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The French Contract Law Reform: a Source of Inspiration?

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A TALE OF NOVELTY AND CONTINUITY: EXPLORING THE FUTURE JUDICIAL CONTROL OF EMPLOYMENT CONTRACTS IN THE FRENCH CONTRACT LAW REFORM

1. Introduction

1. The reform of the law of obligations recently approved by the French government[1] introduces a *general* remedy against "significantly imbalanced" terms in non-negotiated contracts. According to proposed Article 1171 CC[2] "in a contract of adhesion, any term which creates a significant imbalance between the parties' rights and obligations is considered as never written". By virtue of its position, among the general rules on contractual content, the provision would apply to all non-negotiated contracts, including those which are not specifically regulated within the civil code.[3]

2. This chapter explores the new rule's potential impact on one specific domain, namely the judicial control of employment (and, potentially, employment-like) contracts. The rule echoes two existing provisions belonging to the specialised domains of consumer[4] and competition[5] law, but the application to labour law[6] that comes with its scope is unprecedented, and the option that the proposal embraces has not been discussed thoroughly in the French literature – although some authors, occasionally, had invoked[7]

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1 *Ordonnance* no. 2016–131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, available online at https://www.legifrance.gouv.fr/eli/*ordonnance*/2016/2/10/2016–131/jo/texte (last accessed 14 March 2016).

2 In the present chapter, the notation CC is used to designate provisions belonging to the *ordonnance* above or to its near antecedent, the Avant-projet published in 2015. Articles contained in the Code Napoleon in its current form are referred to with the extended notation of Article *** Code civil.

3 Thus its potential scope of application extends to commercial contracts as well as to contracts between private parties and all sorts of personal work contracts.

4 Article L. 132–1 Code de la consommation.

5 Article L. 442–6, I, 2° du Code de commerce.

6 The rules of general contract law, or *droit commun des contrats* are applicable to employment contracts, as confirmed by Article L. 1221–1 Code du travail.

7 Pélissier, Pour un droit des clauses du contrat de travail, *RJS* 7/2005, p. 499.

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or foreshadowed[8] the possibility. At the same time, the paper will show, on occasion French courts already engage in activities that might resemble unfair terms control- be it by applying general contract law or labour law-specific tools.

3. If some form of control of specific terms in employment contracts under open norms is already in place in France, in order to assess the likely impact of the reform on this field, it is important to investigate the similarities and differences between the mechanisms in place and the one to come. Since, as said above, the proposed rule appears to resemble very strongly existing rules targeting unfair terms (*clauses abusives*) in consumer and commercial contracts, there may be reasons[9] to believe that some commonality is to be expected between all these mechanisms – the one formally in place in the special codes, the one to come with the reform, and the one(s) to be found in the law in practice as developed by French labour courts. The paper will then investigate to what extent the existing models, and especially the "original" device in place for consumer contracts, is likely to influence the way in which the new mechanism will be implemented. To this end, it is essential to keep in mind that the forms which "clauses control" takes in labour law nowadays are very diverse: courts have been making use of fundamental rights arguments, general clauses specific to labour law, as well as of pure contract law principles. Not all of these mechanisms will be suitable to be brought back to the idea of unfair terms control, so that the impact of the reform could also be differentiated.

4. In the rest of the paper, the argument is developed as follows: section 2 will provide an analysis of the provision on "significant imbalance" in the reform proposal with the aim of assessing its nature and possible workings. In order to do so, the provision will be (2.1) analysed and compared to similar rules already existing outside the Code Civil and (2.2) studied in light of relevant "neighbouring" provisions in the reform project, in particular the limitation of freedom of contract provided by public order and the codification of the so-called *Chronopost* rulings; section 3, then, will be devoted to the provision's potential impact on labour law, through a short recollection of the several devices already used to the ends of unfair terms control in employment contracts and a comparison between these and the existing model of unfair terms control; finally, section 4 will bring together the results from the previous parts to draw some conclusions.

8 Zabel, Clauses abusives et droit du travail: le concept issu du droit de la consommation pénètre-t-il le droit du travail? *Petites affiches* 184/2013, p. 6.

9 Reinforced by the Report to the President of the Republic accompanying the *ordonnance*, according to which "Les critères d'appréciation du déséquilibre sont déjà connus puisqu'ils sont inspirés de ceux fixés dans le code de la consommation et qu'ils résultent de la transposition de la directive 93/13/CEE du 5 avril 1993 sur les clauses abusives." The report is available online at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004539 (last accessed 14 March 2016).

2. What's new? The new Civil code provisions and the existing rules

5. The *ordonnance* contains several norms which are of potential interest to this analysis. As a matter of fact, the new provision on unfair terms[10] is best understood in light of its scope, as delimited by the definition of contract of adhesion, as well as of other mechanisms of judicial control. Such in-context analysis is necessary in order to identify the likely division of labour among the different provisions. In addition, the paragraph will briefly touch upon a missed chance, or the disappearance of fundamental rights as a possible ground of judicial control. This section addresses all these changes and, where appropriate, compares them to existing "twin" rules in special laws. The overall aim of this analysis will be to get an understanding of the nature of the proposed "significant imbalance" control.

2.1. Clauses creating "a significant imbalance"

6. The core novelty, from the point of view adopted here, is the introduction of an "unfair terms" rule in the first part of the book on obligations. According to the future Article 1171 CC:

> "Dans un contrat d'adhésion, toute clause qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite.
>
> L'appréciation du déséquilibre significatif ne porte ni sur l'objet principal du contrat ni sur l'adéquation du prix à la prestation."[11]

7. The scope of the provision is determined by the notion of *contrat d'adhésion*, as defined in Article 1110 CC. According to that provision, a contract is *de gré à gré* when its terms have been freely negotiated between the parties; it is *d'adhésion* when its

[10] The Gorvernment's online institutional communication presents the rule as a "mechanisme de lutte contre les clauses abusives dans les contrats d'adhésion": see www.justice.gouv.fr/le-garde-des-sceaux-10016/reforme-du-droit-des-contrats-28738.html, last accessed 11 March 2016. The wording *clauses abusives* never appears in the *ordonnance*, but features in the relevant provision from the Code de la consommation. When the 1978 *Loi Scrivener*, which introduced the first rules on unfair terms, it did so in a chapter devoted to "La protection des consommateurs contre les clauses abusives". The original prohibition applied to imbalanced terms which appeared to have been "imposed to the consumer though an abuse of economic power by the other party" (art 35 Loi no.78–23 du 10 janvier 1978 sur la protection et l'information des consommateurs de produits et de services). In this text, unfair terms and clauses abusives are used interchangeably as shortcut for "terms creating a significant imbalance", although the terminology betrays some confusion between the national and the European legal models.

[11] "A contract term which creates a significant imbalance in the rights and obligations of the parties to the contract may be struck out by the court on the request of the party to the contract to whose detriment it is stipulated. The assessment of significant imbalance must not concern either the definition of the subject-matter of the contract nor the adequacy of the price in relation to the act of performance." Unless expressly mentioned, the paper follows the English translation realised by Bénédicte Fauvarque-Cosson, Simon Whittaker and John Cartwright at the request of the French ministry of justice (full text available online at www.justice.gouv.fr/art_pix/Projet_reforme_contrats_2015_EN.pdf).

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"general conditions" have been determined by one of the parties, without prior negotiation.[12] The category of general conditions, to which the provision refers, is not defined in the text but is well-known to French law[13] as well as to other European legal systems.[14] The concept is also employed by the future Article 1119 CC, according to which general conditions can only be invoked when they have been brought to the attention of the non-drafting party and have been accepted by that party.[15] The text marks a shift in comparison with the similar provision contained in Article 1108 CC in the Taubira proposal, which based the classification of a contract as *d'adhésion* on the fact that the contract's *stipulations essentielles* had not been open to the parties' "free discussion".[16] This shift seems to be well-conceived, as the old formulation might have generated ambiguities in cases in which the contract's price, and nothing else, would have been open to some degree of negotiation – which is often the case in mass contracts.[17] The definition might be slightly redundant taking into account that general conditions are almost by definition non-negotiated, but this feeling is attenuated by the lack of a legislative definition of general conditions. It does not expressly address the case in which the contract terms have actually been drafted by a third party, but it seems reasonable to infer that this case would also be covered by the definition of non-negotiated contract if one of the parties alone has decided to adopt the pre-drafted terms.

8. The provisions of Articles 1110 and 1171 CC might bring an end to a discussion which had been open for a very long time. While the notion of *contrat d'adhésion* is over a century old,[18] it had so far not made its way into a legal provision. When unfair terms control was first introduced in France by the Loi Scrivener ignoring this much-debated concept, the choice was lamented by prominent scholars and mostly justified by the difficulty of defining a *contract of adhesion*. Should non-negotiation be the only benchmark, or should the parties' qualities play a role? And, was the legislator to make a difference between single- and multiple-use textwork? The wording was often

12 According to proposed Article 1110 CC, second paragraph "*Le contrat d'adhésion est celui dont les conditions générales, soustraites à la négotiation, sont determinées à l'avance par l'une des parties*".

13 See J. Calais-Auloy, H. Temple, Droit de la Consommation, 8th edition, Dalloz 2010, p. 195, defining them as "pre-drafted terms in contracts concluded by one person with a series of other persons".

14 Think of the German *allgemeine Geschäftsbedingungen*, the Dutch *algemene voorwaarden*, the Italian *condizioni generali di contratto*…

15 Article 1119 CC: (1) *Les conditions générales invoquées par une partie n'ont effet à l'égard de l'autre que si elles ont été portées à la connaissance de celle-ci et si elle les a acceptées. (2) En cas de discordance entre des conditions générales invoquées par l'une et l'autre des parties, les clauses incompatibles sont sans effet. (3) En cas de discordance entre des conditions générales et des conditions particulières, les secondes l'emportent sur les premières*.

16 Article 1108 CC under the the Taubira proposal read "*Le contrat d'adhésion est celui dont les stipulations essentielles, soustraites à la libre discussion, ont été déterminées par l'une des parties*".

17 The replacement of free discussion with the notion of negotiation, on the other hand, seems relatively irrelevant at the level of content, but brings a slight improvement from the point of view of form since it uses an existing legal concept rather than referring to a new notion.

18 Famously introduced into the French legal debate by Raymond Saleilles, the issue was already the topic of a PhD dissertation in 1912: see Pichon, *Des contrats d'adhésion: leur interpretation et leur nature*, La revue judiciaire 1912.

used, throughout the years, in academic texts and has been incorporated in the civil code of Quebec,[19] but the questions stayed unanswered. The text of the *ordonnance* doesn't expressly address all of them – for instance, while the reference to *general conditions* suggests that the main object of the rules are clauses regularly used by one of the parties, it will be up to courts to determine to what extent single-use, non-negotiated conditions can also be checked –, it provided a clear legal basis to address them.

9. As to the substance of the rule, Article 1171 CC resembles closely the language of two other provisions located outside the civil code, namely Article L. 132–1[20] Code de la consommation and Article L. 442–6, I, 2°[21] Code de commerce. Both articles deal with terms creating "a significant imbalance in the rights and obligation of the parties". The consumer law provision, however, has been in place for a longer time and is usually considered to have been a source of inspiration for the similar rule of the Code du commerce. It seems, therefore, that this provision will be the main point of reference to the ends of assessing whether other provisions resemble a mechanism of unfair terms control.[22]

10. Under French consumer law, the prohibition of unfair terms applies exclusively to contracts between a professional and a "non-professional or a consumer". This latter definition covers consumers in the strict sense as well as legal persons which are not conducting business, such as non-profit organisations. This restricted scope traditionally[23] characterises the French approach to unfair terms control *vis-à-vis*, for instance, the German choice to allow review of all non-negotiated contracts – including, thus, business to business transactions.

19 Thus under Article 1379 of the Civil Code of Quebec*: Le contrat est d'adhésion lorsque les stipulations essentielles qu'il comporte ont été imposées par l'une des parties ou rédigées par elle, pour son compte ou suivant ses instructions, et qu'elles ne pouvaient être librement discutées. Tout contrat qui n'est pas d'adhésion est de gré à gré.* Both the reference to "stipulations essentielles" and the notion of free discussion, which featured in the Taubira draft, might have been inspired by this provision.

20 Under Article L 132–1 Code de la consommation: "*Dans les contrats conclus entre professionnels et non-professionnels ou consommateurs, sont abusives les clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat. […]L'appréciation du caractère abusif des clauses au sens du premier alinéa ne porte ni sur la définition de l'objet principal du contrat ni sur l'adéquation du prix ou de la rémunération au bien vendu ou au service offert pour autant que les clauses soient rédigées de façon claire et compréhensible.*"

21 According to Article L 442–6 Code du Commerce: "*Engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé le fait, par tout producteur, commerçant, industriel ou personne immatriculée au répertoire des métiers: […] De soumettre ou de tenter de soumettre un partenaire commercial à des obligations créant un déséquilibre significatif dans les droits et obligations des parties*".

22 See in this respect fn 9 above.

23 See the standard reference contained in the EU consumer law compendium: Schulte-Nölke, Twigg-Flesner and Ebers, EC Consumer Law Compendium- Comparative Analysis (2007), available at http://ec.europa.eu/consumers/archive/cons_int/safe_shop/acquis/comp_analysis_en.pdf, in particular the categorisation at p. 337.

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11. Parallel to the choice for a limited personal scope is the consumer law rules' applicability irrespective of the negotiated or non-negotiated nature of the terms considered, a point on which the French approach departs not only from the German model but also from the EU (minimum harmonisation) Unfair Terms directive.[24] The provision forbidding "unfair" terms was already in place before the Directive's adoption, but it is only after the latter's implementation[25] that it explicitly allows the judge to hold the imbalanced term for never written.[26] In deciding on a term's potential unfairness, the judge has to take into account the circumstances surrounding the contract's conclusion as well as all the other terms included in the contract.[27]

12. The new provision, as we have seen, will apply to all non-negotiated contracts-irrespective of the parties' qualities. The substantive test, thanks to the reference to a "substantive imbalance", seems very similar to the consumer law rule. Another striking similarity concerns the fact that the new provision, like both Article L 132–1 Code de la consommation and the Directive, exempt core and price terms from scrutiny. This is in alignment with the choices of other countries which have introduced specific rules for non-negotiated contracts.[28]

13. In contrast to the earlier version of the provision contained in the draft *ordonnance* published in 2015,[29] Article 1171 CC seems to leave room for an ex officio exercise of judicial control: whereas the draft opted for a mechanism which was clearly different to the one adopted in consumer law, requiring the aggrieved party's to ask for the term's invalidation, the current version adopts the language of "non-écrite" already to be found in the Code de la consommation. The latter sanction, which needs inter alia to be interpreted in light of the case law of the European Court of Justice on the Unfair Terms Directive, has to be considered as more similar to a special form of nullity than to voidability – in other words, it should not be conditional on the aggrieved party's request. This change seems in line with the decision to restrict judicial control to non-negotiated contracts: while requiring some self-reliance seems appropriate in the context of

24 See again the Compendium.

25 For a brief account, see Chazal, Clauses abusives, in *Répertoire du droit commercial*, Dalloz 2013, in particular par 5–6.

26 According to the sixth paragraph of Article L 132–1 "*Les clauses abusives sont réputées non écrites.*" But *Le contrat restera applicable dans toutes ses dispositions autres que celles jugées abusives s'il peut subsister sans lesdites clauses.*"

27 Article L 1321–1 Code de la consommation, fifth paragraph: "*Sans préjudice des règles d'interprétation prévues aux articles 1156 à 1161, 1163 et 1164 du code civil, le caractère abusif d'une clause s'apprécie en se référant, au moment de la conclusion du contrat, à toutes les circonstances qui entourent sa conclusion, de même qu'à toutes les autres clauses du contrat. Il s'apprécie également au regard de celles contenues dans un autre contrat lorsque la conclusion ou l'exécution de ces deux contrats dépendent juridiquement l'une de l'autre.*"

28 See for instance Article 6:231(a) of the Dutch Burgerlijk Wetboek.

29 According to the Taubira proposal's Article 1169 CC "*Une clause qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat peut être supprimée par le juge à la demande du contractant au détriment duquel elle est stipulée.*" The proposal is still available online at the address www.justice.gouv.fr/publication/j21_projet_ord_reforme_contrats_2015.pdf.

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"traditional" (i.e. negotiated) contracts, the threshold for protection can reasonably be set lower for parties to contracts of adhesion. In the latter context, the ex officio mechanism is supposed to compensate for the party's presumed weakness and guarantee the extirpation of unfair terms.

14. Analysing the competition law unfair terms provision seems to confirm what has been observed so far. Article L- 442–6 Code du commerce has been adopted more recently, signalling the expansion of the notion of *clause abusive* (unfair term) beyond the domain of consumer law.[30] Unlike both Article L 132–1 Code de la consommation and the coming Article 1171 CC, the competition law provision does not exclude terms defining the contract's object and the balance between price and performance from its scope. This difference is not surprising since price agreements are actually a typical subject of competition law. In the context of commercial relationships, however, the insertion of an unfair term had no consequence on the contract: it was merely sanctioned by means of damages- where damage could be proved.[31] This brief analysis reinforces, *a contrario*, the impression that the rule of Article 1171 CC bears a strong resemblance to the one of Article L 132–1 of the Code de la consummation – in other words, it seems that the new mechanism is likely to work in a way which is similar to what has been experienced so far in consumer law.

15. What kind of unfair terms control does the new rule foreshadow? We have seen that, compared to the corresponding rules within consumer law, the provision seems to have a similar scope – excluding terms defining the contract's object and the price-performance relationship –, similar standard and also a possibly similar functioning, as indicated by the choice to hold an imbalanced clause for *non-écrite*. One possible difference is to be found in the focus of the scrutiny to be effected by the courts, which in consumer contracts involves appreciating the circumstances of the case at hand and examining contentious terms against the rest of the contract.[32] The new provision, on the contrary, seems to concentrate the imbalance assessment on the individual term concerned.

16. The drafters, thus, seem to have in mind a mechanism not too far removed from the one already in place in consumer law. This mechanism appears to be centred on remedying the accepting party's inability to negotiate the contract by allowing judicial

30 See again Zabel, Clauses abusives et droit du travail: le concept issu du droit de la consommation pénètre-t-il le droit du travail? *Petites affiches* 184/2013.

31 With reference to commercial contracts, then, the main effect of the new provision will be in the remedies available to the non-drafting party, which in certain cases will be able to demand the unfair term to be declared void. But this is something which goes beyond the scope of this contribution.

32 As well as vis à vis other related contracts: see Article L 132–1 (4) Code de la consommation: *Sans préjudice des règles d'interprétation prévues aux articles 1156 à 1161,1163 et 1164 du code civil, le caractère abusif d'une clause s'apprécie en se référant, au moment de la conclusion du contrat, à toutes les circonstances qui entourent sa conclusion, de même qu'à toutes les autres clauses du contrat. Il s'apprécie également au regard de celles contenues dans un autre contrat lorsque la conclusion ou l'exécution de ces deux contrats dépendent juridiquement l'une de l'autre.*

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scrutiny of the terms that the party has probably paid less attention to when deciding to enter the contract. The provisions seek to make sure that excessively imbalanced non-negotiated terms will not be enforced upon non-drafting parties by holding these terms as never written. As said above, it seems very likely that control under Article 1171 CC will take a shape similar to that of current-day consumer law control of clauses abusives.

2.2. The penumbra of unfair terms control

17. The conclusion above is again reinforced by an analysis of other provisions concerning contractual content and limitation to its admissibility in the *ordonnance*. Immediately after giving a definition of contracts (proposed Article 1101 CC), the project introduces a provision which for the first time expressly codifies freedom of contract and sets the scope of a general limitation thereto. According to Article 1102 CC, freedom of contract *"does not allow the parties to derogate from rules which are an expression of public policy."*[33] This provision basically codifies the direct effect on contractual autonomy of Article 6 CC, which provides that private agreements cannot derogate from good morals and public order. The existence of such direct effect, in any case, had been established already some years ago by the Court of Cassation[34] – thus the reform does not innovate on this point.

18. Compared to the *Taubira* draft, it is interesting to take notice of the disappearance of what used to be the second part of this sentence: "[…] *nor to infringe fundamental rights and freedoms recognised by a provision which applies to relationships between private parties except where such infringement is indispensable to the protection of legitimate interests and proportionate to the intended purpose."*[35] Fundamental rights would then be considered not as an absolute limit to contractual freedom, but as norms that tolerate to be compressed, as long as the restriction is justified by a legitimate interest.[36]

19. The disappeared provision echoed limitations that were already existing in the case-law of the Court of Court of Cassation.[37] Moreover, it closely resembled the fundamental rights control provision in labour law, Article L 1121–1 Code du Travail.[38] Within the draft proposal, the provision clarified that fundamental rights were not to become the domain of unfair terms control, which would have to concentrate on different interferences. The failure to incorporate the provision in the final version might entail a

33 The new Article 1162 CC further explains that neither the contract's terms *nor its objective* can be against public order: *Le contrat ne peut déroger à l'ordre public ni par ses stipulations, ni par son but, que ce dernier ait été connu ou non par toutes les parties.*

34 Cass. civ. 7 december 2004 no.01–11823.

35 Ses Article 1102 CC Taubira draft.

36 See Chantepie's recent contribution to the Dalloz blog dedicated to the reform: http://reforme-obligations.dalloz.fr/2016/02/16/la-liberte-contractuelle-back-to-basics/#more-200.

37 See Maurin, Contrat et droit fondamentaux, LGDJ 2013.

38 See *infra* para 3.1.

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different articulation between provisions in and outside of labour law, where, as we just said, a similar rule is already in place. Alternatively, it seems possible to envisage that the protection of fundamental rights will just be taken up into the notion of "public order" consecrated by Article 1102 CC.[39]

20. In the later section on the contract's content, the proposed Article 1170 CC provides that "all terms depriving the debtor's essential obligation of its substance are considered as not written". The first provision, in essence, reproduces the well-known *Chronopost*[40] decision, in which the *Court of Cassation* had voided a term which limited a transporter's responsibility for failing to deliver in the promised time was severely limited, basically leaving the transporter's promise deprived of any meaningful sanction. This provision is one of the marks left by the abolition of the notion of *cause,* which the Court of Cassation had then controversially employed to invalidate the limitation of liability. At that time, the Court's intervention was arguably required by the absence of a rule allowing the invalidation of unfair terms outside the domain of consumer contracts. In this sense, the question may be raised whether a rule of this sort would still be necessary in view of the proposed Article 1171 CC. While the doubt may seem warranted at first glance, "blacklisting" this kind of terms might not be superabundant once the text of proposed Article 1171 CC is subjected to closer inspection. In the context of consumer contracts, terms such as those addressed by Article 1171 CC are taken care of by the Directive's (non-binding) annex and, in French law, by the 2009 regulations establishing the "black" and "grey" lists. In the context of general contract law, however, courts might have been tempted to give greater significance to the second part of Article 1171 CC, which excludes from control the contract's object and the relationship between price and performance. Considered that this relationship is precisely what is affected by exemption clauses, it is probably wise to have included a special provision to secure that they would not be exempted from control. This might, in turn, also provide a source of inspiration for courts dealing with similar, albeit less far-reaching provisions. Again, however, this contributes to shaping the contours of Article 1171 CC: it is not there to address those "extreme" cases of contractual imbalance, which will be taken care of by Article 1170 CC, or, in even more extreme cases, by Article 1169 CC. The latter provision, which also is reminiscent of the functions of *cause*, holds as invalid an onerous contract in which the counter-performance promised to the party undertaking an obligation is "illusory or derisory".[41]

21. To draw some preliminary conclusions, it seems that a first look at some neighbouring provisions confirms that the new rules will occupy in general contract law a space similar to the one taken by "consumer" unfair terms control. The object and price exemption differentiates it quite clearly from a "*laesio enormis*" rule. This is reinforced by

39 See Chantepie, above fn 36.

40 Cass. comm. 22 Octobre 1995, no. 93–18632.

41 This is an exception to the principle, stated in Article 1168 CC, that lack of equivalence between the promised performances does not affect the contract's validity.

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the fact that the borderline case of extreme-reaching exemption terms is separately taken care of by Article 1170, and that of an illusory counter-performance by Article 1169 CC. The missed codification of a more clearly structured fundamental rights control will require courts some extra effort to articulate the boundaries between the new unfair terms control and the limitations imposed by public order.

22. As to the rules' application to labour contracts, the "transplant" of the provision will land on a series of mechanisms that we will briefly analyse in the second part of this paper. In particular, in interpreting the provisions, account will still need to be taken of the provision on fundamental rights which is already in force in that field. On the other hand, it seems that the domain, which is historically characterised by a presumption of inequality in negotiation between the parties, seems a particularly fertile terrain for this transplant.

3. Possible headings of unfair terms control in French labour law

Within the labour law debate, in spite of the wide personal scope of Article132–1 Code de la consommation, the applicability of the consumer unfair terms provision to employment and other work contracts has never really entered the picture. However, this situation does not leave courts entirely unequipped to perform a function similar to that of unfair terms control – albeit in different forms. We will see how several provisions have been mobilised and courts have themselves intervened in order to deal with one-sided terms.

3.1. The general provision of Article L. 1121–1 Code du Travail

23. First, it is appropriate to take a look at judicial control based on the protection of fundamental rights. Originally introduced in the Code du Travail in 1992 as then Article L 120–2, the wording of Article L 1121–1 is particularly general:

> *Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché.*

24. The provision extends a limitation originally imposed on company regulations (*règlements d'atelier*) to all sorts of actions undertaken in the operation of a business. It applies, thus, to employment and other work contracts. What characterises the provision is, on the one hand, its reference to rights and liberties; on the other hand, the standard based on which the employer's actions are scrutinised, namely whether they are justified by the nature of the employee's task and proportionate to the objective pursued. While the second requirement is arguably close to the rationality of unfair terms control, this is hardly the case for the first. Talking of workers' "rights and liberties" is evidently not the same as referring to the balance between the rights and duties of both parties to the contract, as unfair terms provisions typically do. While the consumer provisions look at the rights established by the contract and their balance, Article 1121–1 Code du Travail

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relates to rights existing independent of the contract and protects them against different sorts of violations- including those which might take place by means of contract terms.

25. The focus on personal rights makes the provision at hand of limited use for the scrutiny of contractual terms, but court practice shows that it has found application with reference to different kinds of clauses. Terms that were liable to affect, for instance, the employee's occupational freedom (e.g. non-competition clauses) or her right to freely determine her residence have been scrutinised under Article 1121–1 Code du Travail. Thus, in the case of a term requiring a lawyer to establish her residence nearby her law firm, the employee's integration in the "local environment" of the firm's place of establishment was not considered a sufficient reason to interfere with her freedom to choose her place of residence.[42] Also the practice of requiring employees to return a bonus that they have received from the employer at the end of a year if they resign early during the following year is problematic under this provision, since it restricts the employee's occupational freedom.

26. The rule of Article 1121–1 Code du travail, then, bears significant differences and important similarities to unfair terms control. On the one hand it resembles the latter mechanism in its protective intent and, possibly, in the way it focuses on the employer's unilateral (contractual) activity. On the other hand, the requirement that rights *other than the ones created by the contract* are infringed upon both signifies a different rationale – with much simplification, the protection *of certain rights* rather than control of unilateral drafting – and makes the mechanism harder to invoke in a contractual context.

3.2. The regime of clauses de variation

27. Another mechanism worth considering is the regime to which the Court of Cassation has subjected different kinds of clauses allowing the employer to unilaterally modify the contract (*clauses de variation*, hence: modification clauses). These clauses can take very different forms and affect different elements in the exchange, but usually they are all aimed at allowing adjustments in case the employer's situation should change over time. Classical examples are terms allowing a change in the employee's place of work, in the working time or in the tasks assigned to the employee. Terms establishing a variable remuneration could also fall under this group.

28. The validity of these terms was questioned in a rather radical way by the Court of Cassation in 2001, with a decision according to which

> "(L)a clause par laquelle l'employeur se réserve le droit de modifier, en tout ou partie, le contrat de travail est nulle comme contraire aux dispositions de l'article 1134, alinéa 2, du Code civil, le salarié ne pouvant valablement renoncer aux droits qu'il tient de la loi".[43]

42 Cass. soc.12 juillet 2005 n. 04–13342.
43 Cass. soc. 27 février 2001, n. 99–40219.

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29. Article 1134 of the code civil sanctions the binding force of contract. The provision's second paragraph, recalled in the decision, establishes the irrevocability of contracts, except for the case of mutual consent. This principle includes a prohibition for one party to impose a modification of the contract to the other party during the contract's execution. In this sense, the decision considers the modification clause void insomuch as it deprives the employee of her right to refuse a change to her contract's terms.

30. Notwithstanding this general statement, however, the Court of Cassation allows a number of modification clauses to deploy their effects – subject to conditions that depend on the object of the term considered. In particular, clauses establishing a variable remuneration are admitted when the variation is based on objective criteria which are independent of the employer's will, the variation is not such to shift the entrepreneurial risk onto the employee and the statutory and collective minima are preserved.[44] Terms called "of territorial mobility" (*clauses de mobilité géographique*) are also deemed legitimate[45] when they determine the size of the area to which they apply. It is not allowed to include a term that reserves the employer the possibility to modify the territorial domain to which the employee's mobility obligation applies.[46]

31. Modification clauses are arguably a sensible instrument for increasing the contract's resilience in the context of all long-term relationships. However, they undoubtedly introduce an element of uncertainty into the contract and usually their effects are mostly enjoyed by the drafter. They are also not unknown to consumer contracts, and indeed also in that context they are often the object of specific regulation. In the French system of unfair terms control in consumer contracts, terms of this kind are considered both in the "black" list of terms which are always unfair and in the presumptive "grey" list. The relatively wide wording in the black list, prohibiting all terms that "authorise the professional to unilaterally modify the contract's terms concerning its duration, the character of the goods or services to be delivered or their price"[47] does not mean that all variation clauses are inhibited. The lists, indeed, are followed by exemptions concerning certain long-term contracts.[48] For certain services, an explicit exception is carved out in the legislative part of the Code de la consommation. Thus, for instance, the Court of

44 "*Une clause du contrat de travail peut prévoir une variation de le rémuneration du salarié dès lors qu'elle est fondée sur des éléments objectifs indépendants de la volonté de l'employeur, ne fait pas porter le risque d'entreprise sur le salarié et n'a pas pour effet de réduire la rémunération en dessous des minima légaux et conventionnels*" Cass. soc. 2 juillet 2002, no. 00–13111; Cass. Soc. 4 mars 2003, no. 01–41864 et 20 avril 2005, no. 03–43696.

45 And effective. The Court of Cassation, indeed, has sometimes also refused to identify terms that were not sufficiently explicit. See Antonmattei, *Les clauses du contrat de travail*, Ed. Liaisons, 2009, p. 49–50.

46 Both requirements are articulated in Cass 7 Juin 2006, n. 04–45846.

47 Article R 132–1 Code de la consommation considers a term that "*autorise le professionnel à modifier unilatéralement les clauses du contrat relative à sa durée, aux caractéristiques ou au prix du bien à livrer ou du service à rendre*" always invalid. Furthermore, Article R 132–2 of the same code establishes a presumption of unfairness when a term *"réserve au professionnel le droit de modifier unilatéralement les clauses du contrat relatives aux droits et obligations des parties (autres que celles interdites)"*.

48 See Article R132–2–1 Code de la Consommation.

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Cassation recently granted avail to terms concerning the possible variation of overdraft interests in contracts for banking accounts.[49] The usual requirement for these terms to be valid, in consumer law, is that they must be connected to other mechanisms protecting the consumer's free determination – such as the possibility to terminate the contract without penalty – and, often, that they indicate under which conditions a variation will take place.[50]

32. The criteria used to identify acceptable variation clauses, then, seem rather similar in consumer and employment contracts. In both contexts it is necessary to strike a balance between the need for flexibility typical of long-term relationships and the preservation of a reasonable contractual equilibrium, preventing the consumer/employee from being abandoned to the other party's arbitrary will. In this respect, the indication of the parameters according to – or within which – the prerogative will be exercised represent both an instrument of transparency, hopefully allowing the accepting party to know what she can expect, and a substantive guarantee against capricious requests.

33. The differences which can be identified as to the regime to which certain terms are subject in the two domains do not seem to imply different approaches- in other words, the judicial control of variation clauses seems quite comparable to "consumer law" unfair terms control. In particular, it is interesting to observe that as far as the remuneration is concerned an additional guarantee is added – namely that salary variations have to be based on objective criteria. This requirement is absent in consumer contracts. Arguably, in that context more faith is put in competition: in case the consumer finds the modifications unreasonable, she is entrusted with disciplining the provider by terminating the contract; if a sufficient numbers of consumers react in the same way, it will be the market response that punishes the provider's arbitrary behaviour.[51] Relying on a similar mechanism in the domain of employment relations would be much more controversial.

3.3. The judge-made regime of certain clauses

34. Finally, it is important to mention that French courts have also developed specific regimes for certain terms, not necessarily based on general principles but as a more express form of judge-made law. Here we will consider in particular the case of non-competition clauses and of so-called "*clauses de dédit-formation*", terms requiring the restitution of in-work education costs in case of early termination of the employment contract.

49 See Cass 23 January 2013, no. 10–21177.

50 See Article 128–84 *Code de la consommation* and, in the same direction, the Court of Justice's interpretation of the transparency requirement laid down in Directive 93/13. In this respect, I will be forgiven for referring to my own comment: Leone, Transparency revisited – on the role of information in the recent case-law of the CJEU, *ERCL* 2014, p. 312.

51 This observation is confirmed by the fact that, where competition can more obviously not be relied on – as in the case of natural monopolies such as energy supply – the issue of prices becomes more salient and is sometimes subject to specific regulation.

35. The case of non-competition clauses is exemplary because of the strict principles developed and the fragmentary evolution that has led to the current legal framework. The Court of Cassation, indeed, started with requiring that the term be necessary for the protection of a legitimate interest of the employer and gradually added further requirements, such as the inclusion of a geographical and temporal delimitation. Only in 2002, finally, did the Court add that a non-competition obligation must be accompanied by the payment of an indemnity compensating the employee for the loss of chances that such obligation entails.[52]

36. As concerns the *clauses de dédit-formation*, it is generally considered that the possibility of using them has a value to both parties. The reasoning is that, by being able to secure (the return on) his investment through a restitution clause, the employer should be incentivised to offer employees valuable educational experiences, which may benefit both the employer and the employees. There is, however, a risk that the mechanism will turn into a mere device of employee retention.[53] In order to avoid this risk, the validity of these terms is again subjected to several conditions.

37. From a substantive point of view, the Court of Cassation requires: a) that the offered programme has imposed on the employer additional costs compared to those which were in any case due by law or collective agreements;[54] b) that the amount to be refunded is proportionate to the undergone expenses and in the duration of the training;[55] c) that the term does not result in depriving the employee of her ability to resign. This last requirement means that the "fidelity" obligation imposed on the employee should not be exceedingly long, while the proportionality prong suggests that the amount to be returned should decrease with time. However, neither of the two prongs seem to have been further specified by the highest court.[56]

38. As far as form is concerned, the obligation "has to be the object of a specific agreement entered into before the beginning of the training and which specifies the date, the nature, duration and actual cost to the employer of the training as well as the amount and mode of the reimbursement due by the employee". The "specific agreement"

52 This solution differs from the one retained for commercial agency contracts, where no compensation is required. See Article L. 134–14 Code du Commerce. The Cassation affirms that the provision's failure to require such compensation must be seen as an explicit choice of the legislator. See Cass. com., 4 December 2007, no. 06–15.137.

53 Antonmattei, p 80 uses as example the case of a logistics company specialised in the transportation of hydrocarbons which regularly hired drivers lacking the necessary licence and then asked them to undertake the indispensable training and a correlated obligation to remain with the company for 18 months. In this case, the objective was reducing personnel turnover in a sector whose working conditions were particularly challenging. This strategy represents an abuse of the *clause de dédit-formation*. The case is taken from Cass. soc. 4 juin 1987, n 84–43639.

54 Thus the costs have to be mentioned in the term, Cass. soc. 16 mai 2007, and have to be real (not already refunded to the company by the state), Cass. soc. 19 nov. 1997.

55 Cass. soc. 16 mai 2007, no. 05–16647 and 19 nov. 1997, no. 94–43195.

56 See Antonmattei, p 82. Cass. soc. 17 juill. 1991, no. 88–40201.

requirement is to be intended as imposing that the term should concern one particular training, so that the employee's consent is not given without actual knowledge of the deal's conditions. As to the consequences of incorrect drafting, in most cases a failure to meet all the mentioned requirements will entail the term's nullity. However, when the fidelity obligation stretches exceedingly far in time or the amount to be reimbursed is exceedingly high, it is possible for the judge to reduce the term instead of eradicating it. This is done under application of Article 1152 of the Civil Code, concerning penalty clauses.

39. Whereas non-competition covenants and terms of *dédit-formation* are subject to different standards, what they share is their nature of "collateral" agreements vis à vis the employment relationship. They both concern elements which are not part and parcel of the relationship, but get agreed between the parties due to some specific interest of one or both of them. Therefore, they cannot – or can only partially – be legitimised by reference to some other element in the relationship; they rather have to be *internally* balanced. Thus, the non-competition obligation needs to be granted separate compensation, and the restitution obligation has to relate to expenses freely incurred and must be structured in a fair way. In this sense, they might be relatively hard to fit within the standard paradigm of unfair terms control, which connects the assessment to the parties' rights and duties as arising from the contract as a whole.

40. At the same time, the concern with ensuring a sufficiently balanced content and with making sure that the effects of the clause are clearly identified – and delimited – resonates with what we have seen above. In both cases, finally, a background concern seems to exist with reference to the employee's fundamental rights; the highly specific validity regimes applied to these terms, however, seems to go beyond the control standard articulated by Article L 1121–1 Code du Travail – they look rather as attempts, by the Court, to concretise a fairness or balance requirement which is as closely associated with the relationship between the parties as it is with external (fundamental rights) concerns.

4. Conclusion

41. In the first part of the paper we have seen how the new provisions in the *ordonnance* issued in February 2016 seem to introduce into general contract law a mechanism of unfair terms control very similar to the one already in place in French consumer law. The mechanism, in fact, is so similar to the one of the Code de la consommation that it seems justified to infer that it has comparable aims. The conclusion appears warranted in light both of a comparison between the new unfair terms provisions and the "old" consumer law rules and of the likely division of labour among the different provisions concerning control of contractual content incorporated in the new Code civil.

42. As to the new provision's likely impact on unfair terms control in labour law, we have seen that courts already perform several – scattered – forms of control. Not all these forms can be assimilated to unfair terms control as understood in this paper, i.e. a

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"consumer law-like" control of contractual content. In particular, the differences between the control exercised under Article L 1121–1 Code du Travail protecting fundamental rights and liberties of workers and unfair terms control are to be highlighted. While there can be overlap between the two spheres, Article L 1121–1 presupposes the violation of a right *external* to the contract, whereas unfair terms control is first of all concerned with the rights and duties arising from the contract. The fact that the reform project simultaneously introduces a limitation based on fundamental rights and a form of generalised unfair terms control seems to confirm this observation.

43. The several different forms of control which courts exercise outside of Article L1121–1, on the other hand, could probably be absorbed and re-organised under the heading of unfair terms control. This would both reduce the existing complexity and contribute to a more clear articulation of the validity requirements imposed on certain terms – in particular, one may add, if the courts would be ready to make use of transparency requirements as applied in consumer law. Furthermore, the novelty will do away with the current uncertainty concerning the legal basis justifying the imposition of the said validity requirements, which is at times unclear and at times essentially non-existent.

44. All in all, it seems that one may be able to adapt a classical adagio and say that, with reference to labour law and judicial control of *clauses abusives*, everything needs to change, so most things can stay the same. The choice to restrict the scope of control to contracts of adhesion, besides allowing closing some loopholes, should have reassured at least some of those[57] who were particularly alarmed at the idea of generalised unfair control as foreseen by the Taubira draft. At least with reference to labour law, this contribution would like to submit, the most likely impact of the new rules will be a contribution to some classical values of civil law – accessibility and legal certainty. In addition to that, while holding a moderate potential in terms of (corrective) justice, they also seem unlikely to do much further harm to contractual autonomy.

[57] See for instance http://business.lesechos.fr/directions-juridiques/droit-des-affaires/contrats-et-clauses/02111428568-droit-des-contrats-la-reforme-qui-change-tout-ou-presque-110548.php.