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RESEARCH ARTICLE

The 2016 Reform of French Contract Law: Some Recent Developments

Solène Rowan

King's College London, London, UK
Email: solene.rowan@kcl.ac.uk

Abstract
This article focuses on the impact of the reform of the contract law section of the French Civil Code in 2016 in two key areas: remedies for breach of contract and regulation of unfair terms. In particular, it draws a contrast between the ways in which two of the most controversial provisions introduced by the reforms have been applied in practice. While new Article 1221, which limits specific enforcement where it is disproportionate, has been accepted by the courts, Article 1171, which deems unfair terms as not written, has been interpreted narrowly to the point of being marginalised.

Keywords: France; Civil Code; reform; contract law; specific enforcement; proportionality; unfair terms

I. Introduction

The contract law section of the French Civil Code was comprehensively overhauled and modernised in 2016. Rarely has there been such extensive revision of one of the key parts of the Civil Code. Indeed, it was the first re-examination of contract law in more than 200 years and the culmination of several attempts to reform this section of the Code that had begun more than a century previously. As such, it was a major event for scholars and practitioners in France.

The relevance of the reforms extends far beyond France's borders. The reforms have been significant for law reformers in the many foreign jurisdictions that have used the Code as a model or a source of inspiration with which to forge their own laws. Some of these jurisdictions have drawn upon the developments in France in assessing whether their own laws of obligations are in need of modernisation.[1]

The fundamental reason for the reforms in France was a recognition that the Code, which had been enacted in 1804, no longer accurately stated the law of contract that was being applied by French courts in practice. Over the course of 200 years, the manner in which the courts interpreted the articles of the Code had increasingly diverged from the way they were written. This divergence was an important factor in the declining influence of the Code in foreign jurisdictions. Additionally, French contract law had come to seem significantly less attractive compared to certain common law systems, and as a result was not regarded as a realistic choice for the governing law of many international commercial contracts.

[1] Belgium has recently reformed its obligations regime in its entirety and, in doing so, drew inspiration from the French reforms. See also the position in Peru which, following the French reforms, announced that it would reform its civil code (Ministerial Resolution No. 0300-2016-JUS of 17 October 2016).

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The overall aim of the reform of the contract law section of the Civil Code was therefore to provide a contemporary framework for contractual relationships that is more in tune with the challenges of the 21st century and a rapidly globalising world. In a range of ways, the reforms are a clear improvement on the 1804 Code. The Code is more comprehensive, more intelligible, more accessible, and more predictable. The text and terminology are simpler and modern. Structurally, the new articles are helpfully ordered in a sequence that corresponds to the life cycle of the contract.[2]

The updated contract law section marks the beginning of a new era with 150 articles that provide a comprehensive and modern statement of French contract law.[3] These articles contain a wide array of rules that have been developed and applied in cases over the past two centuries, as well as several noteworthy innovations. Some of these innovations have sparked controversy owing to their departure from tradition and/or their significant impact on the courts' powers.

The number of decisions applying the reformed law is growing apace. Have the French courts been open to the new articles of the Code? How have they responded to the innovations? Although it is too early to fully assess the new landscape, recent decisions indicate that French courts have welcomed the changes in some areas, and that several long-standing uncertainties and contradictions in the law can now be regarded as resolved. However, other decisions show a hesitation to fully implement the reforms.

This article focuses on the application of the reforms in two important areas of contract law: remedies for breach of contract and regulation of unfair terms. Specifically, it examines and contrasts how French courts have approached two of the most controversial innovations introduced by the reforms. First, it considers new Article 1221, which limits specific enforcement in cases where there is a 'manifest disproportion' between the cost of performance and the injured party's interest in obtaining it. Contrary to expectations, the courts have not only accepted but also enlarged the scope of the new proportionality requirement in Article 1221. Recent decisions of the Cour de cassation suggest that Article 1221 will have a significant and tangible impact. Second, this article draws a stark contrast with new Article 1171, which strikes down any term in a standard form contract that is 'non-negotiable and determined in advance' and that 'creates a significant imbalance in the rights and obligations of the parties'. This has been narrowly interpreted to the point of being marginalised by the Cour de cassation deciding that the protection applies only in limited circumstances.

The stark contrast in the reception of these two notable innovations underscores the crucial role of courts in shaping the direction of the new French contract law. It also highlights that it is up to the courts, through creative development, to determine how the new provisions of the Code will be applied. Unsurprisingly given the extent of the overhaul, French contract law is still in the process of settling down. It will take some time yet before the changes brought about can be fully comprehended.

II. Embracing proportionality in the context of specific enforcement (and beyond)

Following the reforms, the concept of proportionality has acquired new significance in the French law of remedies. A striking example is specific enforcement, which has long been a central remedy in France and which the reforms have made subject to this standard.[4,5] This has been well-received by French courts. Indeed, they have proposed that proportionality should also be applied to compensatory damages for breach of contract, in respect of which it is currently not relevant.

[2] See S Rowan, *The New French Law of Contract* (Oxford University Press, 2022).

[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.

[4] See also the law relating to price reduction at Article 1223 of the Civil Code, which confers on the injured party a right to accept performance that falls short of the contractually agreed standard but at a lower price. The reduction must be in proportion to the shortcomings in the performance. Comparable to the proportionality standard of Article 1221, reasonableness has made a remarkable appearance in the context of the remedy of 'replacement' (*faculté de remplacement*) following the 2016 overhaul of contract law: Article 1222 of the Civil Code. See Rowan, *The New French Law of Contract*, 208–13.

[5] Rowan, *The New French Law of Contract*, 248–54.

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A. The centrality of specific enforcement in French contract law

The effect of specific enforcement (*exécution forcée en nature*) is to compel the defaulting party *personally* to perform their contractual obligations. It is an article of faith for French lawyers that this is a central remedy for breach of contract.[6] Specific enforcement has for many years been widely available notwithstanding an apparent conflict in the 1804 Civil Code. Under paragraph 2 of old Article 1184, an injured party could compel the defaulting party to perform where performance was still possible.[7] This appeared to conflict with old Article 1142, which put the emphasis on damages to the exclusion of other remedies. However, in practice, the suggested priority given to damages was interpreted in a narrow manner. The courts consistently ruled that damages did not necessarily have to be the primary or sole remedy. Article 1142 was confined to obligations of a personal nature that could not be enforced through specific enforcement.[8]

The new Civil Code has confirmed this approach. New Articles 1217, 1221, and 1341 provide that, where there has been a breach, the injured party can claim the specific enforcement of the contract. For monetary obligations, this is enshrined in new Article 1341, which confirms that the right of the injured party to performance under new Article 1221 extends to debt claims.[9] The contract price can be claimed in preference to other remedies such as compensatory damages and termination.[10]

French courts have also demonstrated a willingness to grant specific enforcement of non-monetary obligations without hesitation. This applies to various types of contract, including those for the sale of goods, regardless of the nature of the goods or whether they are unique. No duty to mitigate arises.[11] The remedy cannot be refused simply because it is possible to obtain substitute performance. Building contracts are also specifically enforceable. Unlike in England, the potential challenges in overseeing compliance with an order for specific enforcement do not seem to be a significant concern in France, and they pass without mention in the literature on the subject.

Only in three circumstances is specific enforcement unavailable in French law. The first is where performance is impossible.[12] The second is where specific enforcement would result in involuntary servitude. An example is a contract for the provision of personal services.[13] The third is where there is a 'manifest disproportion' between the cost of performance and the interest of the injured party in obtaining it;[14] this was added by the reforms.

B. The new requirement of proportionality

The insertion of a proportionality standard in the context of specific enforcement can be seen in new Article 1221, which provides that '[a]

[6] G Chantepie and M Latina, *La réforme du droit des obligations: Commentaire théorique et pratique dans l'ordre du Code civil*, 3rd ed (Dalloz, 2024) 636; Y-M Laithier, 'Exécution Forcée en Nature' in J Cartwright and S Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law After the 2016 Reforms* (Hart, 2017) 281.

[7] See also Article 1228 of the 1804 Civil Code and Article 1 of the law of 9 July 1991 on the reform of civil enforcement procedures (loi no 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution).

[8] Civ 20 January 1953, JCP 1953.II.7677 note P Esmein.

[9] See also paragraph 1 of Article L111-1 of the Code of Civil Enforcement Procedures.

[10] O Deshayes, T Genicon, and Y-M Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations*, 2nd ed (LexisNexis, 2018) 638 have questioned whether the proportionality requirement in Article 1221 of the Civil Code applies to the specific enforcement of monetary obligations. The requirement is not referred to in Article 1341, suggesting that it does not apply. For P Malaurie, L Aynès, and P Stoffel-Munck, *Droit des obligations*, 12th ed (LGDJ (Librairie générale de droit et de jurisprudence), 2022) 1136, even after the reforms, the injured party can prefer payment of the price over damages or termination.

[11] S Le Pautremat, 'Mitigation of Damages: A French Perspective' (2006) 55 *International and Comparative Law Quarterly* 205.

[12] Article 1221 of the Civil Code.

[13] Civ 14 March 1900, D 1900, D 1900.I.489; Civ 20 January 1953, JCP 1953.II.7677 note P Esmein.

[14] Article 1221 of the Civil Code.

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creditor of an obligation may, having given notice to perform, seek performance in kind unless performance is impossible or if there is a manifest disproportion between its cost to the debtor acting in good faith and its interest for the creditor'.

This new requirement that must be satisfied for specific enforcement to be available is among the most notable changes made by the 2016 reforms of the Code.[15] Prior to the reforms, it was not open to the court to exercise discretion as to whether to grant the remedy. That an order would be disproportionate was not a ground for resisting it. Similarly, there was no bar where the order would result in undue hardship for the contract-breaker. This meant that the remedy could be obtained even where it would be financially ruinous for them.[16]

The absence of any such limitations on the availability of specific enforcement resulted in a number of outcomes that were controversial and arguably surprising. One notable case concerned a company that built a house that was 13 inches beneath the contractually agreed height. It was held by the Aix-en-Provence Court of Appeal that the breach did not relate to an essential term of the contract and that the house was fit for purpose. On that basis, it refused to order the demolition and reconstruction of the house. However, the Cour de cassation disagreed and overturned the decision, holding that it was open to the injured party to compel the defaulting party to perform its obligations to the letter.[17]

The introduction of this new exception was in response to such decisions. It represents a significant change and is intended to enable the courts to achieve a fairer balance between the parties. Extreme results that unfairly prioritise the interests of the injured party over those of the defaulting party can now be more readily avoided.

The drafters of the reforms did not, however, set out guidance either as to the factors that are relevant to assessing the interest of the injured party or as to the meaning of 'manifest disproportion'. Among the factors that commentators have suggested are likely to be relevant are the seriousness of the breach, the extent of the injured party's loss, the level of difficulty in obtaining the promised performance elsewhere, whether the injured party would themselves be in breach of a separate contract with a third party (for example where there are back-to-back contracts), and the risk of under-compensation if compensatory damages were to be awarded.[18] There is a consensus that a 'manifest disproportion' must be blatant, in the sense of 'certain, evident and flagrant',[19] which will serve to limit the scope of the exception.[20]

With the introduction of the proportionality exception, French law has moved notably in the direction of a number of international instruments. The drafters of the reforms were open in acknowledging that they had drawn significant inspiration for the revisions to the section of the Code on remedies and 'borrowed'[21] extensively from various international projects on contract law.[22] Under these instruments, enforced performance is the main remedy, at least as a starting point.[23] Its centrality is, however, subject to exceptions that have regard to the economic cost of the remedy and disproportionality,[24] which the drafters drew upon.[25] The comments to Article 7.2.2(b)

[15] Rowan, *The New French Law of Contract*, 198–208.

[16] Civ (3) 3 December 1969, Bull civ III no 2.

[17] Civ (3) 11 May 2005, RDC 2005.323 note D Mazeaud.

[18] Deshayes et al., *Réforme du droit des contrats*, 555; Laithier, 'Exécution Forcée en Nature', 285.

[19] Chantepie and Latina, *La réforme du droit des obligations*, 638.

[20] Deshayes et al., *Réforme du droit des contrats*, 555.

[21] F Ancel, B Fauvarque-Cosson, and J Gest, *Aux sources de la réforme du droit des contrats* (Dalloz, 2017) [24.91].

[22] Ibid., [24.71] and [24-101].

[23] See Articles 7.2.1 and 7.2.2 of the UNIDROIT Principles; Articles 9:101 and 9:102 of the PECL; H Schelhaas, 'Commentary on Article 7.1 of the UNIDROIT Principles' in S Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed (Oxford University Press, 2015) [2]-[12] in commentary to Article 7.2.2 of the UNIDROIT Principles.

[24] Article 7.2.2(b) refers to an 'unreasonably burdensome or expensive' enforcement.

[25] Ancel et al., *Aux sources de la réforme du droit des contrats*, [24.91].

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of the UNIDROIT (International Institute for the Unification of Private Law) Principles note that performance will be 'unreasonably burdensome or expensive' only in exceptional circumstances,[26] confirming that, as in France, the right to performance is very much the rule.

The exception has also moved French law somewhat closer to English law. Specific performance, a remedy that is rarely awarded in England,[27] is generally refused if it would be oppressive to the defaulting party[28] or give rise to cost that is wholly out of proportion to the benefit to the injured party. Any hardship that might be occasioned to third parties is also a relevant consideration that the courts will take into account.[29]

C. The reception of the new exception

There have been mixed views among commentators in respect of the proportionality exception in the new Article 1221. It has been welcomed as a more moderate approach by some,[30] for whom enforcing performance at all costs is an abuse of right (*abus de droit*).[31] Doubts have, however, been expressed by those who favour the strict availability of specific enforcement, in particular on the basis that it is at odds with the binding force of contract and effectively allows promises to be broken with impunity simply because the cost of performing is too high.[32] For example, Mekki has said that

> '[e]nforced performance is a formidable weapon to encourage the promisor to perform. This exception sends a dangerous message to those promisors who might be tempted to breach their contract, particularly in construction contracts … We expect the exception to be confined to abusive claims.'[33]

In order to prevent abuse of the exception, an amendment was made to new Article 1221 during the ratification process in 2018 to require the defaulting party to be acting in good faith as a precondition to invoking it. The aim was to avoid incentivising the deliberate breach of contractual obligations with the intention of arguing, in bad faith, that there is a manifest disproportion between the cost of enforced performance and the interest of the injured party in obtaining the remedy.[34]

When the reforms were being made, it was anticipated that French courts would interpret the exception narrowly, such that specific enforcement would in practice be refused only in extreme cases.[35] Deshayes, Genicon, and Laithier said that 'the exception is not a principle that is in competition with the binding force of contract and the general availability of specific enforcement … It

[26] Schelhaas, 'Commentary on Article 7.1 of the UNIDROIT principles', 893–4.

[27] *Société des Industries Métallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep 465.

[28] *Francis v Cowcliffe* [1976] 33 P & CR 368 (Ch); *Patel v Ali* [1984] Ch 283; *Wedgwood v Adams* [1843] 49 ER 958 at 960 (Lord Langdale MR).

[29] *Tito v Waddell (N° 2)* [1977] Ch 106, 325–8 (Megarry V-C); *Co-operative v Argyll* [1998] AC 1 (HL).

[30] See, for example, Y-M Laithier, *Étude comparative des sanctions de l'inexécution du contrat* (LGDJ, 2004) 315ff; G Viney, 'Exécution de l'obligation, faculté de remplacement et réparation en nature en droit français' in M Fontaine and G Viney (eds), *Les sanctions de l'inexécution des obligations contractuelles, études de droit comparé* (LGDJ, 2001) 107.

[31] See '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, 15, which refers to the theory of abuse of right in relation to this new exception.

[32] M Mekki, 'Les remèdes à l'inexécution dans le projet d'ordonnance portant réforme du droit des obligations', *Gazette Palais* 30 April 2015; F Terré, P Simler, Y Lequette, and F Chénedé, *Droit civil: les obligations*, 13th ed (Dalloz, 2022) 778; T Genicon, 'Contre l'introduction du "coût manifestement déraisonnable" comme exception à l'inexécution forcée en nature' (2014) 240 *Droit & Patrimoine* 63; O Tournafond and J-P Tricoire, 'Les contrats de construction face aux nouvelles orientations du droit des contrats' (2016) 7/8 *Revue de driot immobilier: Ubanisme – construction* 391.

[33] Mekki, 'Les remèdes à l'inexécution'.

[34] Deshayes et al., *Réforme du droit des contrats*, 550–1; Chantepie and Latina, *La réforme du droit des obligations*, 638.

[35] Chantepie and Latina, *La réforme du droit des obligations*, 639; Deshayes et al., *Réforme du droit des contrats*, 485–8.

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would be a mistake to infer that specific enforcement will be ruled out every time compensatory damages are adequate to fulfil the expectations of the injured party.'[36] This is also true where a replacement can be obtained in the marketplace or to perform the contract would be expensive. It has also been said that 'this limitation is meant to operate at the margin',[37] and is 'exceptional' in character.[38]

These predictions may, however, prove to be incorrect. In the first two decisions on the effect of Article 1221, which were related and made on the same day, the Cour de cassation appeared to interpret the exception broadly.[39] The first case concerned a building company that had acquired a plot of land on a housing estate for redevelopment. It demolished a villa on the land and erected a block of six flats with a swimming pool. The second case concerned a (different) building company similarly redeveloping another plot of land on the same estate by building a block of seven apartments with garages. In both cases, the developments breached contractual provisions that regulated the estate, pursuant to which the footprint of any new buildings could not exceed a specified size. The claimant residents of a neighbouring property on the housing estate sought an order for the demolition of the two blocks of flats or, alternatively, damages.

The Aix-en-Provence Court of Appeal refused to order that the buildings be demolished. Its reasons were twofold. First, the apartments were already inhabited and therefore demolition would in practice be impossible. Second, to demolish the buildings would be 'totally disproportionate'. This was explained on the basis that no 'objective loss' (*une situation objectivement préjudiciable*) resulted from the breach: the buildings did not obstruct the view of the claimants; they were built in the spirit of the housing estate; and there had not been complaints from any other neighbours. The Court found that the claimants were simply unhappy with the new buildings, which they subjectively regarded negatively (*un ressenti négatif*) as being less 'middle-class' or 'bourgeois' than the villas. In these circumstances, there was a manifest disproportion between the cost to the defaulting party of demolition and the benefit to the injured parties. Compensatory damages were awarded of €20 K and €50 K, respectively.

Both decisions were affirmed by the Cour de cassation, which held that the Court of Appeal was correct to find that there was 'a manifest disproportion between the cost of demolition for the defaulting promisor and its interest for the injured party'. It considered that the claimants had sought to have the apartments demolished simply to avoid the inconvenience of a new neighbourhood, which was not justifiable.

These decisions are remarkable for three reasons. The first is that new Article 1221 had not yet come into force when the contracts were entered into and was therefore inapplicable. It came into effect on 1 October 2016 and applies only to contracts entered into after this date. Nevertheless, both the Court of Appeal and the Cour de cassation adopted the precise wording of the prospective new article in their decisions. The practical effect was to apply the article in anticipation of it coming into force.[40]

The second is that there was a route for the Cour de cassation to achieve precisely the same outcome without relying on the 'manifest disproportion' exception. This was the 'impossibility' exception to the availability of specific enforcement, which was cited by the Court of Appeal as an additional reason for rejecting demolition. However, the Cour de cassation did not refer to impossibility and instead cited 'manifest disproportion' as the only basis for its decision.[41] It seems likely that using the very terms of the impending exception and adopting the same reasoning in both decisions was intended to send

[36] Deshayes et al., *Réforme du droit des contrats*, 549.
[37] Ibid.
[38] Laithier, 'Exécution Forcée en Nature', 263.
[39] The 'manifest disproportion' exception does not extend to cases of *responsabilité civile*, however: Civ 3, 4 April 2024, no 22–21.132.
[40] T Genicon, 'Exécution forcée en nature du contrat: une violation anticipée du nouvel article 1221 du code civil?' (2022) 32 *Recueil Dalloz* 1647.
[41] Ibid.

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a clear message that 'manifest disproportion' would henceforth be a key factor in the determination of whether specific enforcement should be granted.

The third reason is that the decisions are a significant break from the past. It was quite normal prior to the 2016 reforms for injunctions to be granted requiring the demolition of buildings constructed in breach of contract without any consideration being given to possible disproportion. For example, in one case, the Cour de cassation overturned a decision of the Aix-en-Provence Court of Appeal refusing an order for the demolition of several hundred dwelling houses that had been built in breach of contract. The Court regarded as irrelevant that the houses had been partly financed with public funds, and were for social purposes.[42] In another case, an extension to a shopping centre built in breach of contract was required by the Cour de cassation to be demolished, even though this would result in the destruction of the shops of around 10 shopkeepers (who were not parties to the litigation). The court also disregarded the financial detriment that would be suffered by the lessees of a number of other shops during the reinstatement works.[43]

It seems likely from the two recent decisions of the Cour de cassation that the new Article 1221 will have a significant impact on the rights of the injured party to obtain performance. This is controversial in France. For example, Genicon has remarked that Article 1221 should not be used as 'a tool to re-evaluate (devalue?) contractual rights'.[44] The right to specific enforcement should remain and Article 1221 should be seen simply as a safeguard against the possibility of the victim of a breach of contract insisting on performance in bad faith. In his view, there was no bad faith on the facts of the two cases. He also dismisses as 'nonsense' the possibility of requiring that performance brings an objective benefit before specific relief can be sought.[45] It is not for the courts to erode the right to performance by making assessments of the utility of the performance that is expected under the contract. Whether or not the expected benefit is legitimate in the eyes of others is irrelevant.[46]

D. *The extension of proportionality to the context of compensatory damages for breach of contract?*

These criticisms seem not to have troubled the Cour de cassation, which has since gone even further by suggesting that a proportionality exception should be introduced for compensatory damages for breach of contract, where it does not play a role. Aside from making some terminological changes and reordering, the reforms did not materially revise the articles of the Code on compensatory and agreed damages. They were put aside by the drafters to be addressed along with extra-contractual liability by a later and broader project to reform civil liability in France.[47] The result is that, in contrast with specific enforcement, the Code does not subject compensation to a proportionality standard. However, in practice, French courts have recently begun to apply the exception when considering whether to award compensatory damages for breach of contract.

The purpose of compensatory damages is to give the injured party a sum of money that puts them in the position in which they would have been had the contract been performed.[48] Compensation should be full (*principe de réparation intégrale du préjudice*) and commensurate with

[42] Civ (3) 18 March 1974, Bull civ III no 127.

[43] Civ (3) 3 April 1996, Bull civ III no 91.

[44] Genicon, 'Exécution forcée en nature du contrat', 1649.

[45] Ibid., 1649–54.

[46] Ibid.

[47] Ministère de la Justice, 'Projet de réforme de la responsabilité civile' (13 March 2017), Bureau du droit des obligations [accessed 10 July 2024]; English translation by S Whittaker and J-S Hetti, Reform Bill on Civil Liability (March 2017), www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf [accessed 10 July 2024]. Note that Article 1261 of the project to reform civil liability would introduce proportionality for 'reparation in kind'.

[48] For an example of an express affirmation by a French court of this proposition, see Civ (3) 9 January 1991, Bull civ III no 12.

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the loss suffered (*tout le préjudice mais rien que le préjudice*).[49] Generally it is for the courts of first instance and the lower appeal courts to assess the loss suffered by the injured party and decide the quantum of the damages award (*pouvoir souverain d'appréciation des juges du fond*).[50] There is a broad power to decide whether to award cost of cure or diminution in value as the measures of damages.[51] When making this decision, the courts have generally not had regard to considerations of proportionality and reasonableness.[52] This is in contrast with English law, in which cost of cure damages have been refused on these grounds. That the cost of repair is high[53] or significantly in excess of the original contract price[54] is generally irrelevant in France.

There is some tension between cost of cure damages being unrestricted and the new 'manifest disproportion' exception to the right to specific enforcement in Article 1221.[55] The common purpose of cost of cure damages and specific enforcement is to enable the injured party to obtain performance, although in the case of cost of cure damages this is from someone else. However, while the injured party cannot obtain specific enforcement when disproportionate, there is no such limitation for cost of cure damages. It is surprising and arguably incongruous for remedies that achieve substantially the same outcome to have such divergent threshold requirements. This is all the more so since the injured party has an entirely free choice of remedy.[56] It gives rise to a risk that the injured party will consistently choose cost of cure damages over specific enforcement, where all other things are equal.

This tension was highlighted by the Cour de cassation in a recent case of 6 July 2023.[57] The defaulting party was a building contractor that built a house that did not comply with contractual specifications. On the ground floor, the ceilings were 5 cm too low, having been built at a height of 2.48 m instead of 2.53 m, and on the first floor they were 30 cm too low, being 2.20 m to 2.22 m in height instead of the contractually agreed 2.50 m.

The award by the Rennes Court of Appeal of damages for the cost of demolishing and rebuilding the entire house was overturned by the Cour de cassation, which held that the injured party could not recover the cost of demolition and reconstruction if it was disproportionate to the loss suffered.[58] In explaining its decision, the Court recognised that the reforms have created a contradiction, in that specific enforcement is subject to a proportionality requirement but, where the claim is for compensation, the cost of demolishing and rebuilding is not.[59] It stated that

> the difference of treatment regarding the rights and obligations of the parties who are in a similar situation and the role of the court does not appear justified[60] … a court dealing with a claim for the demolition and reconstruction of a defective building must consider whether there is a manifest disproportion between its cost to the debtor acting in good faith and its interest for the creditor considering the loss suffered as a result of the defect, regardless of whether

[49] New Article 1231-2, which substantially reproduces old Article 1149.

[50] A Pinna, *La mesure du préjudice contractuel* (LGDJ, 2007); but see L Thibierge, 'La mesure des dommages-intérêts: question de fait ou question de droit? Libres réflexions au travers du prisme de la minimisation du préjudice' (2019) 1 *Revue des Contrats* 193.

[51] Ibid., paras 92–122.

[52] See, however, the new requirement of reasonableness when seeking 'replacement': Article 1222.

[53] Civ (3) 11 January 1984, Rev Droit Immob 1984.191; Civ (3) 9 December 1975, JCP 1976.IV.43; Pinna, *La mesure du préjudice contractuel*, [137].

[54] Civ (1) 12 October 1961, Bull civ I no 455.

[55] A similar incongruity exists with the newly conditional availability of the analogous remedy of 'replacement' under Article 1222 of the Civil Code.

[56] Under Article 1217 of the Civil Code. See Laithier, 'Exécution Forcée en Nature', 264; B Haftel, 'La responsabilité contractuelle' (2017) 4 *Revue des Contrats* 143 [14].

[57] Civ 3, 6 July 2023, no 22-10.884. Contrast Civ 3, 4 April 2024 in the context of extracontractual liability, no 22.21.132.

[58] Citing Civ 3, 17 November 2021, no 20-17.218.

[59] Civ 3, 6 July 2023, no 22-10.884, at [10].

[60] Civ 3, 6 July 2023, no 22-10.884, at [11].

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> the claim is for specific enforcement on the basis of old article 1184 or new article 1221 or a compensatory damages claim for the cost of demolition and reconstruction.[61]

It concluded that the Court of Appeal had been wrong in not considering disproportion when awarding damages.

This is a remarkable decision. Its effect is to introduce a disproportionality exception for compensatory damages, even though there is no provision to this effect in the Civil Code. It is also a significant departure from previous decisions of the same court. For example, in one case the Cour de cassation upheld a decision of the Angers Court of Appeal to award the cost of demolishing and reconstructing a house that had been built over a metre beneath the height that was specified in the contract, even though the house was fit for purpose.[62] In another case the Cour de cassation overturned a decision of the Montpellier Court of Appeal refusing to award damages to rectify the non-conformity of an otherwise perfectly adequate roof to contractually agreed specification.[63]

It is unclear whether the drafters of the reforms considered this tension, but it has been the subject of considerable discussion among commentators, some of whom have criticised it. Laithier posted the following rhetorical question: '[I]s it possible to assess the damages at the level of the cost of repair or replacement where the magnitude of this cost partly explains the refusal of enforced performance in kind? Would it be legally or economically coherent to accept this limitation in respect of performance in kind but to refuse it in calculating the amount of damages?'[64]

A possible way of solving the tension would be for the injured party to be subject to a general requirement to act reasonably to mitigate any losses that result from a breach of the contract. This would mean taking reasonable steps to minimise their loss or not taking unreasonable steps that increase their loss.[65] No such requirement presently exists in French law. This is principally based on a view that the injured party should not be burdened with a responsibility for reducing the liability of the defaulting party.[66] Instead, it is for the injured party to choose their preferred remedies. This is enshrined in new Article 1217 of the Code. It is possible that this will soon change. The pending Reform Bill on Civil Liability[67] would, if enacted, introduce a doctrine of mitigation. However, it is unclear whether the Reform Bill will be implemented.[68] The *Cour de cassation* appears to have shown some circumspection towards mitigation,[69] so it seems unlikely that it would apply it pre-emptively in the same way as with new Article 1221.

[61] Civ 3, 6 July 2023, no 22-10.884, at [12].

[62] Civ (3) 5 December 1979, JCP 1981.II.19605. See also Civ (3) 6 May 1981, Juris-Data no 1981-001783.

[63] Civ (3) 22 October 2002, Rev Droit Immob 2003.95.

[64] Laithier, 'Exécution Forcée en Nature', 284; See also J-S Borghetti, 'Faut-il distinguer les dommages et intérêts compensatoires des dommages et intérêts en lieu et place de la prestation ?' (2016) 4 *Revue des Contrats* 787.

[65] On the effect in English law of mitigation on the injured party's choice of remedies, see H Beale (ed), *Chitty on Contracts*, 34th ed (Sweet & Maxwell, 2021), 29–122. In the context of 'replacement' (*remplacement*), see new Article 1222 of the Civil Code.

[66] See, generally, Le Pautremat, 'Mitigation of Damages'; Y-M Laithier, 'La Cour de cassation refuse d'imposer au créancier le devoir de minimiser le dommage' (2010) 1 *Revue des Contrats* 52; O Deshayes, 'L'introduction de l'obligation de modérer son dommage en matière contractuelle—Rapport français' (2010) 3 *Revue des Contrats* 1139; Y-M Laithier, 'Les sanctions de l'inexécution du contrat' (2016) Hors-série *Revue des Contrats* 39; Haftel, 'La responsabilité contractuelle', 143; Borghetti, 'Faut-il distinguer …?, 787; O Deshayes '"Existe-t-il un devoir de minimiser son dommage en matière contractuelle?"—Une question mal posée' (2014) 1 *Revue des Contrats* 27; Thibierge, 'La mesure des dommages-intérêts'; G Viney, 'La victime n'est pas tenue de limiter son préjudice dans l'intérêt du responsable' (2015) 1 *Revue des Contrats* 24.

[67] Articles 1237 and 1263 of the Draft Reform Project of Civil Liability; see Borghetti, 'Faut-il distinguer …?', paras 19–26.

[68] 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), https://www.senat.fr/fileadmin/import/files/fileadmin/Fichiers/Images/communication/Lois/20200722_23_propositions_Responsabilite_civile.pdf (senat.fr) [accessed 10 July 2024]. This was followed by a 'proposition de loi': www.senat.fr/leg/ppl19-678.html [accessed 10 July 2024].

[69] Com 23 September 2020 no 15-28.898; for more récents decisions, see M Dugué, 'Obligation de minimiser le dommage en matière contractuelle: où en est-on?' (2023) 1 *Revue des Contrats* 34.

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III. Marginilising the protection against unfair terms

In contrast with the embrace of the proportionality exception in Article 1221 since the reforms came into force, the Cour de cassation has been conspicuous in reducing the scope of application of Article 1171 on the protection against unfair terms. How broadly Article 1171 should be applied has long been a controversial topic,[70] but this now appears to have been resolved in favour of a narrow approach.

A. The generalisation of the protection against unfair terms

French law generally leaves to the parties any issues of substantive fairness, that is, the fairness of the actual content of the contract. They are free to determine the substantive content and economic balance of their bargain. If the bargain proves to be bad for one of the parties, this is ordinarily regarded as irrelevant and not a ground of nullity. It is a long-standing and uncontroversial rule[71] that contracts do not have to be objectively fair or balanced in order to be valid. This is regarded as essential for legal certainty.[72] As Article 1168 of the Civil Code provides, 'in synallagmatic contracts, a lack of equivalence in the acts of performance of the parties is not a ground of nullity of the contract, unless legislation provides otherwise'. It is therefore not the role of the court to interfere with the substance of the contract to rebalance the obligations of the parties.

There are, however, important exceptions to the rule, and it is, on occasions, open to the court to invalidate unfair terms in the name of 'contractual justice' (*justice contractuelle*). This can happen where a term creates a significant imbalance between the parties. A new provision introduced into the Civil Code by the reforms, Article 1171, deems not written any term in a standard form contract that is 'non-negotiable and determined in advance' and that 'creates a significant imbalance in the rights and obligations of the parties'. This does not apply to core terms since the substantive fairness of the contract is not susceptible to review.[73]

Article 1171 seeks to 'preserve the interests of the party which is the weakest'.[74] The inspiration for its introduction can principally be found in pre-existing French legislation on consumer contracts and unfair competitive market practices. In common with new Article 1221, it was also influenced by a number of international contract law instruments that contain rules against unfair terms.[75] Indeed, it closely mirrors Article 4:110 of the Principles of European Contract Law (PECL),[76] and there are also similarities with the corresponding provisions in the UNIDROIT Principles. These are Article 2.1.20 (which prohibits 'surprising terms' contained in standard terms), Article 3.2.7 (which enables the avoidance of a contract or an individual term that unjustifiably gives one party an excessive advantage), and Article 7.1.6 (exemption clauses that are grossly unfair).

B. The controversial breadth of the protection against unfair terms

New Article 1171 has turned out to be among the most controversial of the reforms in the new Code. The controversy relates to the scope of the provision, and to a significant degree is owing to the vague terms in which it is drafted. In the original version from 2016, it stated:

> 'Art. 1171.—Any term of a standard form contract which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written.'

[70] Deshayes et al., *Réforme du droit des contrats*, 340.
[71] Chantepie and Latina, *La réforme du droit des obligations*, 428.
[72] Malaurie et al., *Droit des obligations*, 519.
[73] See also Articles 1169 and 1170 of the Civil Code.
[74] 'Report to the President', 3.
[75] Ancel et al., *Aux sources de la réforme du droit des contrats*, [25.101].
[76] See also Articles 8:109 of PECL; II.-9:401 to II.-9:410 of the Draft Common Frame of Reference.

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> The assessment of significant imbalance must not concern either the main subject-matter of the contract or the adequacy of the price in relation to the act of performance.

It was feared that such was the breadth of this wording that any term in a standard form contract that caused a significant imbalance in the rights and obligations of the parties would have effectively been struck out. There were also concerns that the article would be invoked widely, to the detriment of contractual certainty.[77] During the ratification process in 2018, amendments were made restricting its scope to terms in standard form contracts that are 'non-negotiable and determined in advance by one of the parties'.[78] The resulting version provides as follows:

> 'Art. 1171.—In a standard-form contract, any term which is non-negotiable and determined in advance by one of the parties and which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written.'
>
> The assessment of significant imbalance must not relate either to the main subject-matter of the contract or to the adequacy of the price in relation to the act of performance.

Despite these amendments, there continues to be debate about the scope of the protection against unfair terms under the provision. It is much more comprehensive than before the reforms. At that time, the protection that French law afforded against unfair terms was altogether more piecemeal, with the exception of consumer contracts and under competition law. No general power existed to strike down unfair terms. The types of provision that tended to be unfair, such as penalty, exclusion, limitation, and non-compete clauses, were regulated separately and discretely. In Article 1171, 'the legislator has generalised a provision to counter abusive clauses'.[79]

C. *The marginalisation of the scope of application of Article 1171 following the reforms*

Since the reforms were introduced, the courts have further reduced the scope of Article 1171. In a decision of 26 January 2022, the Cour de cassation effectively pushed the article to the margins by confining its application to circumstances where pre-existing legislation in the Commercial Code and the Consumer Code on unfair terms did not apply.

The facts were that a restaurant entered into a lease in respect of certain equipment. Rent was payable monthly over a 60-month period. There was a termination clause that contained stringent terms against the lessee: the lessor had the right to terminate the lease for a breach of any obligations, including the non-payment of a single rental payment; the grace period to be given by the lessor after notice to pay the defaulted payment was relatively short (eight days); after this period had expired, the lessor was entitled to ignore any subsequent offer made by the lessee to pay; and termination gave rise not only to an obligation to return the equipment but also to an obligation to pay a sum equal to the unpaid rent on the date of termination, with a penalty clause of 10%, plus a sum equal to all the remaining rental payments due until the end of the original term of the lease, with its own penalty of 10%, all 'without prejudice to any damages' that the lessee might owe.

The lessee stopped making rental payments eight months after entering into the lease. The lessor invoked the contractual right to terminate. It sought all payments due until the end of its original term and collateral penalties. Citing Article 1171, the Court of Appeal of Lyon held that the termination clause was 'deemed unwritten'. The clause created a significant imbalance in the rights and obligations

[77] See, for example, the criticism of P Stoffel-Munck, 'The Revolution in Unfair Terms' in J Cartwright and S Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law After the 2016 Reforms* (Hart, 2017) 145, 157–65.

[78] Contracts entered into between 1 October 2016 and 30 September 2018 are subject to the wording promulgated in 2016: see Rowan, *The New French Law of Contract*, ch 1.

[79] Chantepie and Latina, *La réforme du droit des obligations*, 440.

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of the lessor and the lessee, in that the lessor had a unilateral right to terminate the lease, without any reciprocity.

The lessor appealed on the ground that, on the facts, the provisions of the Code of Commerce relevant to commercial contracts between traders were applicable and not Article 1171. It disputed that there was a significant imbalance in the rights and obligations of the parties, and sought to explain the absence of reciprocity as being inherent in leases. It was argued to be attributable to the fact that lessors have to perform their obligations in full (by delivering the equipment) at the start of the contract, and from that point onwards the outstanding obligations are on the lessee.

The Cour de cassation therefore had to rule on the scope of application of Article 1171, and in particular its relationship with other pre-existing provisions on unfair terms in the Commercial Code.[80] If the Court held that Article 1171 applied, it then had to determine whether there was an imbalance in the rights and obligations of the parties that resulted from the lack of reciprocity.

The relationship between Article 1171 and other pre-existing provisions of the Code had been the subject of vigorous debate for some time before the point came before the Cour de cassation. It had been explored in the French parliament when the reforms were being ratified. This was in part owing to the drafters of Article 1171 having drawn inspiration, and even lifted directly, from these pre-existing provisions, in particular Article L212-1 of the Consumer Code, which applies to contracts between professionals and consumers, and Article L442-1, I of the Commercial Code, which regulates unfair competitive market practices. In Article 1171, the drafters sought to extend similar protection to all contracting parties.

The result is that Article 1171 shares similarities and overlaps with these provisions. Article L442-1, I of the Commercial Code provides:[81]

> The following behaviour by any person exercising production, distribution or service activities in the course of the commercial negotiation, conclusion or performance of a contract attracts responsibility in its perpetrator and obliges him to make reparation for the loss caused by this action:
>
> 1° obtaining or trying to obtain from the other party an advantage not corresponding to anything agreed in return [to any *contrepartie*] or manifestly disproportionate having regard to the value of what is agreed in return;
>
> 2° subjecting or attempting to subject the other party to obligations creating a significant imbalance in the rights and obligations of the parties;
>
> …

As with Article 1171, the test under L442-1, I of the Commercial Code is whether an obligation creates a significant imbalance in the rights and obligations of the parties. It is, however, wider in scope than Article 1171, in that it is not confined to standard form contracts; core terms are not excluded from review; and the substance of the bargain, including any financial imbalance, can be reviewed. A further notable difference is that Article L442-1, I provides for sanctions that are broader than those under Article 1171. The court can order not only compensatory damages but also an injunction and a civil penalty.[82]

The other analogue of Article 1171 is Article L212-1 of the Consumer Code, which provides:

[80] Ancel et al., *Aux sources de la réforme du droit des contrats*, [25.91]; 'Report to the President', 9.

[81] Translation by S Whittaker.

[82] For more details (in English) on Article L442-1 of the Commercial Code (old Article L442-6, I, 2) see S Whittaker, 'Unfair Terms in Commercial Contracts and the Two Laws of Competition: French Law and English Law Contrasted' (2019) 39(2) *Oxford Journal of Legal Studies* 404, 410–18. See also Stoffel-Munck, 'The Revolution in Unfair Terms', 152–6; H Beale, B Fauvarque-Cosson, J Rutgers, and S Vogenauer (eds), *Cases, Materials and Text on Contract Law: Ius Commune Casebooks for the Common Law of Europe*, 3rd ed (Hart, 2019) 848–9.

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> Any clause contained in a contract concluded between a professional and a consumer shall be regarded as unfair if its object or effect is to create, to the detriment of that person or consumer, a significant imbalance in the rights and obligations of the parties to the contract.
>
> …the unfairness of a clause shall be assessed by reference, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract. It shall also be assessed in the light of the clauses contained in another contract where the conclusion or performance of each of those two contracts is legally dependent on the conclusion or performance of the other.
>
> Assessment of the unfair nature of any clause within the meaning of the first paragraph shall relate neither to the definition of the main subject-matter of the contract nor to the adequacy of the price or remuneration as against the goods sold or the service offered, as long as the clause is drafted in plain, intelligible language.[83]
>
> …

The similarities between Article L212-1 of the Consumer Code and Article 1171 of the Civil Code include that there must be an obligation that creates a significant imbalance in the rights and obligations of the parties for the provision to be engaged; core terms are not reviewable; and a term will be struck down if found to be unfair. A material difference is in the types of terms that can be reviewed. Article 1171 applies only to non-negotiable terms in standard form contracts, but Article L212-1 applies to all contract terms, whether in individually negotiated or in standard form contracts.

Since Article 1171 is part of the general law of contract, there had been some debate about how it would operate alongside Articles L212-1 of the Consumer Code and L442-1, I of the Commercial Code. Could all three provisions be invoked simultaneously or are they mutually exclusive?[84]

During the ratification process, the French parliament had sought to resolve this question by supporting the view that Article 1171 could not be relied upon where the special provisions of the Consumer Code or the Commercial Codes apply.[85] An amendment was proposed to this effect. This was not ultimately adopted, but only because the Minister of Justice regarded the parliamentary debates alone as sufficient evidence of the legislative intention on the point.[86]

The Cour de cassation followed this lead in its 26 January 2022 decision, holding that Article 1171 applies only where the provisions on special contracts in other codes are not able to be relied upon. This limits the scope of application of Article 1171, which does no more than fill the gaps in the pre-existing legislative regime against unfair terms. Unusually, the Court justified its decision by reference to the parliamentary debates during the ratification process and the intention of the legislator that the three provisions be mutually exclusive.

On the facts, the Cour de cassation held that Article 1171 applied as the provisions of the Commercial Code were inapplicable. However, the termination clause was not unfair. The lack of

[83] Translation in Beale et al., *Cases, Materials and Text on Contract Law*, 846–7.

[84] Stoffel-Munck, 'Le nouveau droit des obligations: les questions en suspens' in 'Le nouveau droit des obligations après la loi de ratification du 20 avril 2018' (2018) June *Revue des Contrats* 55; Beale et al., *Cases, Materials and Text on Contract Law*, 849ff.

[85] 'Réforme du droit des contrats, du régime général et de la preuve des obligations: Discussion d'un projet de loi adopté par le Sénat', JORF 12 December 2017, 6358, www.assemblee-nationale.fr/dyn/15/comptes-rendus/seance/session-ordinaire-de-2017-2018/seance-du-lundi-11-decembre-2017.pdf [accessed 10 July 2024]; the general principle is that rules relating to special contracts take precedence over the general principles of the Civil Code as newly codified by paragraph 3 of Article 1105 relating to nominate and innominate contracts.

[86] F Pillet, 'Rapport fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) sur le projet de loi, modifié par l'Assemblée Nationale, 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' (Sénat: no 247, 24 January 2018) 23, www.senat.fr/rap/l17-247/l17-2471.pdf [accessed 10 July 2024].

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reciprocity did not create an imbalance in the rights and obligations of the parties.[87] The Court agreed with the lessor's argument that the absence of reciprocity was inherent in leases of equipment. It was attributable to the fact that lessors have to perform their obligations in full by delivering the equipment at the start of the contract, and from that point onwards the outstanding obligations are on the lessee.

Commentators have been almost unanimous in criticising the decision. It has been described as 'dealing a major blow' to Article 1171 and reducing its application to 'the smallest possible scope'.[88] As Stoffel-Munck colourfully said, Article 1171 is 'a legal illustration of the story of Frankenstein. Frightened by the creature they have created, the public authorities have constantly reduced its scope.'[89]

It has been argued that the various provisions against unfair terms should be available cumulatively and that the injured party should be able to choose freely among them.[90] There has also been criticism of the reliance of the Cour de cassation on the parliamentary debates during the ratification process. As Latina has said, 'the decision of 26 January 2022 … calls into question what is deemed a source of the law. In the future, will senior judges have to read thousands of pages of parliamentary debates in order to comply with all the statements made by rapporteurs in the National Assembly and the Senate?'[91]

Some commentators have also noted that the Cour de cassation should simply have relied on the original objective and intention of the legislator when reforming the Civil Code. A key aim of the 2016 reforms was to strengthen the protection of weaker parties and promote contractual justice.[92] This was formally recorded in the *Rapport au President de la Republique*,[93] in which the drafters explained the new articles and their rationale, and in which the original intention of the legislature can therefore clearly be seen. The legislative intent during the ratification process relied on by the Cour de cassation is at odds with the original intention of the legislator when reforming the Code.

Some commentators have played down the importance of the decision of the Cour de cassation on the basis that, in practice, narrowing the scope of Article 1171 may not have such a significant impact. It is likely that contracting parties who seek to challenge the fairness of contract terms will prefer to rely upon Article L212-1 of the Consumer Code or Article L442-1, I of the Commercial Code over Article 1171 of the Civil Code. The function and the effectiveness of Article L212-1 of the Consumer Code in striking down unfair terms is well-settled, which cannot be said for Article 1171, which is still attended by various uncertainties. For example, Article L212-1 contains a list of terms that are either deemed to be unfair in all circumstances or presumed to be unfair.[94] There is no equivalent provision in Article 1171.

There is also reason to think that Article L442-1, I will be preferred over Article 1171. One such reason is that disputes about the fairness of competitive commercial practices are heard at first instance by elected tradesmen in specialist commercial courts (with appeals heard by judges drawn from a small pool in the Court of Appeal of Paris), rather than career judges in the civil courts. This brings greater certainty and the 'subjectivity of the assessment of significant imbalance is restrained

[87] Civ Com, 26 Jan 2022, no 20-16.97, at [11].

[88] M Latina, 'Les mauvais coups portés par la Chambre Commerciale de la Cour de cassation a la lutte contre les clauses abusives' (2002) 2 *Revue des Contrats* 10.

[89] P Stoffel-Munck, *Le cantonnement du domaine de l'Article 1171: un joli coup pour la démocratie?* (2022) 2 *Revue des Contrats* 16, para 1.

[90] Chantepie and Latina, *La réforme du droit des obligations*, para 449–1.

[91] Latina, 'Les mauvais coups', para 9.

[92] M Latina, 'Clauses abusives: la réduction du champ d'application de l'Article 1171 du Code Civil' (2002) *L'Essentiel Droit des Contrats* 1, para 1; Latina, 'Les mauvais coups', para 7.

[93] 'Report to the President'.

[94] Articles R212-1 to R212-5 of the Consumer Code; Deshayes et al., *Réforme du droit des contrats*, 342; Chantepie and Latina, *La réforme du droit des obligations*, para 444; Beale et al., *Cases, Materials and Text on Contract Law*, 849ff.

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by the drastic reduction in the number of judges with familiarity with it … [It] allows for more predictability.'[95]

In the light of the Cour de cassation's decision, the reality seems likely to be that Article 1171 will most often be invoked in respect of contracts between individuals. This encompasses, for example, contracts made through online platforms such as Airbnb or involving professionals who are not treated as engaging in commercial activities such as independent self-employed individuals (*professions libérales*), including lawyers, accountants, and consultants.[96]

IV. Conclusion

The reform of the contract law section of the Civil Code marks the dawn of a new era following the extraordinary longevity of the 1804 Code. It provides a contemporary framework for contractual relationships that is more in tune with the challenges of the 21st century and a rapidly globalising world. The new regime is much more comprehensive and intelligible. The Code is more up to date, more accessible, and more predictable. The text and terminology are simpler and modern. Structurally, the new articles are helpfully ordered in a sequence that corresponds to the life cycle of the contract. The reforms are a clear improvement on the 1804 Code in a range of ways.

What the recent application by the Cour de cassation of Articles 1221 and 1171 shows is that the new regime still needs to bed down. The judiciary will have a prominent role in adjusting and developing the law, and it will take time for the new face of French contract law to become clear.[97] At the time the reforms were drafted, Article 1171 was described as 'innovative'[98] and a 'revolution',[99] and widely thought of as 'reflecting a profound change of the spirit of French contract law'.[100] However, the Cour de cassation has significantly reduced its scope. It now has only limited value in guaranteeing 'a balance to contracting parties who cannot negotiate contract terms'.[101] In contrast, the requirement of proportionality of Article 1221 has had a real practical impact. The moderating force of the new standard of proportionality achieves a fairer balance between the competing interests of the parties and avoids extreme outcomes.

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[95] Stoffel-Munck, 'The Revolution in Unfair Terms', 152–6.

[96] Ibid.

[97] D Fenouillet, 'Les valeurs morales' (2016) 3 *Revue des Contrats* 589; S Whittaker and J Cartwright, 'Introduction' in J Cartwright and S Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law After the 2016 Reforms* (Hart, 2017) 10–11.

[98] Stoffel-Munck, 'The Revolution in Unfair Terms', 146.

[99] Ibid.

[100] Chantepie and Latina, *La réforme du droit des obligations*, para 440; Deshayes et al., *Réforme du droit des contrats*, 354; Ancel et al., *Aux sources de la réforme du droit des contrats*, para 25.91].

[101] Chantepie and Latina, *La réforme du droit des obligations*, para 445.

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