



universität
wien

EXPOSE OF THE DOCTORAL THESIS

TITEL OF THE DOCTORAL THESIS

The doctrine of the Cause in French Contract Law

Submitted by:

Mag. Melissa Jabbour

in partial fulfillment of the requirements for the degree of
Doctor iuris

Vienna 2020

Degree program code as it appears
on the student record sheet: A 783 101

Field of the Study as it appears
on the student record sheet: civil law (contract law), comparative law

Supervisor: Univ. Prof. Dr. Franz-Stefan Meissel

Table of Contents:

1. Introduction of the research topic
2. A brief overview of the French doctrine of the Cause
3. Central research questions and purpose of the doctoral thesis
4. Motivation for the doctoral thesis
5. Workplan
6. Preliminary table of contents of the doctoral thesis
7. Preliminary bibliography

1. Introduction of the research topic

Contracts play a crucial role in our everyday life. In fact, we conclude contracts on a daily basis, sometimes even without being aware of it. This clearly shows how easy it has become to conclude contracts without having to worry about a specific form or category. In fact, the freedom of contract is one of the main concepts governing European Legal Systems and has the following two sides: On the one hand, there is the freedom to contract that allows parties to choose which kind of contract they want to conclude. On the other hand, the freedom from contract gives them the possibility to refuse the conclusion of a specific contract.¹

Taking the example of the French Contract Law, the article 1102 of the French Civil Code now explicitly states the freedom of contract as a main principle.² However, this article shows at the same time that this freedom is not limitless and that the conclusion of contracts is framed by legal rules. This intervention through legal prescriptions is necessary to avoid mistakes in the process of conclusion of contracts, often resulting in abusive contracts that take advantage of the weaker party.³

Even though there exist some general rules that can be found in many European legislations, such as the capacity to contract, the specific legal prerequisites for a valid contract still differ from country to country. From the creation of the Civil

¹ Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* Art 1:102 [1] (Oxford University Press 2018).

² French Civil Code, Art 1102:

Chacun est libre de contracter ou de ne pas contracter, de choisir son cocontractant et de déterminer le contenu et la forme du contrat dans les limites fixées par la loi. La liberté contractuelle ne permet pas de déroger aux règles qui intéressent l'ordre public.

Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation. Contractual freedom does not allow derogation from rules which are an expression of public policy. (Translation taken from John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker, *The law of contract, the general regime of obligations, and proof of obligations* (2016)).

³ Mackaay E, *The civil law of contract* in Gerrit De Geest and Boudewijn Bouckaert (eds), *Encyclopedia of Law and Economics* 3 (2nd ed. Edward Elgar 2010).

Code of 1804 until 2016, four main requirements were for instance needed for the conclusion of a valid contract, being the consent of the parties, the capacity to contract, a purpose and a lawful Cause.⁴ The necessity of a Cause is a French specificity that is not present in many other legal systems. In fact, the Austrian Civil Code “Allgemeines bürgerliches Gesetzbuch” (ABGB) does not stipulate a Cause as a legal condition.⁵ Hence, it is necessary to explore the concept of Cause in order to understand why the French Civil Code of 1804 introduced this notion as an indispensable condition.

2. A brief overview of the French doctrine of the Cause

In order to be able to perceive the reasons for the introduction of the Cause as a condition for a valid contract, the definition of this concept must be examined precisely.

Initially, the Cause had its roots in French medieval law⁶ that associated this notion with the purpose of a stipulation.⁷ Since then, the definition of the Cause had never ceased to be queried, changed and developed over the years. At the same time, the French doctrine of the Cause was massively criticized by the so-called anti-causalists, who rejected the idea of the Cause as a necessary condition for a valid contract. The Cause succeeded nonetheless to find its way into the French Civil Code of 1804, which stipulated that an “obligation without a Cause or with a false Cause or an unlawful Cause cannot have any effect”.⁸

The Cause of the French Civil Code had actually two dimensions: On the one hand, there was the “objective” Cause that referred to the abstract purpose of the contract.⁹ This goal was the same for every category of contract and can be described as the counter-performance¹⁰ expected by the other party. Taking the example of a sale of goods contract, the objective Cause for the seller was the purchase price whereas for the buyer it was the possibility to acquire the

⁴ French Civil Code, former Art 1108:

Quatre conditions sont essentielles pour la validité d'une convention : Le consentement de la partie qui s'oblige ; Sa capacité de contracter ; Un objet certain qui forme la matière de l'engagement ; Une cause licite dans l'obligation.

Four conditions are essential für the validity of a contract: the consent of the parties; the capacity to contract; a certain purpose; a lawful cause of the obligation.

⁵ Austrian Civil Code (ABGB), section 865f.

⁶ Jean-Philippe Lévy and André Castaldo, *Histoire du droit civil* 831 (2nd ed. Dalloz 2002).

⁷ Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* Art 2:101[19] (Oxford University Press 2018).

⁸ French Civil Code, former Art 1131.

⁹ Solène Rowan, *The New French Law of Contract*, *International & Comparative Law Quarterly* 9 (LSE Research Online, May 2017).

¹⁰ Solène Rowan, *The New French Law of Contract*, *International & Comparative Law Quarterly* 9 (LSE Research Online, May 2017).

ownership of the good. On the other hand, the “subjective” Cause represented the personal reasons that led the parties to conclude the contract. As a consequence, the motivation behind the conclusion differed from one contract to another. As long as the subjective Cause was not illegal or contrary to public morals, any reason was acceptable.¹¹ This dual concept of Cause was valid for every type of contract, except for gratuitous contracts, that are characterized by the lack of a counter-performance. In these cases, the objective Cause also corresponded to the intention not to receive any benefits in return.

With time, the notion of the Cause was also used by the French Court of Cassation to rebalance contracts. In fact, the lack of an objective Cause was taken as a reason to annul a contract because of the absence of reciprocity. The idea behind this procedure was that a contract could only be valid from a legal point of view if there was a minimum benefit for both parties. On top of that, the French court also invoked the absence of a lawful Cause to be able to annul contracts that became unfavorable deals.¹²

The understanding of the definition of the Cause is subsequently crucial to be able to follow the different attempts of the major transformation of the French contract law. Since 2004, different reformatory projects were published in order to change the French contract law. The main reasons for the intended changes were the complexity of the concept of Cause, resulting in confusing definitions. On top of that, the requirement of a cause is missing in other countries. Therefore, the request for simple and clear expressions to enforce the attractiveness of the French contract law on the international level was also a crucial instrument for the development of the reform of 2016.

3. Central research questions and purpose of the doctoral thesis

Over two centuries, the French contract law of 1804 was not modified apart from slight adjustments. It was only in 2016 that a new French contract law was created following the modifications of the reform of the French law of obligations. In fact, the two conditions “purpose” and “Cause” have been replaced by the notion of “content” of the contract.¹³ Thus, the term Cause has completely disappeared from

¹¹ C. D, *Suppression de la cause – Réforme du droit des contrats, du régime général et de la preuve des obligations* (Dalloz 2016).

¹² *Point club video*, 94-14800 (French Court of Cassation, first civil chamber July 3rd, 1996).

¹³ French Civil Code, Article 1128:

Sont nécessaires à la validité d'un contrat: 1. Le consentement des parties; 2. Leur capacité de contracter; 3. Un contenu licite et certain.

The following are necessary for the validity of a contract: 1. The consent of the parties; 2. Their capacity to contract; 3. Content which is lawful and certain. (Translation taken from John

the French Civil Code. As a consequence, we can legitimately ask ourselves what were the main reasons that led to these fundamental changes resulting in the abolition of the Cause after such a long time. In my doctoral thesis, I will therefore explain why this reform was needed and subsequently implemented after so many years of preparation and discussions. However, the central research question of my doctoral thesis is to evaluate if the Cause has truly disappeared or if on the contrary its function has been kept alive under another concept even though the Cause is not explicitly mentioned in the Civil Code anymore.

Hence, the purpose of this research is not only to present the current specificities of the French contract law, but also to show its evolution since 1804. On top of that, I would like to compare the French system to other legal situations in order to be able to depict similarities and differences between European legal systems since 1804. In fact, the condition of a Cause for a contract to take effect can also be found in other codifications, such as in the Belgian, Luxembourg, Italian and Spanish Civil Code.¹⁴ On top of that, the doctrine of consideration of the common law seems to be close to the French Cause. On the contrary, as mentioned before, the Austrian contract law and the legal systems of many other countries do not refer to the Cause for the conclusion of a valid contract. The understanding of the different legal systems is very important, given that legal national rules have an impact on neighboring countries and influence their legislation as the example of the French reform of 2016 will show. The purpose of my thesis is therefore to evaluate the changes that were made by this reform and to analyze their impact on French law and on international legal development.

To summarize, this doctoral thesis is characterized by the following four central research questions:

- What were the specificities of the Cause of French contract law?
- Has the Cause really been abolished by the reform of 2016?
- If the Cause has been kept under new concepts and it is only its designation that has changed, why has this reform been so massively criticized?
- Will the elimination of the Cause in France contribute to the abolition of the Cause worldwide? Will this reform have an impact on the consideration of the common law, which seems to be close to the concept of Cause?

Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker, *The law of contract, the general regime of obligations, and proof of obligations (2016)*.

¹⁴ Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* Art 2:101[19] (Oxford University Press 2018).

4. Motivation for the doctoral thesis

My attachment for French culture has its roots in my childhood and education, given that I attended a French school in Vienna, the Lycée Français de Vienne. As a consequence, I grew up in an international environment. This may be the reason why I am very interested in discovering, analyzing and comparing different systems and cultures.

During my law studies in Vienna my curiosity for foreign legal systems and especially for the French law has never ceased to grow. In fact, my interest in French legislation led me several times to Paris: Back in 2016, I completed my Erasmus exchange program at the university Panthéon-Assas (Paris II). Then, in summer 2019, I accomplished a three-month internship at the legal department of an international group. These two experiences in Paris enabled me to learn more about French legal particularities.

This is the reason why I am very thankful that the topic of my doctoral thesis enables me to combine my passion for contract law with my interest in comparing different legal systems.

5. Workplan

During my last stay in Paris, I had the chance to make some first-hand research about the specificities of the French contract law before and after the reform. On top of that, I also had the opportunity to meet the French Professor Laurent Pfister, specialized in legal history, who helped me in my investigation. Therefore, I will start by focusing on the evolution of the importance of the Cause in French contract law and only deal with other legislations in a second step.

I am planning to divide my doctoral thesis into three different parts. First of all, I will focus on the French doctrine of the Cause since the creation of the French Civil Code in 1804. Afterwards, I will present the reasons for the reform of the French law of obligations that came into effect on October 1st, 2016 and subsequently evaluate the impact of these changes. Finally, I will compare the French system to other legislations in Europe, especially to the Austrian contract law and to the common law.

6. Preliminary table of contents of the doctoral thesis

Introduction

Part 1: The importance of the Cause for the French contract law of the French Civil Code

- A. The notion of the Cause of the French Civil Code of 1804
 - 1. The Cause, a prerequisite for a valid contract
 - 2. The evolution of the definition of the Cause until 1804
 - a. The Roman understanding of a Cause
 - b. The Cause of the canon law
 - c. The Cause since the 16th century
 - d. The Cause of the Code Civil of 1804

- B. The evolution of the definition of the Cause since 1804
 - 1. The emergence of the movement of the anti-causalists
 - 2. The evolution of the meaning of the Cause since the 20th century
 - 3. The utilization of the Cause by the French Court of Cassation

- C. The importance of the Cause for public policy
 - 1. The political public policy
 - a. The protection of the state
 - b. The protection of the family
 - c. The protection of moral values
 - d. The concept of good manners
 - 2. The economical public policy
 - a. The economical public policy of direction
 - b. The economical public policy of protection
 - 3. The consequences of a Cause contrary to public policy
 - a. The absolute nullity of a contract
 - b. The exception of the relative nullity of a contract

Part 2: The Reform of the French law of obligations, an upheaval of the French contract law

- A. The main reasons for the reform of 2016
 - 1. An outdated French obligation law
 - 2. The complexity of the French obligation law
 - 3. The criticism of the unclear definition of the Cause
 - 4. The missing attractiveness of the French contract law
 - 5. The influence of other legal systems

- B. The long road to the reform of 2016
 - 1. Reform project Catala of 2005
 - 2. Reform project Terré of 2009
 - 3. Reform project from the government of 2013
 - 4. The final form of ordinance of the reform of 2016

- C. The major innovations of the reform
 - 1. The changes of the French contract law
 - a. A general presentation of the modifications
 - b. The abolition of the Cause
 - c. The elimination of the reference to good manners
 - 2. A successful reform? First experience with the new legal changes
 - a. The French reaction following the abolition of the Cause
 - b. A more attractive French contract law?

Part 3: Comparative law

- A. The development of the French Cause in other legislations
 - 1. The example of the Italian Codice Civile
 - 2. The international impact of the French reform
 - a. The international reaction
 - b. A reform leading to the abolition of the Cause worldwide?

- B. Some parallels to the common law
 - 1. A brief overview of the common law
 - a. The definition of the consideration
 - b. The doctrine of the consideration
 - 2. Comparison of the two concepts
 - a. Similarities and differences
 - b. Actual development of the consideration

Conclusion

6. Preliminary bibliography

a. French sources

• Literature

D C, *Suppression de la cause – Réforme du droit des contrats, du régime general et de la preuve des obligations*, (Daloz 2016).

1 Demogue R, *Traité des obligations en général* (Librairie Arthur Rousseau, Rousseau & Cie, 1923).

Duguit L, *Les transformations générales du droit privé depuis le Code Napoléon*, (Librairie Félix Alcan, 1920).

Genicon T, *Défense et illustration de la cause en droit des contrats* 27/7652 Recueil Daloz 1551 (Daloz Revues 2015).

2 Ghestin J, Loiseau G and Serinet Y-M, *Traité de droit civil, La formation du contrat* (4th ed. L.G.D.J. 2013).

Gounot E, *Le principe de l'autonomie de la volonté* (Rousseau 1912).

Lévy J-P and Castaldo A, *Histoire du droit civil* (2nd ed. Daloz 2002).

Malaurie P, Aynès L and Stoffel-Munck P, *Les obligations* (5th ed. Defrénois 2011).

Posez A, *La réforme du droit des obligations: une révolution en tapinois*, Ledroitcritique.fr, <http://www.ledroitcritique.fr/la-reforme-du-droit-des-obligations-une-revolution-en-tapinois/> (last visited May 10, 2014).

Terré F, Simler P and Lequette Y, *Droit civil, Les obligations* (11th ed. Daloz 2013).
Tournafond O, *Pourquoi il faut conserver le théorie de la cause en droit français* Recueil Daloz 2607 (Daloz Revues 2008).

Wicker G, *La suppression de la cause par le projet d'ordonnance: la chose sans le mot?* 27/7652 Recueil Daloz 1557 (Daloz Revues 2015).

Witz C, *Pourquoi la réforme et pourquoi s'y intéresser en France?*, 54, 4 Revue internationale en droit compare, 935 (Persée 2018).

• Jurisprudence

Chronopost SA, La Poste and French Republic v. Commission, 93-18632 (French Court of Cassation, commercial chamber Oct. 22, 1996).

Faurecia sieges d'Automobiles v Sté Oracle France, 09-11841 (French Court of Cassation, commercial chamber June 29, 2010).

Point club video, 94-14800 (French Court of Cassation, first civil chamber July 3rd, 1996).

b. German sources

Bien F and Borghetti J-S (eds), *Die Reform des französischen Vertragsrechts* (Mohr Siebeck 2018).

Kötz H, *Europäisches Vertragsrecht* (2nd ed. Mohr Siebeck 2014).

Von Gierke O, *Die soziale Aufgabe des Privatrechts* (Springer-Verlag Berlin Heidelberg 1889).

c. English sources

Berman G A. and Picard E. (eds), *Introduction to French Law* (Wolters Kluwer 2008).

Cartwright J, Fauvarque-Cosson B and Whittaker S, *The law of contract, the general regime of obligations, and proof of obligations*, http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf (2016).

Jansen N and Zimmermann R (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018).

Lorenzen E G., *Causa and Consideration in the Law of Contracts*, 28, 7 The Yale Law Journal Company, Inc. 621 (The Yale Law Journal Company, Inc. 1919).

Mackaay E, *The civil law of contract* in Gerrit De Geest and Boudewijn Bouckaert (eds), *Encyclopedia of Law and Economics* (2nd ed. Edward Elgar 2010).

Bénédicte Fauvarque-Cosson and Guillaume Wicker (eds), *The Reform of French Contract Law*, 6 *Montesquieu Law Review* (2017).

Nicholas B, *The French Law of Contract* (2nd ed. Clarendon Press 1992).

Rowan S, *The New French Law of Contract*, *International & Comparative Law Quarterly*, (LSE Research Online, May 2017).

This bibliography is only a preliminary overview of the relevant sources for the doctoral thesis and will be completed over time.