September 2021.

[13] Fauvarque-Cosson and Patris-Godechot (n 5) 8–9.

[14] 'Doing Business in 2004: Understanding Regulation' (World Bank and OUP: Washington DC, 2003); 'Doing Business in 2005: Removing Obstacles to Growth' (World Bank and OUP: Washington DC, 2004); 'Doing Business in 2006: Creating Jobs' (World Bank and OUP: Washington DC, 2005).

[15] See Fauvarque-Cosson and Patris-Godechot (n 5) 152–7.

[16] Ibid.

awareness that French contract law would need to be modernized in order to be a serious and credible option for international business. As the then French Minister of Justice, Christiane Taubira, said in the Senate in 2014:

> … our law [of contract] dates from over two centuries … Times have changed … Our law does not inspire anyone in the world …There is a battle of influence in Europe between our continental law … and the common law … This battle is … permanent … It is necessary to modernise our law of contract and obligations.[17]

B The Objectives of the Reform

This was the context in which the French government began to grapple with the need for reform. It promulgated three objectives which were identified by the drafters of the reforms in their 'Report to the President of the Republic'[18] in which they explained the new articles and their rationale. These were that the contract law section of the Civil Code should be more up to date, accessible, and predictable; be more attractive to international business and competitive with the major common law regimes; and promote fairness.[19]

The drafters sought to achieve the first objective in a combination of ways. The first was to use more simple and modern language than used in the 1804 Code. According to the Report to the President, the aim was that laymen unfamiliar with legal jargon should be able to understand the rules and see how justice is done.[20]

Second, the drafters sought to codify principles that had been established in decided cases. The need to do so was significant and pressing. In France, judicial decisions, even those of the highest court, the *Cour de cassation*, do not have nearly

[17] Official report of the session of 23 January 2014 in the 'Sénat': <www.senat.fr/seances/s201401/s20140123/s20140123014.html> accessed 1 September 2021; interview in 'Les Echos' magazine: <www.youtube.com/watch?v=K9V-DqNw2kQ> accessed 1 September 2021.

[18] 'Report to the President of the Republic relating to Ordonnance no 2016–131 of 10 February 2016 on the reform of contract law, the general regime and proof of obligations', JORF no 0035 of 11 February 2016.

[19] Ibid., 1–2. These goals were reaffirmed in the reports published by the National Assembly and the Senate when ratifying the decree: S Houlié, 'Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le projet de loi, modifié par le Sénat en deuxième lecture, ratifiant l'ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations' (Assemblée Nationale: no 429, 29 Nov 2017) <https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b0429_rapport-fond> accessed 1 September 2021; F Pillet, 'Rapport fait au nom des lois constitutionnelles, de législation, du suffrage universel, du Règlement d'administration générale (1) sur le projet de loi ratifiant l'ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations' (Sénat: no 33, 11 Oct 2017) <https://www.senat.fr/rap/l17-022/l17-0221.pdf> accessed 1 September 2021.

[20] Ibid., 2.

the same importance as in common law systems.[21] There is no formal system of precedent, as will be explained in Chapter 2 on the consideration of the sources of contract law. Appellate cases are innumerable in comparison with England. The *Cour de cassation*, for instance, comprises six chambers and more than 100 judges who deal with over 25,000 disputes each year.[22] As of 2020, there were thirty-six regional courts of appeal, comprising over 1,000 judges.[23] It is therefore much more difficult than in England to identify decisions to which importance should be attached and to distil binding principles. There is also a greater risk of inconsistency between decisions. These difficulties are compounded by the brevity and terse style of judgments in France which reveal little of the reasoning of the court. The aim was to reduce the uncertainties inherent in relying on past cases.

Third, the drafters revised the structure of the 1804 Code to give each section more defined scope and clarity.[24] A clear distinction is now drawn between the sources of obligations,[25] the legal regime governing obligations,[26] and the proof of obligations (*preuve des obligations*).[27] The articles relating to contract law are ordered in a sequence that corresponds to the life cycle of the contract, dealing first with contract formation, followed by validity, interpretation, unfair terms, privity, and finally remedies for breach.[28]

These clarifications were also perceived to go some way towards fulfilling another goal of the reforms, which was to restore the international status of French contract law, both as a model for other countries and amongst European law reformers, in case a European civil code should ever be drafted. A codified set of laws presented clearly that is easier to read and more accessible was thought to be essential. At the very least, French contract law principles should be readily understood.

Codifying the case law and adopting this new structure have resulted in the contract law provisions of the Code becoming more comprehensive. It has also led to the articles being extensively re-numbered. Some of the iconic articles of the 1804 Code have disappeared. For instance, the enunciation of the fundamental principles of the binding force of contract and good faith in performance, which for many generations was found in old article 1134, is now split between new articles 1103 and 1104.

[21] On the role of the courts and the status of decided cases as a source of law in the civil law, see J Bell, *French Legal Culture* (Butterworths Lexis: London, 2001) 66–72; J Cartwright, 'Un regard anglais sur les forces et les faiblesses du droit français' RTD 2015.691, 693.

[22] According to the 2019 report of the *Cour de cassation*: <https://www.vie-publique.fr/sites/default/files/rapport/pdf/276165.pdf> accessed 1 September 2021.

[23] Statistics of the Ministère de la Justice, 'Les chiffres-clés de la Justice 2020' <http://www.justice.gouv.fr/art_pix/Chiffres_Cl%E9s_nov2020.pdf> accessed 1 September 2021. England has only forty-two Justices of Appeal.

[24] 'Report to the President' (n 18) 2.

[25] Articles 1100 to 1303-4 of the Civil Code.

[26] Articles 1304 to 1352-9 of the Civil Code.

[27] Articles 1353 to 1386-1 of the Civil Code.

[28] 'Report to the President' (n 18) 2.

The second objective as described in the Report to the President[29] was to make French contract law more commercially orientated, attractive to potential foreign investors, and competitive with major common law regimes. It was hoped that this would encourage the choice of French law as the governing law in international contracts.[30] The Report explains as follows:

> In a globalised economy where the laws of different countries are themselves in competition, the absence of evolution of contract law… penalises France on the international scene… [a more modern and predictable contract law] would attract foreign investors and businesses wanting to choose French law as the governing law of their contract.[31]

This was even cast as an opportunity for French law to capitalize on Brexit. For example, one French parliamentarian said that 'Brexit gives us the opportunity to make continental law prevail over the law of common law countries'.[32]

Neither the Report to the President nor the French parliamentary debates shed light on precisely how the drafters intended to fulfil this objective. Such brief references as were made to enhanced commerciality related to remedies for breach of contract, where the drafters sought to reduce the need for recourse to the court and introduce greater optionality and flexibility. The injured party can now act unilaterally to suspend performance (*exceptio non adimpleti contractus*), reduce the contract price, and terminate.

The third objective—substantive fairness (*justice contractuelle*)[33]—involved achieving a fair balance between the substantive interests of the parties. In France, the courts have long been seen as the guardians of this balance.[34] Over the years there have been many well-known cases in which courts have interfered with the contract in order to redress a bad bargain or unfair terms.[35] The drafters sought to enhance these powers and amplify considerations of fairness. For example, greater prominence is now given to the principle of good faith and there are wider powers

[29] Ibid., 1–2.

[30] The Senate criticized this objective, arguing that the attractiveness of the law does not depend only on legal factors but also on the economic power of the State and the reputation of its legal system and law firms: see Pillet, 'Report to the Senate' (n 19) 12.

[31] 'Report to the President' (n 18) 1–2.

[32] Pillet, 'Report to the Senate' (n 19).

[33] S Smorto, 'La Justice Contractuelle' Revue Internationale de Droit Comparé 2008.60.

[34] S Whittaker, 'Contracts, Contract Law and Contractual Principle' in J Cartwright and S Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law After the 2016 Reforms* (Hart Publishing: Oxford, 2017) 29; Smorto (n 33).

[35] Using the notion of *cause*: see Chapter 7 on unfair terms and notably the *Video cassette* decision: Civ (1) 3 July 1996, D 1997.500, note P Reigné; see also the well-known *Chronopost* decision: Com 22 Oct 1996, D 1997.121, note A Sériaux; Com 30 May 2006, D 2006.1599, note X Delpech and D Mazeaud.

for the court to strike down unfair terms and adjust the agreed risk allocation where unforeseen circumstances arise.

To some extent this objective was in conflict with the second objective of making French contract law more commercially attractive. This was addressed in the Report to the President in the following terms:

> It appeared necessary … not to recast the law of contract in its entirety but to modernise it… while still preserving the spirit of the Civil Code which is favourable to both consensualism to encourage economic exchanges and protective of the weakest… Enhancing the attractiveness of our law does not require us to relinquish balanced legal solutions that are not only protective of the parties but also effective and responsive to changes in the market economy... The reforms propose solutions that seek to achieve a balance between the rights and duties of the parties.[36]

There will be consideration in the chapters that follow as to whether the competing objectives have been successfully reconciled in the reforms, and of the coherency of the balance that is struck between the classical tensions of freedom of contract, transactional certainty, and the protection of the weak.

C The Long Road to Reform

The road to reform was a long one, requiring sustained persistence for the revision of the section of the Civil Code on contract law to come to fruition. Momentum first really began to build in 2004 at around the time of the celebration of the bicentenary of the enactment of the Code, which marked the beginning of what became a serious push towards reform. In the years that followed, several proposals were published, only to fall away, before the 2016 reforms were finally enacted.

The first reform project in this period, commonly referred as the 'Catala proposals',[37] was published in 2005. Drafted mainly by academic lawyers, it contained proposals for the reform not only of French contract law but of all the core areas of French private law. Despite generating considerable interest and enthusiasm, the draft reforms never reached the statute book, due largely to an insufficiency of political will at that time.[38] This was followed in 2008 and 2009 by two further reform projects, which contained many of the same ideas. Both were under the

[36] 'Report to the President' (n 18) 2 and 5.

[37] *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 Sept 2005* (Documentation Française: Paris 2006) translated into English by J Cartwright and S Whittaker: <http://www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf> accessed 1 September 2021.

[38] Vogenauer (n 5) 17.

auspices of the Ministry of Justice[39] and neither was ultimately adopted. This is not to say, however, that any of the three projects were in vain. The proposals that were made and the commentary and discussion that ensued served as the foundations on which the 2016 reforms were later built. With the clarity of hindsight, these proposals deserve great credit and arguably were essential stepping stones without which the reforms might never ultimately have been adopted.

Another essential ingredient was political will. Having previously been lacking, this came to the fore between 2010 and 2016, despite a change in the prevailing political colour following the French presidential election in 2012, which saw François Hollande succeed Nicolas Sarkozy. The two Ministers of Justice who held office during this period each established working groups comprising lawyers, business representatives, and ministers to draft what would become the final reform proposals.

There was also a degree of political dexterity in the enactment of the reforms. The French government was concerned that full debates of the proposals in the French Parliament would lead to delay and possibly even their failure. It therefore invited Parliament to grant legislative authority for the enactment of the reforms by government decree (*ordonnance*). This meant that the normal parliamentary process could be bypassed and the proposals passed without full scrutiny. To justify this course, the Ministry of Justice argued that French contract law was in urgent need of reform, the objectives of the proposed reforms were uncontroversial, and the fundamental principles on which contract law was based would remain unchanged. It also pointed to the proposed text being the culmination of the various reform proposals published over the preceding ten years, all of which had been the subject of intense scrutiny.[40]

This met with considerable opposition on the basis that reform by decree was inappropriate for such an important area of private law.[41] The Senate was particularly vocal in disputing the propriety of the proposed procedure. Ultimately, however, the French Parliament authorized the government to proceed. The draft proposals were published in February 2015,[42] and a short period of consultation

[39] Ministère de la Justice, *Projet de réforme du droit des contrats*, July 2008. A new version was drafted in 2009. See also F Terré, *Pour une reforme du droit des contrats: Réflexions et propositions d'un groupe de travail sous la direction de François Terré* (Paris: Dalloz, 2008).

[40] See Christiane Taubira's intervention in Parliament on 16 April 2014: <https://www.youtube.com/watch?v=OFrpvFh-I4s> accessed 1 September 2021.

[41] The *Conseil Constitutionnel* was petitioned by members of the Senate to review the constitutionality of the Government being granted authority to legislate on such an important topic without parliamentary debate. The *Conseil Constitutionnel* held that the process adopted by the Government complied with article 38 of the Constitution, which allows the Government to legislate by decree in certain circumstances; it was limited and had clear and precise goals. See its decision Cons Const 12 Feb 2015, no 2015-510 DC. See also F Ancel, 'Le procès en illégitimité: retour sur le processus d'élaboration de l'ordonnance du 10 février 2016' RDA 2017, no 15.83.

[42] 'Projet d'Ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations' published 25 February 2015 <http://www.justice.gouv.fr/publication/j21_projet_ord_reforme_contrats_2015.pdf> accessed 1 September 2021.

followed. At the end of this period, the text was revised by the Ministry of Justice before being published in final form in February 2016.[43] It came into effect on 1 October 2016.

The final remaining hurdle was for the government decree to be ratified by the French Parliament. This had to occur within the prescribed period of eighteen months, failing which the decree would be void. A ratification bill was presented to Parliament in June 2017. There was some hope that it would pass without modification. However, Parliament and in particular the Senate sought to reopen the debate and reformulate some of the most controversial innovations.[44] It did so with some success,[45] several articles being modified quite substantially.[46]

Ratification finally occurred on 20 April 2018, with the amended articles formally taking effect on 1 October 2018.[47] The amendments that had been made in the interim had the somewhat peculiar and unsatisfactory effect that there are no fewer than three different contract law regimes in operation in France. Contracts that were entered before 1 October 2016 are governed by the law prior to the reforms; those entered between 1 October 2016 and 30 September 2018 are subject to the principles in the 2016 decree; and those entered from 1 October 2018 are governed by the principles of the 2016 decree as amended by the 2018 ratification law.

This was not, however, the end of the journey. Although extensive, the 2016 reforms did not amend in any significant respect the articles of the Civil Code relating to contractual liability and compensatory and agreed damages. These were held over by the drafters to be addressed separately along with extra-contractual liability as part of a later and broader project to reform civil liability in France.[48] As the Report to the President stated:

> Contractual liability cannot be reformed in isolation from extra-contractual liability: it is generally accepted that, fundamentally, these two forms of liability are mechanisms of the same nature, resting on the existence of an action giving rise

[43] 'Ordonnance no 2016-131 du 10 février 2016' (n 2).

[44] M Mekki 'La loi de ratification de l'ordonnance du 10 février 2016—une réforme de la réforme?' D 2018.900.

[45] On these changes, see the various articles by prominent French commentators in 'Le nouveau droit des contrats après la loi de ratification du 20 avril 2018' RDC Hors-série June 2018.

[46] Others were clarified but not substantially amended.

[47] 'Loi no 2018-287 du 20 avril 2018 ratifiant l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations', JORF no 0093 du 21 avril 2018.

[48] Ministère de la Justice, *Projet de réforme de la responsabilité civile* (March 2017), <http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf>; translated from French into English by S Whittaker in consultation with J-S Borghetti: *Reform Bill on Civil Liability* (March 2017) <http://www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf> accessed 1 September 2021.

> to liability, harm, and a causal relationship between the two. Only differences of regime distinguish between them, based essentially on the special character of the action giving rise to liability in the contractual context.[49]

The first proposals made as part of this project were published in April 2016 and a period of consultation was initiated, which closed at the end of July 2016. New proposals taking account of comments that had been submitted were published in March 2017.[50] The Reform Bill on Civil Liability contains eighty-three new articles in which there are a number of significant innovations.[51] At the time of writing (June 2021), the proposals of the 2017 Reform Bill are yet to be implemented. It is presently unclear whether this will happen and, if so, when and in what form.[52]

As a result, the analysis of contractual liability and compensatory and agreed damages in this book is confined to the original articles in the 1804 Civil Code, which were renumbered but otherwise substantially replicated in the 2016 reforms and continue to apply. Occasional reference is made to some of the main proposed changes and innovations, which could potentially be introduced in the future,[53] but this is not intended to be comprehensive.

[49] 'Report to the President' (n 18) 17; translation of S Whittaker in his chapter entitled 'A Common Framework for Civil Liability?' in J-S Borghetti and S Whittaker (eds), *French Civil Liability in Comparative Perspective* (Hart Publishing: Oxford, 2019) 21.

[50] *Projet de réforme de la responsabilité civile* (n 48).

[51] For example, the introduction of a form of mitigation (proposed articles 1237 and 1263) and civil fines (*amende civile*) which are punitive in nature (proposed article 1266-1).

[52] In July 2020, several senators who were impatient to see reforms enacted put forward proposals amending the 2017 reforms: '23 propositions pour simplifier la vie des Français en facilitant la réparation des dommages' (Sénat: 22 July 2020) <20200722_23_propositions_Responsabilite_civile.pdf (senat.fr)> accessed 1 September 2021. This was followed by a 'proposition de loi': <https://www.senat.fr/leg/ppl19-678.html> accessed 1 September 2021.

[53] On the draft project, see J-S Borghetti and S Whittaker (eds), *French Civil Liability in Comparative Perspective* (Hart Publishing: Oxford, 2019).