Judicial Lawmaking in a Code Jurisdiction: A French Saga on Certainty of Price in Contract Law

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I. INTRODUCTION

A. Three Code Articles

This article analyzes three quite different provisions of the French Civil Code. All three provisions date from the Code’s enactment in 1804; none of the three have been amended by the legislature in the nearly two centuries since the Code’s adoption. One of the provisions (Article 1134(3)) is quite general; it says no more than contracts “must be performed in good faith.” By contrast, the

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* Professor of Law, University of Maryland School of Law.
1. The text of the French Civil Code appears in the annual editions of the Dalloz Code Civil. That work includes, following each article, annotations to the leading case law and doctrinal writing. For an English translation of the Code, see John H. Crabb, The French Civil Code (1977). Translations of significant excerpts (including all the provisions discussed in this article) may also be found in Arthur Taylor von Mehren and James Russell Gordley, The Civil Law System: An Introduction to the Comparative Study of Law 1163-81 (2d ed. 1977). I have relied on the von Mehren and Gordley translations unless otherwise indicated.
2. C. Civ. art. 1134 reads in full:
   1) Agreements lawfully formed take the place of laws for those who have made them.
   2) They cannot be revoked except by mutual consent or on grounds allowed by law.
   3) They must be performed in good faith.
   In this and all subsequent translations of Code articles, I have added paragraph numbers.
second provision (Article 1591), which applies only to sales contracts, is quite specific; it commands that the price "must be fixed and stated by the parties." The third provision (Article 1129(1)) has neither the generality of Article 1134(3) nor the specificity of Article 1591, but falls somewhere between the two. It provides that the "object" of a party's obligation must be "a thing that is specified at least to its species." In terms more familiar to a common law lawyer, that provision requires that the subject matter of a contract be sufficiently definite.

Two principal considerations explain the selection of these three provisions. First, their interpretation, and the relationship between them, has generated over the last twenty-five years an important body of case law. A study of that case law tells us a good deal about judicial lawmaking in a Code jurisdiction. Second, these provisions afford an opportunity to analyze how courts in a Code jurisdiction address the problem of statutory obsolescence. Here the potential villain is Article 1591, the most specific of the three provisions. That article adopts for sales contracts the Roman law rule on certainty of price. Perhaps that rule was suitable in Roman times, but it appears wildly unsuited for the modern law of sales. Understanding how the judges ultimately defused it helps demonstrate that codification imposes surprisingly few constraints on the development of the law.

The high point of our story occurred on December 1, 1995. On that day, the Court of Cassation—France's Supreme Court—determined in a particularly solemn fashion that a price term was sufficiently definite if it allowed a party to the contract to set the price. Neither Article 1129(1) nor Article 1591 required

3. C. Civ. art. 1591 reads in full:

The price for the sale must be fixed and stated by the parties.

4. C. Civ. art. 1129 reads in full:

1) The object of an obligation must be a thing that is specified at least to its species.

2) The amount can be uncertain, so long as it can be determined.

5. On Article 1129, see François Terré et al., Droit civil. Les obligations n° 262, at 218-19 (6th ed. 1996) [hereinafter Terré, Les obligations] and Barry Nicholas, French Law of Contract 115-16 (2d ed. 1992). In the context of bilateral contracts (the subject of this article), the term "thing" in Article 1129(1) refers to the other party's performance. "Species" ("espèce" in French) refers to the nature of the performance. In addition to imposing a definiteness requirement, Article 1129(1) reinforces other articles of the Code in requiring that a performance be possible (at least at contract formation) and licit. See Nicholas, supra, at 116-17.


French legal publications rarely cite a case by the parties' names. Rather, the standard citation form includes the date of the decision or decisions (here December 1, 1995) and the name of the court (here the Assemblée plénière of the Court of Cassation). The hundred plus judges on the Court of Cassation normally sit in sections (chambres) determined by subject matter; i.e., criminal, civil, commercial, etc. Only a small number of cases of exceptional importance go to a full Court or Assemblée plénière composed of judges from all the sections. (For easy reference, I have, whenever possible, used a party's name when referring to a particular case.).

The principal, unofficial law reports are Dalloz (D.) and Juris-Clauseur Périodique (J.C.P.), also known as La semaine juridique. The reports also include case notes prepared by eminent
anything additional. The Court then invoked Article 1134(3) to add, in what the
comentators characterized as an obiter dictum,7 that the party setting the price
had to do so in good faith.8 These four decisions marked a spectacular turn-
around in the Court’s case law. Previously, the Court had nullified contracts
allowing one of the parties, usually the seller, to set the price. Sales contracts
were vulnerable to that fate under Article 1591, and in 1978 the Court interpreted
Article 1129(1) to impose the same certainty requirement on most other
contracts.9 Now all has changed; contracts allowing a party to determine the
price are valid, but the other party may obtain damages (and perhaps termination)
if the party setting the price acts in bad faith.

This outcome, and the judicial saga leading up to it, support at least two
conclusions, the first pretty standard and the second far more controversial. The
standard conclusion emphasizes the important role played by general clauses in
Code jurisdictions. Open-ended texts, such as Article 1134’s requirement of
good faith performance, have often served as a means for courts to take into
account contemporary needs when interpreting a Code enacted at a time when
conditions were quite different.10 The most famous example of this “Flight into
the General Clauses” occurred in Weimar Germany in the 1920s when the courts
rewrote contracts, disrupted by catastrophic inflation, by invoking the debtor’s
obligation to perform in good faith.11

A second more controversial conclusion argues that codification need not
constrain that much the development of the law. No doubt codification
encourages judges to look to Code texts for solutions to cases, but many civilian
jurists recognize that textual positivism is an inadequate approach.12 It is

jurists—usually by law professors but sometimes by judges. Case citations normally identify the
author of any accompanying note.

7. See the case notes by Professors Aynts and Ghestin cited in supra note 6.

8. American readers will recognize that this is the Uniform Commercial Code rule. See U.C.C. § 2-305(2) (1997), providing that “a price to be fixed by the seller or by the
buyer means a price for him to fix in good faith.” French jurists often invoked Section 2-
305’s flexible approach for determining the validity of a price term as a basis for criticizing
the more rigid pre-1995 French position. See, e.g., the case note by Professor Ghestin to Cass. Ic
civ., Nov. 29, 1994, J.C.P. 1995, II, 22371 (Alcatel cases). Ironically, the Code’s principal drafter,
Karl Llewellyn, appears to have been heavily influenced by Continental jurists, especially by their
use of the concept of commercial reasonableness. James Whitman, Commercial Law and the
American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code, 97 Yale

note Yvon Loussouarn.

10. On general clauses in French Codes, see René David, French Law. Its Structure, Sources,
and Methodology 194-207 (Michael Kindred transl., 1972).

General Clauses” derives from the title of a well-known book condemning the phenomenon. See J.
W. Hedemann, Die Flucht in die Generalklauseln (Tübingen 1933), discussed in Dawson, supra, at
475.

12. Franz Wieacker, A History of Private Law in Europe 450-58 (Tony Weir transl., 1995);
Manlio Bellomo, The Common Legal Past of Europe 1000-1800, at 11-14 (Lydia G. Cochrane transl.,
inadequate because Codes do not abolish history but are the product of it. They address a whole range of questions which professionally-trained jurists have debated for centuries without achieving any definitive resolution. That debate among jurists on how best to rationalize the law—often called “legal science” by civilian scholars—does not cease with codification. Therefore, according to the leading contemporary German scholar Reinhard Zimmermann, the search “for the most appropriate answer should not be (and is in fact not always) deflected by an odd quirk in the wording of a code.” Similarly, Frangois Gény, one of France’s leading private law scholars earlier in this century, minimized the effect of codification in France by describing it “as little more than an operation of pure form, simplification, and rearrangement” whose primary effect was to unify the country.

The saga of our three Code provisions does not conclusively demonstrate that Zimmermann and Gény are correct. However, it does provide some evidence that Code texts—even very specific ones such as Article 1591—do not freeze the law as much as one might fear. When texts fail, either because there is a gap in the Code (the unforeseen case) or because an obsolete provision produces an unacceptable result (the unforeseen change of circumstances), judges are tempted to engage in what Gény called “free scientific research” and what we would call common-law lawmaking. The predominant view is to deny that French judges exercise any such powers, but our saga includes numerous decisions where the judges appear to have exercised them. As we shall see, the Court of Cassation’s rigorous enforcement of the certainty of price requirement, and the Court’s extension of that requirement to contracts other than sales, is not explainable through fidelity to Code texts but through a desire to protect the weaker party in a standardized contract of adhesion from what the Court believed to be unconscionable price terms. Only when the Court of Cassation was forced

15. Gény limited free scientific research to the former situation of gaps in the Code. Gény, supra note 14, n° 85, at 212. Much like Benjamin Cardozo did for the common law in this country, Gény addressed the question of how judges should exercise their lawmaking power in an objective fashion so as to reduce to a minimum the arbitrariness of any personal contribution. Cardozo cited Gény’s Méthode d’interprétation at least eleven times in The Nature of the Judicial Process, referring to it as a “brilliant book.” Benjamin N. Cardozo, The Nature of the Judicial Process 138 (Yale paperbound ed., 1971).
to recognize the havoc wrought by its invalidation of most long-term agreements for distributing goods did the Court shift gears. Under the new approach, the courts police the dominant party's behavior at the performance stage under the rubric of good faith rather than invalidate the contract at the outset because one party has put the other party at the former's mercy by reserving the power to determine the price or other performance due.

B. Codification of Private Law

The nineteenth century was the golden age of codification for countries in the civil law tradition. The century opened with France's adoption in 1804 of its Civil Code and closed in 1896 with a newly-reunited Germany's adoption of its own Civil Code, effective on January 1, 1900. These two texts, although different in many ways, both present in statutory form the law of persons, family, inheritance, property, torts, contracts, and unjust enrichment. Those private law subjects formed the heart of the Corpus Juris Civilis compiled by the Emperor Justinian in the early sixth century from the writings of leading Roman jurists; prior to the nineteenth-century codifications, Justinian's work had enjoyed the status of law on most of the European continent. What was Roman private law remains the heart of the contemporary legal system for lawyers trained in the civil law tradition, even if it is no longer directly received as law. In this age of nation-states, it has become desirable if not necessary for each state in the civil law tradition to have its own civil code, but all those Codes remain heavily influenced by Roman law. Despite growing American hegemony, codification remains popular in large areas of the world.

Civil Codes differ from ordinary statutes in a number of ways. First, their


Professor Zimmermann's writings are particularly fruitful because he believes that national codification, nurtured by a historically oriented legal science, provides the best way to achieve private law harmonization among the members of the European Union. See Reinhard Zimmermann, Civil Code and Civil Law. The Europeanization of Private Law Within the European Community and the Re-emergence of a European Legal Science, 1 Colum. J. Eur. L. 63, 80-82 (1994). Harmonization, as fashioned in Brussels, has so far had little impact on the private law of the member States. Daniela Caruso, The Missing View of the Cathedral: The Private Law Paradigm of European Integration, 3 Eur. J.J. 3, 4 (1997) ("private law remains guarded in the jealous hands of national institutions . . . quite conscious of their 'national' character").

19. Professor Zimmermann reports that more than fifty states have codified or recodified their private law since 1945. Zimmermann, Codification, supra note 18, at 105.
coverage is much broader. Indeed, Civil Codes, at least as initially conceived, cover the whole range of private law.\(^{20}\) Second, they address that subject matter in a systematic fashion. A codification is not just a consolidation of relevant texts found in prior enactments, but a restatement of the applicable law. At least in theory, any such restatement should be clear, consistent, and complete so that all the texts appearing in the Code form a coherent whole.\(^{21}\) Third, a Code presupposes a certain permanence; codification, like the comparable public law phenomenon of constitution making, requires both the presence of propitious circumstances and the expenditure of considerable effort. Neither France nor Germany have ever recodified their private law. As a result, subsequent generations of jurists do not view Codes as contemporary Americans tend to view statutes; i.e., as political responses, triggered by special interest groups, to specific problems. Rather, Codes constitute a body of norms designed for the long haul. Thus, at least in theory, a Code is the quintessential example of public-regarding legislation.\(^{22}\)

Countries in the common law tradition have adopted a more modest approach to codifying private law. Codification has had its eminent proponents—Jeremy Bentham in Great Britain and David Dudley Field in this country, to name only the most prominent—and Grant Gilmore asserts that most American lawyers in the pre-Civil War decades assumed codification would occur.\(^{23}\) What did occur, however, was something quite different. In the late nineteenth and early twentieth century, legislatures in England and the United States adopted a small number of statutes (normally called "Acts" rather than "Codes") covering discrete subject matter areas (primarily negotiable instruments and the sale of goods). In this country, these enactments took the form of uniform laws proposed by the National Conference of Commissioners on

\(20\) The French Civil Code of 1804 was one of five Codes promulgated in France during the Napoleonic period. The other Codes governed commercial law, criminal law, criminal procedure, and civil procedure. In subsequent years, the term "Code" has also been applied to enactments of lesser scope; e.g., the Labor and Agricultural Codes. These later Codes cover subject areas previously governed by the Civil Code.

The French Civil Code, like our Uniform Commercial Code, covers both commercial and consumer contracts. The French Commercial Code contains additional rules for certain commercial contracts, but that Code has experienced a "slow death" as its provisions have been replaced by more specialized statutes governing corporations, patents and trademarks, negotiable instruments, etc. See Denis Tallon, Reforming the Codes in a Civil Law Country, 15 J. Soc. Pub. Tchrs. L. 33, 34 (1980).

\(21\) James Gordley, European Codes and American Restatements: Some Difficulties, 81 Colum. L. Rev. 140 (1981) (doubting theory is attainable). Justinian's Digest—the most significant portion of the Corpus Juris Civilis—was, on the other hand, a compilation of earlier juristic writings deemed worthy of preservation.

\(22\) French jurists rarely speak in such legal process terms. For an exception, see Bruno Oppetit, De la codification, D. 1996, Chr. 33, 37 (left column).

Uniform State Laws. These uniform laws functioned as common law statutes; i.e., the courts continued to develop the law without much attention to the statutory text.

Other than in these areas, the common law tradition left the development of private law largely to the judges. Legislatures might occasionally intervene to correct some deficiency in the common law—a prime example is the adoption of Workers' Compensation Acts to correct the courts' mishandling of industrial accidents—but there was no effort to restate the law systematically (or even partially), as one would expect in a Code. England flirted briefly in the 1970s with the prospect of codifying its common law of contract, but the project came to naught. The principal exception to case law's triumph is the Uniform Commercial Code, which was approved by the conference in 1952 and subsequently adopted by forty-nine of the fifty states. Only Louisiana, wedded to its own Civil Code, has resisted the trend. This new uniform act not only covers a broader swath of territory than did its predecessors, but also utilizes a systematic approach which makes it resemble in a number of ways a true Code.

Opponents of codification have argued that a Code has the unfortunate effect of freezing the law. How can the law develop to accommodate changing conditions when the applicable rule takes the form of a fixed text, perhaps enacted many years in the past? A variant of this argument enabled the noted German jurist Carl Friederich von Savigny to delay codification in Germany for nearly a century. According to Savigny, law reflects the common consciousness of the people; like custom, it grows organically over time. Writing in 1814, Savigny feared that a German codification on the French model would halt this evolutionary phenomenon. Similarly, James Carter, the most prominent

24. Gilmore, supra note 23, at 69-71. In drafting the Uniform Negotiable Instruments Law and the Uniform Sales Act, the Commissioners were heavily influenced by the English Bills of Exchange Act (1882) and Sale of Goods Act (1893).
25. Id. at 71-72.
27. William D. Hawkland, The Uniform Commercial Code and the Civil Codes, 56 La. L. Rev. 231 (1995). Professor Hawkland, who served as one of Karl Llewellyn's assistants in securing the Code's adoption, argues that Llewellyn (the Code's principal drafter) believed the U.C.C was a true Code (and not just a big commercial statute), but did not say so publicly because of a perceived hostility to codification. Id. at 235.
28. See Frederick von Savigny, Über die Notwendigkeit eines allgemeines bürgerlichen Rechts für Deutschland (1814). The only English translation appeared in 1831. Frederick Charles von Savigny, Of the Vocation of Our Age for Legislation and Jurisprudence (Abraham Hayward trans., Arno Press Reprint 1975). While Savigny's book may be read as a polemic against codification, his principal point was that Germany was not yet ready for codification. Legal scholars needed more time to observe and master the historical development of German law. John Henry Merryman et al., The Civil Law Tradition: Europe, Latin America, and East Asia 476-77 (1994). Savigny's book generated eight decades of intense scholarly activity (the Pandectist Movement) which prepared the way for Germany's 1896 codification. The scholars focussed on Justinian's Digest (also called the "pandects"), an odd place to learn more about German law.
opponent of the Field Codes in this country, successfully argued that a Code was an elitist text that would freeze the law by preventing further development by popularly-elected judges.29

This "deep freeze" phenomenon is a danger posed by all enacted or legislative law.30 As explained by Professors Hart and Sacks, enacted law and decisional law (case law) necessarily take different forms. Statutes owe their authority to the legislature which gives a particular set of words the force of law. Case law, on the other hand, is more flexible because it is not imprisoned in a particular text.31 Similarly, enacted and case law rules represent a model with two poles. At one end are rigid legislative rules ("do not drive over 50 mph"), while at the other are open-ended case law rules stating no more than general principles ("drive at a reasonable speed").32 Rigid enacted rules are workable (at least in theory) because the legislator is available to change them if experience proves them to be unwise. In reality, legislatures rarely revisit their earlier work products, and how to respond to obsolete statutes has become one of the more pressing problems confronting courts in this country.33

Similar problems have arisen in civil law countries that have codified their private law. The problem is particularly acute in France where the Civil Code, enacted in 1804, predates the Industrial Revolution. The majority of the original Code's 2,281 articles have never been amended; those untouched articles include most of the basic provisions on the law of obligations (i.e., contract, tort, and unjust enrichment).34 Not surprisingly, a recent study confirms that the most pressing issue of statutory interpretation confronting French courts is the necessity of adapting outdated statutory texts to transformations of the economy.35 Judges, forced to decide cases spewed up by the facts of modern life, often must apply texts enacted with quite different social situations in mind.36 That task has proved to be a difficult but not insurmountable one.

34. As of 1980, roughly one thousand articles had been amended. The greatest activity has occurred in the area of family law. Tallon, supra note 20, at 34-35. As of the late 1970s, 1,358 articles of the original Code remained unchanged. Crabb, supra note 1, at 13.
35. Troper et al., supra note 16, at 172. In this exceptionally useful book, national experts from nine countries respond to a standardized set of questions prepared by the editors.
36. Id.
C. Code Interpretation

Interpretation is the principal tool available to the courts for handling obsolete statutes. In this country, that tool is not particularly effective because statutory interpretation has become, especially at the federal level, quite textually based. Fortunately, Code interpretation in France and other civil law countries tends to be more free-wheeling. In part this difference is attributable to what might be called the Swiss-cheese phenomenon. A Civil Code, like Swiss cheese, may have holes, while a statute in a common law system cannot. By definition, a Code is a systematic, comprehensive restatement of the law; the French Civil Code, therefore, occupies the entire field of private law by superseding all prior sources of law. If a judge cannot find in the Code a provision to apply for deciding a case (the judge appears to be in one of those “holes”), then the judge must look harder, must apply the most analogous provision, or must do something to find a decisional rule in the Code.

The need to find an applicable rule is particularly acute for the French judge on account of the deductive logic employed in French judicial opinions; under the prevailing opinion writing style, the judge must formulate a rule and then apply it syllogistically to the facts. It is a denial of justice for the judge to refuse to decide a case on account of the obscurity or insufficiency of the Code. The common law judge, on the other hand, exercises common-law lawmaking powers whenever statutory texts do not apply. In those cases the statutory text need not produce an answer. No doubt the coordination of the adjoining common law with newly-enacted statutory law presents a major challenge to judges in a non-Code jurisdiction, but that task is not one of statutory interpretation.

There is a second, more basic reason justifying an activist approach by the courts to Code interpretation. Paradoxically, this justification invokes the incompleteness of the Code. Its chief proponent was Jean-Marie Portalis, the most influential of the four jurists selected by Napoleon to draft the Code. Portalis wrote a lengthy and eloquent introduction to the draft in which he emphasized its incompleteness. According to Portalis, the Code did no more than announce general principles “fertile in their consequences”; it was not the legislature’s job to “descend” to the level of detail and anticipate all the cases

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38. When enacting the Civil Code in 1804, the French legislature explicitly denied any further legal force, in matters covered by the Code, to Roman law, royal ordinances, and general and local customs. See Article 7 of the Law of 30 vendôme an XII (1804).
40. Article 4 of the Civil Code explicitly so provides.
41. In the past, common law judges have tended to treat statutes as hostile intruders and have narrowly interpreted them when they derogated from the common law. More recently, they have given statutes a more friendly reception and even invoked them as analogies when formulating common law rules. See Calabresi, supra note 33, at 85-86.
that might arise.\textsuperscript{42} That responsibility belonged to the judges whose task was to "implement, ramify, and extend those principles" and to "fill" over time the gaps in the Code.\textsuperscript{43} For Portalis, the incompleteness of the Code derived not only from the generality of its provisions, but also from the inability of an enacted text to stop the flow of human events. He explained:

For the laws, once promulgated, remain as they have been written. Men, on the other hand, never rest; they always act, and this movement which never stops, and whose effects are in turn affected by circumstances, produce, at each moment, some new combination, some new fact, some new result.\textsuperscript{44}

As a result of this instability, the legislature does not, properly speaking, "make" a Code; rather, the Code of a people is made with time.\textsuperscript{45}

Portalis' views, widely accepted by French jurists today, did not have much influence in nineteenth-century France. The quite different approach to Code interpretation that prevailed was that of the Exigetical School.\textsuperscript{46} The jurists associated with this school, mostly law professors but also including some judges, utilized grammatical, logical, and historical arguments to discover the intent of the lawmakers. While the school's use of analogy may have been a bit daring when contrasted with the contemporaneous common law hostility towards statutes, the Exigetical School's approach remained highly text-based. There was little interest in any creative development of the Code's general principles.\textsuperscript{47}

The Exigetical School's popularity in the nineteenth century was largely attributable to the prevailing ideology about judging. Judges had developed a bad reputation in pre-Revolutionary France. The law courts of the Old Regime (the Parlements) were aristocratic bodies; the judges had purchased their offices, which remained in the same family for generations. Having actively defended the privileges of the nobility and clergy, the judges were among the first victims


\textsuperscript{43} I Fenet, \textit{supra} note 42, at 476; Ewald, \textit{supra} note 42, at 47.

\textsuperscript{44} I Fenet, \textit{supra} note 42, at 469; Ewald, \textit{supra} note 42, at 41.

\textsuperscript{45} I Fenet, \textit{supra} note 42, at 476; Ewald, \textit{supra} note 42, at 48. Portalis' conclusion reads better in the original French: "Les codes des peuples se font avec le temps; mais, à proprement parler, on ne les fait pas." (emphasis in original).


\textsuperscript{47} Halpérin, \textit{supra} note 14, at 56-59.
of the Revolution when the Constituent Assembly abolished the *Parlements* in 1790. The victors in the revolutionary struggle wanted no return of the Old Regime, and one impetus behind the codification movement was a desire to restrain the judges. A comprehensive Code, so the argument went, would be judge-proof. Judges could no longer make law, but would mechanically apply Code texts. No doubt Portalis and the Code's three other drafters (all distinguished jurists under the Old Regime) did not share this vision and recognized its impracticability, but their view was a minority one at the time. The prevailing ideology denied any creative role to judges and emphasized the completeness of the Code. Those premises were consistent with the Exigetical School's assumption that the judge was not making law but merely applying statutory texts.

The last two decades of the nineteenth century witnessed a turning point in the interpretation of the Code. The principal change was the appearance of a fourth method of interpretation that sought to discern the function or purpose of the text to be interpreted. Prior to this development, the Exigetical School had recognized three methods of interpretation: the linguistic method, which focused on the text itself; the grammatical method, which utilized analogies and various maxims; and the historical method, which looked to either the legislative history of the Code or to the Roman or customary basis for the provision subject to interpretation. All three methods sought to ascertain the legislature's actual intent. Under the purposive approach, on the other hand, the interpreter ascribes to a Code text an objective purpose that does not depend on the actual intent of the lawmakers.

This new method of interpretation proved useful to scholars and judges who wished to adapt aged statutory provisions to modern conditions. In this respect it bears a striking resemblance to the Legal Process School in this country. Some French jurists, however, took purposive interpretation one step further to embrace Gély's "free scientific research." For these jurists, to accomplish the needed updating, the interpreter must consider contemporary social needs in formulating a text's purpose. As explained by Ballot-Beaupré, the chief judge of the Court of Cassation, in an oft-quoted speech delivered on the occasion of the Code's centenary in 1904, the courts—as long as they do not

48. *See* Wells, *supra* note 39. Professor Wells argues that the austere syllogistic opinion form adopted by the French courts reflected an effort to deflect any suggestion of judicial departures from enacted texts; i.e., to conceal judicial lawmaking. *Id.* at 104-06.
52. *Id.* at 183.
53. *See* Eskridge, *supra* note 37, at 26-28, 143-46 (Legal Process School engages in dynamic statutory interpretation by attributing purposes to statutes.).
54. *See supra* text accompanying note 15.
violate the letter of the Code—should interpret its broad provisions “generously and humanly so as to adapt the text to the realities and needs of modern life.” Ballot-Beaupré’s ideal judge strikingly resembles Ronald Dworkin’s well-known Hercules; both strive mightily to extract from the text the best possible result.

Portalis surely would have been pleased with Ballot-Beaupré’s remarks, as was François Gény. Not only did purposive interpretation appear consistent with their understanding of the courts’ responsibility for completing the Civil Code, but it also contributed mightily to the preservation of Portalis’ work product. Recodification had become a very live issue in France at the turn of the century. The Radical Republicans who governed the country viewed the industrialized, bourgeois society of “la belle Epoque” as quite different from the more authoritarian and rural society of Napoleon’s Empire. Did not France—like Germany—need a new Code to accommodate those changes? The recodification movement nevertheless petered out shortly after the Code’s centenary in 1904. A factor contributing to its failure was the greater willingness of the judges to innovate by proposing judge-made solutions for contemporary problems.

The Republicans learned to love the Code (or at least live with it) when they realized it could be updated by interpretation.

II. EBB AND FLOW OF ARTICLES’ INTERPRETATION

A. Benign Neglect Prior to the 1970s

All three Code provisions which are the subject of this article enjoyed a comparatively peaceful existence until the 1970s. This inattention is particularly surprising for Article 1134(3), the general clause requiring good faith in contract performance. A similar provision in the German Civil Code (Article 242)

55. I Gény, supra note 14, n° 190, at 250 n.2 (quoting Ballot-Beaupré in epilogue to second edition). Professor David also quotes, in his standard work on French law, Ballot-Beaupré’s speech. David, supra note 10, at 163-64.

Gény’s and Ballot-Beaupré’s position is nevertheless consistent with a strongly intentionalist approach to the Code. As emphasized by Professor Wieacker, the drafters of the Code Civil and other eighteenth and nineteenth century Civil Codes came from the legal elites immersed in the prevailing private law culture. Wieacker, supra note 12, at 258, 443. Surely the drafters did not expect that codification would terminate the development of concepts that had been pondered, debated, and refined by jurists for nearly two thousand years. See infra text accompanying note 199. On strong intentionalism, and the rejection of hermeneutics (the reader’s ascribing meaning to a text), see Paul Campos, That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text, 77 Minn. L. Rev. 1065 (1993).


57. Gény found in Ballot-Beaupré’s remarks a means to reconcile “unshakeable respect for the law (loi) with a sincere desire for progress.” I Gény, supra note 14, n° 190, at 250.

58. Halpérin, supra note 14, at 180-81. The legislature also relieved the pressure for recodification by enacting several major pieces of reform legislation outside of the Code; e.g., the Workers’ Compensation Law of 1898. Id.

became the basis, starting in the early 1920s, for a mammoth effort by the German courts to achieve fairness by rewriting contracts unbalanced by inflation or other unforeseen circumstances. According to the German courts' interpretation of that article, a debtor could not in good faith discharge a debt with currency that had become worthless. Several eminent French jurists have invoked Article 1134(3) to argue that French courts should adopt a similar approach to contracts disrupted by war or other unforeseeable circumstances, but the courts have steadfastly refused to recognize unforeseen circumstances (imprévision) as a grounds for discharging or revising contracts. In fact, until recently they very rarely applied Article 1134(3) at all, and most of the older cases invoked by modern treatise writers as examples of bad faith performance do not cite Article 1134(3) as the basis for the decision. As one treatise writer has described the situation, Article 1134(3) enjoyed a long sleep.

There are at least two explanations for this neglect. First, the Exigetical School, dominant throughout the nineteenth century, interpreted Article 1134(3) to do no more than to abolish the Roman law distinction between contracts requiring good faith by the parties and contracts requiring only literal performance. For the latter contracts, Roman law rarely allowed an aggrieved party to plead fraud or duress. Quite plainly, Article 1134's drafters intended to change that rule. The Exigetical School, uninterested in updating the Code, was happy to leave matters there, as were the courts. Henceforth, all contracts required good faith.

Second, the Republican activists, who came into prominence at the Code's centenary, found in the notion of "abuse of right" a ready substitute which made unnecessary any reference to bad faith performance. Fashioned by leading...
progressive jurists at the beginning of this century, the theory of abuse of right recognized that the holder of a right could be liable for its abuse.\textsuperscript{67} A paradigmatic abuse of right, as at common law, was a property owner's erection of a spite fence. Although the theory lacked a firm textual basis, its proponents expected that it would provide the courts with a means to alleviate the injustices often produced by the highly individualistic, everyone-protect-themselves philosophy which the Exigetical School found in the Code. Thus, they applauded when the Court of Cassation found an abuse of right by an employer who fired an at-will employee, whose performance was satisfactory, after leading the employee to believe he had job security.\textsuperscript{68} According to Louis Josserand, the theory's most vigorous advocate, rights (like Code sections) had their own purpose or finality; they were not absolute but had to be exercised for some legitimate motive consistent with that purpose.\textsuperscript{69} Thus, courts could review an employer's exercise of a contract right to terminate an at-will employee to determine if there was an objective basis for the employer's actions.

The theory of abuse of rights provoked a lively doctrinal debate in the early decades of this century, but the results obtained in the courts were meager.\textsuperscript{70} This was largely attributable to Georges Ripert, a noted conservative jurist, who defused the overtly political (social justice) aspects of the theory by arguing that there was an abuse of rights only if the rights holder had the subjective intent to injure.\textsuperscript{71} Professor Ripert's approach received the Court of Cassation's endorsement in 1971 when the Court found no abuse of rights, because there was no intent to injure, in a lessor's refusal, "inspired by self-interest and maintained through stubbornness," to consent to a lessee's installation of a new baking oven.\textsuperscript{72} That decision severely restricted the scope of the theory and presaged poorly for any flowering of the companion doctrine of good faith performance.

Unlike Article 1134(3), Article 1591 on certainty of price was most definitely not asleep prior to the 1970s, but its application did not raise serious difficulties. This fact is surprising, given the specificity of the rule found in that

\textsuperscript{67} For a thorough discussion of the theory, see Jacques Ghestin et al., Traité de droit civil. Introduction générale mm\textsuperscript{71} 761-805, at 747-92 (4th ed. 1994).

\textsuperscript{68} See Cass. civ., August 1, 1900, S. 1901, 1, 219, note Albert Wahl; Cass civ., May 18, 1909 and July 7, 1909, S. 1909, 1, 428, unsigned note. In one of the 1909 cases the employee had relied on the employer's assurances by relocating; in the other two cases there was no evidence of detrimental reliance.

\textsuperscript{69} Louis Josserand, De l'abus des droits (1905). (The application of Josserand's argument found in the following sentence is my own.)

\textsuperscript{70} Antoine Pirovano, La fonction sociale des droits: Réflexions sur le destin des théories de Josserand, D. 1972, Chr. 67.

\textsuperscript{71} Georges Ripert, La règle morale dans les obligations civiles mm\textsuperscript{91} 90-95, at 159-68 (4th ed. 1949). For Ripert's conservatism and service as a minister for the Vichy government, see Halpérin, supra note 14, at 190-91.

article. As observed by Barry Nicholas, the Roman rule on certainty of price has remained strongest in legal systems which assumed their modern shape longest ago. Thus, in 1804 the French Civil Code adopted a particularly rigid version of the Roman rule; the text of Article 1591 requires the price to be “fixed and stated by the parties,” while Roman law only required that it be ascertainable at the time of contract formation. Nearly a century later in 1896, the German Civil Code adopted a more flexible approach allowing a party to set the price if done equitably.

This evolution demonstrates that the Roman rule, while not unreasonable for the relatively simple commercial framework of the ancient world, does not meet the needs of modern commerce. As described by a leading French treatise, it is a rule designed for petty shopkeepers who do not plan for the long term. Today, however, commercial sales contracts are normally executory and often involve numerous performances over a protracted period of time. To expect the parties at contract formation to “fix and state” the price is unrealistic because most buyers and sellers want to establish a secure relationship and not to gamble on the futures market. Lawmakers in other countries have responded to these concerns, while France, at least until 1995, preserved its splendid isolation by insisting on certainty of price as an essential element of a sales contract.

Judicial flexibility in interpreting Article 1591 explains why that article did not cause significant problems prior to the 1970s. The courts did not interpret Article 1591 to require the parties at contract formation to set the price in numerical terms, as the statutory words “fixed and stated” seemingly demanded. Rather, as the Court of Cassation announced in a leading case on certainty of price, it was sufficient that the price was “determinable” by reference to factors that did not depend on the will of either of the parties. Therefore, a price term satisfied Article 1591 if it required the buyer to pay the debt (readily ascertainable) of a named entity.

74. Id. at 250. If a party sets a price unfairly, the other party may ask the court to set the price. Id. at 251. In 1942, Italy largely adopted the German approach in its revised Civil Code. Id. at 252.
75. Id. at 251. By the late nineteenth century, common law courts enforced sales contracts which said nothing about price; in these cases, the buyer was obligated to pay a reasonable price. See William L. Prosser, Open Price in Contracts for the Sale of Goods, 16 Minn. L. Rev. 733, 740 (1932).
77. See Nicholas, supra note 73, at 250-55; U.C.C. § 2-305(2) (1977).
78. All modern commentators have emphasized France's isolation. Two recent comparative studies support that conclusion: Denis Tallon, La détermination du prix dans les contrats (étude de droit comparé) (1988) and Isabelle Corbisher, La détermination du prix dans les contrats commerciaux portant vente de marchandises, 40 Rev. Int'l Dr. Com. (Revue internationale de droit comparé) 767 (1988).
the Code, which recognized that the parties could leave the determination of the price to a third person. A purposive interpretation of Article 1592 supports upholding a wide range of price terms tying the price to some objective index not controlled by either of the parties. It also supports enforcing a sale at the market price on some designated date in the future, a result reached by several decisions in the 1930s.80 Is not the market price merely the price determined by a large number of third persons?

Courts balked, however, when the price term appeared to require some further agreement by the parties, as in a sale for “what it is worth” or for a “fair price.”81 Those price terms remained unenforceable under the Court’s interpretation, as did a price term allowing either party to set the price. In both cases, the determination of the price required some further manifestation of intent by one or both of the parties. Finally, courts were unwilling to provide a remedy if the index or other pricing mechanism selected by the parties failed for some reason. Substituting some new mechanism required a rewriting of the contract, something the courts believed they could not do. After all, did not Article 1592 explicitly state that there is no sale if the third person selected by the parties is unable or unwilling to fix the price?82

Article 1129(1), the third Code provision addressed in this study, also played a relatively uneventful role until the 1970s, but the relationship of that article with the more specific Article 1591 remained an unsettled question. The latter article applies only to sales contracts (for both real and personal property), while Article 1129(1) applies to all contracts; i.e., it forms part of what the French call the general or “common law” of contracts. This “common law” of contracts represents the Code’s principal advance over the Roman law of contracts. While the formalistic and procedurally-based Roman law recognized only a discrete number of specific contracts for which the law provided a remedy,83 the Civil Code allows the parties to fashion whatever contracts they choose. According to Article 1134(1), contracts “lawfully formed” have the effect of law between the parties.84 For a contract to be valid, Article 1108 of the Code requires just four elements: consent, capacity, a definite subject matter (objet), and a licit

82. The pre-UCC common law of sales did not differ much from the pre-1970s French law described above. Courts enforced a reasonable price if the parties said nothing on price, but did not enforce agreements which agreed to allow one party to set the price. Similarly, if a designated third person price-setter did not do what was expected, the contract failed. See Prosser, supra note 75, at 734-36. Professor Prosser, the future torts scholar, questioned the courts’ distinction between cases where the parties said nothing on price and cases where the parties provided a mechanism for setting the price. Why should the courts refuse to imply an agreement to do what is reasonable in the latter situation when they were willing to do so in the former? Id. at 736 n.7. The Uniform Commercial Code ultimately adopted Prosser’s position. U.C.C. § 2-305 discussed in supra note 8.
83. Nicholas, supra note 66, at 159-67.
84. See supra text accompanying note 1.
cause. Alongside this general or common law of contract, the Code preserves the principal special contracts found in Roman law. For those special or named contracts, Article 1107 of the Code tells us that the Code contains "special rules" in addition to the "general rules" applicable to all contracts. Article 1591 on certainty of price is one of those special rules applicable to sales contracts. A similar special rule applicable to service and construction contracts appears in Article 1710 which defines the essential elements of those contracts in terms of one party agreeing to do something for another party for "an agreed price."85

The Code's recognition of the parties' ability to fashion their own contracts, rather than restricting them to a list of pre-approved contracts, is often attributable to the "will" theory of contract. According to this theory, it is the intent of the parties which gives contracts their legal force. The judge is merely the servant of the parties, a "ministre de la volonté des parties," charged with enforcing their common intent.6 This theory gained wide acceptance in the nineteenth century; it still predominates in France where agreement provides the basis for contract (reliance receiving no independent protection)7 and where unconscionability has gained no general entry into the Code.8

Modern scholars, both French and American, have questioned whether the Code's drafters—heavily imbued with natural law notions of justice and fairness—shared this highly individualistic vision of independent actors making their own private law.9 More importantly, contemporary doctrinal writers have seen in the general framework which the Code imposes on contracting parties—often called the "ossature" or bone structure on which the parties must

85. Service and construction contracts comprise a single special contract, designated by the Code as a louage d'ouvrage, but called today a contrat d'entreprise. The contrat d'entreprise has become, after the sales contract, the most commonly used special contract. Jérôme Huet, Traité de droit civil. Les principaux contrats spéciaux n° 32002, at 1107-08 (1996). French law distinguishes the contrat d'entreprise from employment contracts (now covered by a separate Labor Code) and from agency contracts (mandat), where the agent represents (and can bind) the principal.

86. Terre, Les obligations, supra note 5, n° 24, at 25.

87. In France, all contracts are bilateral in that they require the assent of both parties. However, a contract need not impose performance obligations on both parties. Thus, if A promises to make a gift to B and B assents, there is an enforceable contract (called a unilateral contract in France). See C. Civ. art. 1103 (Dalloz 1996-97). If B does not assent, A cannot be liable in contract even if B detrimentally relies. This example demonstrates both that consideration is not necessary to enforce a promise and that reliance does not provide a basis for doing so. Of course, other Code articles may protect reliance interests; e.g., Article 1382's fault principle has been used to compensate a party for losses attributable to the other party's fault in contract negotiations.

88. In three specific situations, the Code provides a rescissionary remedy for lésion; i.e., a gross disproportion between the performances required of the parties. See Nicholas, supra note 5, at 138. The most significant provision covers land sales and protects only the seller. C. Civ. art. 1674 (Dalloz 1996-97). The Code explicitly provides that lésion does not invalidate contracts in other situations. Id. at art. 1118.

build their contract—the means for courts to assure that the particular interests of the contracting parties are equitably reconciled and the general interests adequately safeguarded. For these writers, the most prominent features in the Code’s framework are the requirements that a contract have a definite subject matter (objet) and a licit cause. These general provisions allow courts to introduce external norms into the world of contract, thus tempering the private parties’ lawmaking powers. Not surprisingly, given the demise of the rugged individualism associated with nineteenth-century liberalism, late twentieth-century judges have proved more willing to do so than their nineteenth-century counterparts. In intervening in the formerly more private world of contract, the judges have no doubt been encouraged by the legislature’s example.

Article 1129(1) performed this framework function prior to the 1970s. For example, if, unbeknownst to the parties, the subject matter of a contract did not exist at contract formation, or a party’s performance was impossible, the courts treated the contract as null. Similarly, certain subject matters (e.g., the human body) could not become the objet of a contractual obligation. On the other hand, Article 1129’s role was quite modest in assuring the definiteness of a contract’s subject matter. Two reasons explain this limited role. First, there was the apparent relationship between Article 1591 on certainty of price and Article 1129. Was not the former a more demanding special rule applicable only to sales contracts? One would not expect the general rule applicable to all contracts to be as demanding. In addition, the wording of the two articles supported this approach. Article 1591 requires the parties to “fix and state” the price, while Article 1129 only requires that the contract specify the “kind” of performance due; with respect to the amount or quantity of the performance, it is sufficient that it is somehow “determinable.” The case law developed these distinctions. For certain special contracts (e.g., agency contracts) and for service and construction contracts, the courts explicitly recognized that the parties could leave open the price term. If the parties were subsequently unable to agree on a price,
the courts would determine a reasonable price for them.  

Certainty of price thus became a special rule applicable only to sales contracts.

The second explanation for Article 1129’s limited role in requiring definiteness derives from the willingness of the Code’s drafters to write a contract for the parties. In other words, many Code articles (especially those applicable to special contracts) are suppletive in nature; i.e., they serve as gap fillers if the parties do not explicitly override them by agreement. This Code feature makes contract drafting relatively straightforward, if not easy, in France. The Code itself says nothing about offer and acceptance or the mechanics of contract formation, but the case law is clear that contract formation occurs when the parties agree on the essential terms, unless the party who denies there is a contract establishes that the parties did not intend to be bound until there was agreement on a nonessential term. For example, for a sales contract, the essential terms—the only terms on which the parties must agree for there to be a contract—are the thing sold and the price. For other contracts, there is more uncertainty but surprisingly little litigation over what terms are essential. In practice, if the parties intend to be bound (a factual matter left entirely to the trial judges), the courts seem quite willing to fill any gaps in their agreement with suppletive terms derived from the Code, common usage, or good morals. Indeed, the traditional French approach resembles in a number of ways that of the Uniform Commercial Code. Code provisions are largely suppletive (i.e., they apply unless the parties otherwise agree), and a contract does not fail for indefiniteness if the parties intend to be bound and there is a reasonably certain basis for giving an appropriate remedy.

98. Huet, supra note 85, n° 31256, at 1059-60 (agency contracts or mandat) and nn° 32191, at 1184-86 (service and construction contracts, or contrats d’entreprise). For agency contracts, the courts also revise unreasonable price terms. Id. n° 31257, at 1060-61; Cass. civ., Jan. 29, 1867, D.P. 1867, 1, 53, S. 1867, 1, 245 (reprinted with accompanying commentary in Terré and Leguette, supra note 62, at 783-861). For service and construction contracts, commentators justified these special rules—which seemed to ignore the word "price" found in Article 1710 (see supra text at note 85)—by invoking the difficulty of determining the price before performance of the work and the practice of tradespeople billing clients for services performed. Huet, supra note 85, nn° 32191-92, at 1184-85. For agency contracts, the commentators also invoked the traditionally gratuitous nature of the contract and a desire to protect clients from agents who were professionals. Terré and Leguette, supra note 62, at 785-86.

99. René David has emphasized this feature of the Code and suggested that statute drafters in common law jurisdictions might follow the Code’s example. David, supra note 10, at 83-92. The drafters of the Uniform Commercial Code, perhaps influenced by Continental Codes, included many suppletive provisions in the Code. These provisions apply unless the parties otherwise agree. See, e.g., U.C.C. § 2-308 (1997) (delivery terms).


101. Id.


B. Revival of Article 1591 in the 1970s

The relative calm surrounding Article 1591 abruptly ended on April 27, 1971 when the Court of Cassation decided nineteen companion cases colloquially referred to as the *Pompistes de marque* decisions. These cases pitted the leading international oil companies against their dealers; i.e., the "pompistes de marque" who operated service stations selling gasoline under a company's trademark. In these cases, the Court nullified, for uncertainty of price under Article 1591, the standard long-term distribution contract utilized by the oil companies. That contract bound dealers to supply themselves with gasoline from a single company; in return for such exclusivity, the company provided its dealers with loans of materials and/or money and refrained from establishing competing dealers within agreed territorial limits.

The distribution contracts before the Court contained no express term governing the price which the dealer would pay for the company's gasoline because at the time of contract formation the government regulated both the wholesale and retail price of gasoline. That mechanism for determining the price failed in 1966 when the government modified its regulation to control only the pump price. When the oil companies responded by determining the wholesale price, numerous dealers sought to escape their contracts, claiming that the contracts were sales contracts and seeking judicial nullification for uncertainty of price. The Court of Cassation obliged them in the nineteen decisions rendered on April 17, 1971.

The *Pompistes de marque* decisions initiated what one critic has called a judicial hunt for contracts to nullify for uncertainty of price. For nearly


105. The Code does not recognize the distribution contract (contrat de concession) as a special contract. Rather, it is one of many "named" contracts developed by practitioners exercising the parties' right under the Code to fashion their own contracts. See supra text accompanying notes 83-84. Thus, it is subject only to the general provisions of the Code, unless the courts chose to categorize it as one of the recognized special contracts; e.g., a sales contract.

European Community competition law now regulates distribution networks. For a discussion of the applicable Commission regulations, see Stephen Weatherill & Paul Beaumont, EC Law 635-38 (1993) and François Collart Dutilleul & Philippe Delebecque, Contrats civils et commerciaux nn° 934-49, at 688-702 (1992). A leading French commentator has expressed "astonishment" that an anonymous bureaucracy in Brussels, under the pretext of protecting competition within the Community, has been able to regulate a category of contracts which the national Parliament has left unregulated, despite pressure to intervene. Alain Sayag, The Distribution of Cars, in Anglo-French Comparisons, supra note 89, at 336. The Commission regulations do not affect the price term of distribution contracts but restrict the territorial protection the supplier may provide the dealer (parallel imports must not be cut off) and guarantee the dealer a minimum contract term.

106. The trial courts had found that the parties intended that the oil companies would charge the dealers as much as the government regulation allowed.

twenty-five years, until the full Court of Cassation intervened to halt the venture on December 1, 1995, the courts nullified long-term distribution contracts, as well as analogous franchise and supply contracts, that did not contain a "serious, precise, and objective" price term applicable to purchases made by the dealer or franchisee under the contract. This adventure in judicial lawmaking produced an abundance of litigation and an avalanche of scholarly criticism. According to the critics, the Court's case law imposed an unrealistic demand on the contracting parties. Long-term contractual arrangements for distributing goods are necessarily incomplete, especially with respect to the price the distributor must pay; using a third person price-setter is normally too time-consuming, while tying price to some objective index is often too risky. In practice, suppliers usually complete the agreement by themselves, setting the price at the time of delivery. Given these economic realities, it is unsurprising that the Court's new case law did not much change commercial practice. Distribution contracts with open price terms, or price terms referring to the

108. Both French law and European Community law distinguish between distribution and franchise contracts. The distinctive feature of a franchise contract is the franchisee's acquisition of know-how or of industrial or intellectual property; unlike a dealer under a distribution contract, the franchisee does not necessarily resell goods purchased under the contract. Under French law, both distribution and franchise contracts afford the dealer or franchisee some territorial protection against competition. On the other hand, if a supplier does not restrict itself from dealing with other persons within an agreed territory, the contract binding a retail outlet to that supplier is not a distribution or franchise contract, but rather an exclusive supply contract. For these distinctions, see Dutilleul and Delebecque, supra note 105, at nn' 924-33, 936, at 678-87, 689-90. Community law regulates both exclusive supply and franchise contracts in the same fashion it does distribution contracts. See the authorities cited supra in note 105.

French law does not treat any of these contracts as requirements contracts; i.e., the party in the dealer's position, unless obligated to purchase a quota from the supplier, is only obligated to refrain from purchasing from other suppliers. Requirements contracts are largely unknown in France because the buyer's obligation to buy is null as subject to a potestative condition. Nicholas, supra note 5, at 168.

109. This standard for certainty of price, formulated subsequent to the Pompistes de marque decisions, appears in a great many of the Court of Cassation's opinions from the late 1970s and 1980s. See Tallon, supra note 78, at 64 and Guillaume Tell decision infra at note 122. Under this formulation, the sales price need only be determinable, but its determination cannot depend on subjective factors such as the parties subsequently agreeing on the price or on one party setting the price.

110. Comparativists have noted the high rate of commercial litigation in France. This phenomenon is attributable, at least in part, to the low cost of litigating and to the litigants' ready access, at the trial level at least, to commercial courts composed of nonlawyers. See Donald Harris & Denis Tallon, Conclusions, in Anglo-French Comparisons, supra note 89, at 392-93.

111. Three articles appearing shortly before the full Court ended the hunt for nullities summarize well the difficulties caused by the Court's approach. See Louis Vogel, Plaidoyer pour un revirement: contre l'obligation de détermination du prix dans les contrats de distribution, D. 1995, Chr. 155 [hereinafter Vogel, Plaidoyer]; Laurent Aynès, Indétermination du prix dans les contrats de distribution: comment sortir de l'impasse?, D. 1993, Chr. 25 [hereinafter Aynès, Indetermination du prix]; and Didier Ferrier, La détermination du prix dans les contrats stipulant une obligation d'approvisionnement exclusif, D. 1991, Chr. 237 [hereinafter Ferrier, La détermination].
supplier's catalogue price, remained prevalent despite their invalidity under the *Pompistes de marque* cases.\textsuperscript{112} This situation produced injustices when a dealer invoked the contract's nullity, not because the dealer was unhappy with the supplier's price, but because the dealer wished to avoid damages for its own breach or to escape, often subsequent to the relationship's termination, a noncompetition or other accessory clause.

At first glance, the unfortunate result in the *Pompistes de marque* cases appears attributable to the Code's obsolete article on certainty of price. No doubt the *Pompistes de marque* facts reflect an aspect of modern life not foreseen by the drafters of the 1804 Code: the mass production and distribution of consumer goods. To market their goods, suppliers of gasoline, automobiles, appliances, and (more recently) fast foods have developed networks of dealers for selling their products to the consuming public. By the late 1960s, the distribution mechanisms in place in France resembled those found elsewhere in the industrialized world.\textsuperscript{113} Suppliers (usually the manufacturer) chose to sell their products through recognized distributors, bound to the supplier through long-term contractual arrangements, rather than through their own employees (vertical integration) or through independent retail outlets.\textsuperscript{114} To accomplish this goal, suppliers and their lawyers developed standardized contracts which the suppliers imposed on their dealers.\textsuperscript{115} As was the case with the major oil companies, the supplier usually provided some monetary or material assistance and territorial protection to the dealer; in return, the supplier expected the dealer to refrain from handling the goods of other suppliers. The distribution contracts which resulted did not appear to match any of the special contracts provided for in the Code, but were examples of the parties (or at least the dominant party) fashioning their own contracts to meet commercial needs.

\textsuperscript{112} Aynès, Indétermination du prix, *supra* note 111, at 25 (contracting practices unaffected by Court's caselaw) and Vogel, Plaidoyer, *supra* note 111, at 155 (impossible to impose on practice a rule which the latter does not respect).

\textsuperscript{113} On world-wide similarities in distribution methods, see Vogel, Plaidoyer, *supra* note 111, at 155-56. \textit{See also} Donald Harris & Denis Talon, \textit{Conclusions, The Distribution of Cars: A Complex Contractual Technique, in Anglo-French Comparisons, supra* note 89, at 370-71 (study of English and French distribution contracts reveals contract terms not very different).

This phenomenon appears to have arrived later in France than in other Western countries, a delay perhaps attributable to the hard times and devastation caused by two World Wars. Prior to the *Pompistes de marque* cases, the only distribution or similar contracts prompting significant litigation were those binding brasseries to the major brewers of beer. \textit{See Cass. req., Feb. 5, 1934, Gaz. Pal. 1934, 2, 331 (discussed infra} note 119).

\textsuperscript{114} For a description of the contractual arrangements that had become prevalent by the 1960s, see René Rodière & Claude Champaud, \textit{A propos des "pompistes de marque": Les contrats de distribution intégrée et la marge commerciale du distributeur}, J.C.P. 1966, 1, 1988; Paul Didier, \textit{A propos du contrat de concession: La station service}, D. 1966, Chr. 55 and J.-M. Mousseron & A. Seube, \textit{A propos des contrats d'assistance et fourniture}, D. 1973, Chr. 197.

\textsuperscript{115} On distribution contracts as contracts of adhesion, see François Xavier Testu, \textit{Le juge et le contrat d'adhésion}, J.C.P. 1993, 1, 3673, at 201.
French distribution contracts, however, have one very distinctive feature. For the French practitioner, the distribution contract is only a “framework” contract (contrat cadre) for the “application” contracts (contrats d’application) which follow. Thus, the dealer’s purchasing of goods from the supplier is not performance under the distribution or framework contract but the formation of a separate contract. Distinguishing in this fashion between framework and application contracts does not appear to affect contract drafting; the parties sign a single document drafted by the supplier. Rather, it provides a method for analyzing the contractual relationship between the parties—a method which the parties hoped would convince the courts to enforce distribution contracts. The contract’s original proponents acknowledged that distribution contracts might disconcert jurists “accustomed to traditional contract concepts derived from Roman law,” but argued that those concepts had been created for situations “which bore no relation to the economic realities of the modern world.” Those realities required “an updating of one’s baggage of legal tools.” The framework contract provided such a mechanism.

The concern raised by distribution contracts was one of indefiniteness. The contracts obviously contemplated that the dealer would purchase goods for resale, but did not specify either quantity or price. How could such a contract satisfy the Code’s general rule on definiteness (Article 1129) or its special rule, applicable to sales contracts, on certainty of price (Article 1591)? The response proffered by the suppliers was to analyze separately the framework contract and the application contracts. The former did not appear to be a sales contract (there was no transfer of property). It also appeared to be sufficiently definite; i.e., the dealer’s promise of exclusivity in return for material assistance and territorial protection. The application contracts were most likely sales contracts, but they became sufficiently definite when the parties agreed on the quantity and price; i.e., when the dealer accepted the supplier’s price for the order. The dealer was likely to do so because the dealer’s only alternative was to terminate the framework contract, thus allowing the supplier to recoup some or all of its material aid. If the supplier did not wish to rely on the dealer’s acquiescence, it could seek to assure the validity of the sales contracts by providing in the framework contract that the dealer would pay the market price or even the supplier’s posted price for goods subsequently ordered. Case law from the 1930s involving distribution contracts for beer had treated those price terms as satisfying Article 1591.

117. Rodière & Champaud, supra note 114, at para. 1.
118. Id.
119. Cass. req., Feb. 5, 1934, 1934 Gaz. Pal., 2, 331; Cass. com., Feb. 17, 1931, D.P. 1931, 1, 41, note Pierre Voirin. Both cases treated market price as an enforceable price term. In the 1934 case, the dealer had agreed to pay the price the brewery was charging its other clients for beer at the time of the dealer’s order. In upholding that price term under Article 1591, the Court reasoned that
The suppliers' strategy received a major rebuff in the *Pompistes de marque* decisions. In those cases the Court of Cassation made no mention of the distinction between framework and application contracts but treated the oil companies' distribution contracts as sales contracts which failed for uncertainty of price. That rebuff, however, did not appear to be definitive for at least two reasons. First, the principal basis for the decisions appeared to be that the mechanism selected by the parties for setting the price had failed. The parties had relied on a third person—the government—to set the price; when the government ceased to do so, the contracts became void. The courts could not impose on the parties a substitute price term if they failed to agree on price. Thus, the Court of Cassation did not resolve in the *Pompistes de marque* decisions the validity of allowing the supplier to set the price.  

Second, the Court did not explain why distribution contracts were sales contracts. Just one year previously, the Court had qualified a distribution contract for beer as an exclusive supply contract and not a sales contract. In addition, the Court's categorizing distribution contracts as sales contracts seemed inconsistent with the parties' right to fashion their own contracts. According to this line of reasoning, parties need not agree to a sale, but may form an unnamed contract subject only to the Code's "general" rules.

**C. Revival of Article 1129(1) in the 1970s**

The definitive rebuff to distribution contracts with incomplete price terms came six years later in 1978. Significantly, the Court of Cassation chose Article 1129(1) to administer the coup de grace, thus recognizing that distribution contracts were not sales contracts. The occasion arose in three companion cases involving distribution contracts between brewers and their brasseries. In one of the three cases, the Brasserie Guillaume Tell had agreed to purchase beer exclusively from a particular brewery for a period of five years in return for various financial advantages. Unlike the distribution contracts in the *Pompistes de marque* cases, the standardized contract in the *Guillaume Tell* case contained an express price term. That term required the brewery to deliver beer "at prices generally observed for goods of the same quality at the location of the brasserie." No dispute arose over price, but the brasserie invoked the contract's nullity for uncertainty of price when the brewery sought to enforce the contract's penalty clause for the brasserie's violation of the exclusivity provision. The trial

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the price was determinable because it was tied to the market and did not depend on the will of either party. While the Court's reasoning is not crystal clear, the Court's point appeared to be that competitive conditions prevented the brewery from arbitrarily setting the price for its clients.

120. For a forceful argument to this effect, see Jacques Ghestin, *L'indétermination du prix de vente et la condition potestative*, D. 1973, Chr. 293.


court (a Court of Appeals), applying Article 1591, had found the price sufficiently determinable because the contract referred to market price. The Court of Cassation, on the other hand, applied Article 1129(1) to quash the lower court’s judgment; the Court reasoned that the lower court had not found that the market price at the place of delivery provided an element of reference that was "serious, precise, and objective."

The scholarly reaction to Guillaume Tell and its companion cases was uniformly hostile. The commentators made three basic points. First, they criticized the Court’s interpretation of Article 1129(1) to require certainty of price for contracts that were not sales contracts. As later expressed by the Court of Cassation’s First Advocate General Michel Jéol, “How the devil did that article get drawn from its lethargy to become the general rule for the determination of the price in contracts of long duration?” That question is a good one. Article 1129 requires definiteness with respect to “things” and, according to the critics, “price” is not a thing. With respect to price, Article 1591 states a special rule for sales contracts; that rule may apply elsewhere by analogy, but it cannot become the general rule for all contracts under Article 1129(1).

Second, the commentators criticized the Court’s seeming rejection of market price as a valid price term. They understood the Court’s formula for a valid price term ("serious, precise, and objective") to require something more than a reference to prices generally charged in the area or to the price charged by a particular supplier to its clients generally. What that something was remained unclear, but there was a general consensus that under the Court’s new rule market price was no longer sufficiently definite unless there were enough transactions on the market to produce a quoted price. However, any such limitation on the use of market price as a price term was unnecessary because in most industries competitive conditions prevented suppliers from arbitrarily setting prices. Perhaps a supplier could get away with it for a while, but if one supplier consistently charged more than did competing suppliers, the offending supplier would not retain for long a stable network of dealers. Anticompetition laws also protected dealers by prohibiting suppliers from price discrimination between their customers. Thus, the Court should have treated as sufficiently “serious, precise, and objective” those prices generally charged at the place of delivery or even the price charged by a particular supplier generally to its clients.


126. The critics drew textual support from Article 1589(1) of the Code which similarly distinguishes between "things" and "price." It reads: "The promise of a sale is the equivalent of a sale when there is reciprocal consent as to the thing and as to the price." (emphasis added). Translated by Crabb, supra note 1.

127. See Frison-Roche, supra note 96, at 283.
Third, the commentators emphasized the devastating practical consequences of the Court's decisions. Not only did the trilogy of decisions invalidate most long-term distribution contracts in France, but they offered the parties no ready mechanism for curing the problem. Organized markets with price quotes often did not exist, and the use of third persons to resolve disagreements over price was usually too cumbersome.\textsuperscript{128}

The unfortunate result in \textit{Guillaume Tell} and its companion cases could no longer be blamed on an obsolete statutory text, given the Court's shift from Article 1591 to Article 1129(1) as the basis for decision. Indeed, the Court's critics believed that the real basis for the Court's new case law—both the \textit{Pompistes de marque} and \textit{Guillaume Tell} decisions—was a desire to protect the weaker party (the dealer) in a contract of adhesion. According to one commentator, the cases reflected a visceral judicial hostility to exclusive supply provisions.\textsuperscript{129} The Court's concern was to protect the dealer, tied by contract to a particular supplier, from unfair prices arbitrarily imposed by the supplier. To put that argument in American terms, a price term in a standardized contract of adhesion is unconscionable if it allows the dominant party (here the supplier) to arbitrarily determine the other party's performance (here the price the dealer must pay). To restate that argument in French terms, the Court was using Article 1129(1)—part of the Code's general framework or "ossature"—to assure that contracts equitably reconciled the interests of the parties.\textsuperscript{130}

This reasoning did not convince the Court's critics. They responded in two ways to the Court's concern about protecting the weaker party. First, the Court was battling a nonproblem because there was no evidence that suppliers had abused their power to set price.\textsuperscript{131} Second, to the extent there was abuse, nullifying the distribution contract was overkill. Rather than to allow dealers—including dealers in breach—to escape their contractual obligations, the courts should sanction, when it occurs, abusive price-setting by suppliers.\textsuperscript{132} The critics might have added that the Court's approach was not easy to reconcile with the unconscionability defense enacted by the legislature shortly before the \textit{Guillaume Tell} decision. Unlike the Court, the legislature explicitly limited the defense to consumers or other nonprofessionals who contract with professionals.\textsuperscript{133}

\textsuperscript{128} Another possible mechanism is for the distribution contract to require the supplier to meet a lower offer received by the dealer. For the Court of Cassation's approval of that mechanism, subject to onerous conditions, see Cass. com., June 28, 1988, D. 1989, Jur. 121, note Philippe Malaurie.

\textsuperscript{129} Vogel, Plaidoyer, \textit{supra} note 111, at 159 (right column).

\textsuperscript{130} See \textit{supra} text accompanying note 90.

\textsuperscript{131} Aynès, Indétermination du prix, \textit{supra} note 111, at 26. As explained in the prior paragraph, competitive conditions and competition law restrict the supplier's options.

\textsuperscript{132} Vogel, Plaidoyer, \textit{supra} note 111, at 162.

\textsuperscript{133} The original Civil Code contained no general concept of unconscionability. \textit{See supra} note 88 for discussion of the related, but narrow, doctrine of \textit{lésion}. In 1978, the legislature authorized a Commission to compile a list of unconscionable terms (\textit{clauses abusives}) that would be unenforce-
The Court's opinions in the *Pompistes de marque* and subsequent cases do not mention any concern about protecting the weak. Rather, they apply in syllogistic fashion the rule on certainty of price (the price term must be "serious, precise, and objective") which the Court had extracted first from Article 1591 and subsequently from Article 1129(1). This omission is unsurprising. French opinion writing style leaves no place for the expression of reasons, much less of policy considerations. Opinions of the Court of Cassation, which rarely exceed a page and never contain more than a single sentence, deliberately conceal any judicial lawmaking. While the opinions state and apply what the Court believes to be the controlling rule, they never explain the basis for the rule. In other words, there is no reasoned opinion explaining how a particular Code article or how policy considerations support the Court's rule.\(^\text{134}\)

The policy basis for the *Pompistes de marque* case law is nevertheless reasonably clear. The Court's First Advocate General Michel Jéol was quite candid about it in the conclusions he submitted to the full Court in the four cases decided on December 1, 1995, which put an end to the Court's invalidating contracts for uncertainty of price.\(^\text{135}\) He depicted the *Pompistes de marque* and subsequent cases as a "calculated venture" in judicial lawmaking. According to Jéol, the Court had responded to what it perceived to be an imperative social need; i.e., "protecting the weak against the strong." The Court's response did not have a firm textual basis, but the Court "had not hesitated to apply the Code beyond, and even outside of, what the legislature had intended." In a pronounced understatement, Jéol recognized that the Court's work product had generated less enthusiasm than some of its earlier, more fortunate efforts in

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\(^{134}\) The 1978 law on unconscionability only protects consumers or other nonprofessionals when contracting with professionals; it does not apply to distribution contracts between dealers and their suppliers. For the text of the 1978 law, as amended in 1995 to implement the European Union Directive on Consumer Protection, see C. consom. art. 132-1 reprinted in Dalloz *Code civil* immediately following Article 1134. The present text, unlike the 1978 law, does not require an abuse of bargaining power; it is sufficient that there is a "significant disequilibrium" between the performance obligations of the parties.

\(^{135}\) See Wells, *supra* note 39, at 92.
lawmaking. He, therefore, urged the Court to shift course by protecting the weaker party at the performance stage rather than at contract formation. As we shall see, this new approach, adopted by the Court, protects the dealer from abusive price-setting by the supplier, but otherwise enforces distribution contracts allowing suppliers to determine the price.

Jéol’s conclusions depict a Court engaged in what François Gény would have called “free scientific research.”

Rather than focusing on grammatical or textual considerations, the Court is seeking to formulate as objectively as possible the best rule to meet contemporary social needs. Indeed, the conclusions of the Court’s advocate generals, as well as the reports of its reporting judges, reveal an unofficial discourse which contrasts sharply with the official discourse of the Court’s syllogistic opinions. As exemplified by Jéol’s conclusions, the former discourse, unlike the text-based official discourse, emphasizes policy considerations extrinsic to the Code’s text. Unfortunately, the unofficial discourse is largely inaccessible even to interested scholars; each year the private reporters publish only a handful of advocate generals’ conclusions. The unofficial discourse's influence (and even its content) therefore often remain a matter of surmise.

There is little doubt, however, that Jéol correctly describes what motivated the Court in its Pompistes de marque case law. Additional evidence is available in a study prepared for the Court of Cassation's official Annual Report by Judge Joëlle Fossereau, who had served as the reporting judge in the four cases decided by the full Court on December 1, 1995. In that study, she described the Pompistes de marque decisions and their aftermath as "twenty years of case law struggling blow by blow to restore balance to the contracting parties, all done without a principle or general text serving as a base." According to Judge

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136. The one specific example of judicial lawmaking cited by Jéol is the Court of Cassation's creative use of Article 1384(1) to respond to the need to compensate persons injured by motor vehicles. For that more successful venture in judicial lawmaking, which culminated in the full Court's well-known decision in Jandheur, Ch. réunies, Feb. 13, 1930, D.P. 1930, 1, 57, note Georges Ripert, S. 1930, 1, 128, note Paul Esmein (reproduced in Terré & Leguette, supra note 62, at 519-25), see Tomlinson, supra note 46, at 1337-51.

137. See supra text accompanying notes 15, 54.

138. The reporting judge reviews the record, researches the legal issues, and suggests in a written report how the Court should resolve the case. Unlike the advocate general, the reporting judge takes part in the Court’s deliberations and voting. Lasser, supra note 135, at 1356-57. Reports of the reporting judge occasionally appear in the Dalloz and Juris-Classeur Périodique reports.

139. For a remarkable recent study on the unofficial discourse of judicial decisionmaking in France, see Lasser, supra note 135. Lasser believes that the bifurcation of judicial discourse serves to mediate between France’s historical distrust of the judiciary and the need for socially responsive lawmaking. Id. at 1403.

140. Id. at 1328.

141. Id. at 1357. Lasser succeeded in extracting from the Court of Cassation a good number of advocate generals’ conclusions. He was less successful with the reporting judges’ reports, which normally remain the judges’ own property.

142. Joëlle Fossereau, L’indétermination du prix dans les contrats, in Rapport de la Cour de
Fossereau, long-term distribution contracts, especially those tying a dealer to a particular supplier, raise issues not addressed by the Code. Thus, to protect the weaker party (presumably the dealer), the Court had to construct a set of judge-made rules. For Judge Fossereau, the full Court's shift to police price-setting at the performance stage was a modification, but not a rejection, of that approach.

D. Retreat from Article 1129(1) in the 1980s

*Guillaume Tell* and its companion cases demonstrate the problems generated when a rule applied by the Court of Cassation does not reveal the real basis for the Court's decisions. The Court's rule—an interpretation of Article 1129(1)—appeared to be that the price term in all contracts had to be "serious, precise, and objective." The unexpressed basis for the rule was a desire to protect the weaker party. Even assuming that some suppliers had abused their price-setting powers, the Court's rule was far broader than needed to prevent the perceived abuse. That difficulty prompted a disorganized retreat by the Court. This retreat demonstrated that the Court's reliance on Article 1129(1) to require certainty of price was unworkable. In 1995, the Court finally came to its senses and shifted articles to require, under Article 1134(3), good faith price-setting by the dominant party.

The Court's 1991 decision in *Baumgartner* highlighted the disorderliness of the retreat. As noted by a leading commentator, the Court's decision in that case attracted considerable attention, very little of it favorable. The distribution contract in *Baumgartner* did not restrict the dealer to a single supplier but required the dealer to market the supplier's products according to the latter's specifications. It also required the dealer to generate for the supplier a certain amount of revenue, while limiting the sales which the supplier could make to others. When the supplier breached the latter obligation, the dealer sued for damages. The supplier then invoked the contract's nullity for uncertainty of price; the contract itself said nothing on the price which the dealer would pay for the supplier's goods.

Cassation 1995, at 111, 111.

143. The Court did not have before it any empirical evidence of abuse. In few, if any, of the many cases decided by the Court did the dealer claim that the supplier had actually abused its power to set prices. Aynès, Indétermination du prix, supra note 111, at 26. This disinterest in empirical evidence reappears when the Court shifted course in 1995. At that time, the Court did not have before it any evidence of "the devastating effects" attributed to its *Pompistes de marque* case law by Judge Fossereau's study. Christophe Jamin, Réseaux intégrés de distribution: De l'abus dans la détermination du prix au contrôle des pratiques abusives, J.C.P. 1996, 1, 3959, at 343.


145. Frison-Roche, supra note 96, at 280. In an earlier, comparable case, the Court had reached a similar result, but that case had not generated the same "grand bruit" as *Baumgartner* did. See Cass. com., Nov. 9, 1987, D. 1989, Jur. 35, note Philippe Malaurie, J.C.P. 1989, II, 21186, note Georges Virassamy (Société Graphic).
The common-law lawyer would readily recognize that *Baumgartner* is distinguishable from the *Pompistes de marque* and *Guillaume Tell* cases. In those cases, the weaker party (the dealer) had invoked the contract's nullity, while here it was the supplier that sought to escape its contractual obligations. Furthermore, the contract did not appear to be a one-sided contract of adhesion because neither party was tied exclusively to the other. French jurists also sensed that the *Baumgartner* facts presented a different case, but there was no easy way for the Court of Cassation to take that factor into account. French judicial opinions do not cite case authority, and the prevailing judicial style provides no mechanism for distinguishing a prior case on the facts. Rather, the Court of Cassation's responsibility is to assure that the lower courts apply the correct legal rule. In the *Baumgartner* case, the lower court (a Court of Appeals) had faithfully applied the interpretation given Article 1129(1) by *Guillaume Tell* to invalidate the contract for uncertainty of price. That result appeared to be correct because the rule formulated by the Court in *Guillaume Tell* was not limited to unconscionable contracts. Furthermore, the Court of Cassation had always treated the nullity for uncertainty of price as an absolute nullity, which either party to the contract could raise, and not a relative nullity, as in the case of fraud or duress, which only the injured party could raise.

The dealer in *Baumgartner* nevertheless convinced the Court of Cassation to quash the lower court's judgment. The Court's technique for doing so was to formulate a new rule invoking the distinction, found in Articles 1136 and 1147 of the Code, between a debtor's obligation to transfer (*donner*) something and her obligation to do or not do something (*faire* or *ne pas faire*). According to the Court of Cassation, the lower court erred in invalidating the distribution contract because the parties' obligations under the contract were of the latter variety; i.e., to conduct their business in certain ways and to refrain from dealing with certain persons, rather than to transfer something. In *Baumgartner* and a string of cases which followed, the Court applied that distinction to restrict its rule on certainty of price to contracts involving obligations to transfer. In applying this new distinction, the *Baumgartner* Court treated the distribution contract as a framework contract distinct from the subsequent sales contracts, something which the *Pompistes de marque* and *Guillaume Tell* cases had refused to do. As a result, the distribution contract itself escaped nullification because it only included obligations to do or not to do something. While the subsequent

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148. See Cass. com., Jan. 29, 1991, J.C.P. 1991, II, 21751, note Laurent Leveneur (Rodimond); Cass. com., July 2, 1991, D. 1991, Jur. 501, note Philippe Malaure (Facum); and the three cases reported in D. 1993, Jur. 379, note Jacques Ghedin. These casenotes all discuss *Baumgartner*. In these later cases, the Court reformulated the *Baumgartner* rule to inquire whether the parties' obligations under the contract were "essentially" to transfer something or "essentially" to do or not do something.
sales contracts—the application contracts—did impose on the seller an obligation to transfer something, the Court added that the lower court could not invalidate the distribution contract on that basis unless it first determined that the price for the subsequent sales could not be "freely negotiated and accepted" by the parties. Under this reasoning (surely a dictum), it appeared that the distribution contract would still be invalid if the supplier could impose its price on the dealer.

The Court's approach in *Baumgartner* prompts at least three major criticisms. First, the Court's new rule seems bereft of any textual basis. If Article 1129(1) requires certainty of price, that requirement should apply to both varieties of obligations. Thus, the Court's new rule seems policy-driven—a transparent effort by the Court to limit the invalidity of contracts for uncertainty of price to cases—unlike *Baumgartner*—where the weaker party needs protection from the stronger party's imposition of a price. According to the Court's unofficial dialogue, the unconscionability of those contracts was what prompted the Court's much ballyhooed "hunt" for nullities due to uncertainty of price.

Second, the Court's artificial distinction between obligations does not succeed in differentiating those cases where one party needs protection from those where neither party does. What does the obligation to transfer have in common with unconscionable bargains imposed on dependent parties? The answer appears to be that it has nothing in common. As explained by one amazed critic, the notion of an obligation to transfer, distinct from an obligation to do or not do and derived from Roman law, lost its practical significance when the Civil Code, unlike Roman law, adopted a consensualist approach to the transfer of property. Under the Code's approach, property passes from the seller to the buyer by agreement. Thus, the seller's obligation to transfer the property (the paradigmatic obligation to transfer) becomes, at the moment of contract formation, an obligation to deliver the property, which is an obligation to do. As a result, the Code's retention in Articles 1136 and 1147 of the old distinction between obligations to transfer and obligations to do or not do had attracted little attention prior to *Baumgartner*. For nearly two centuries it had "slumbered away" deep in the old treatises, largely ignored by the courts. The Court's effort to revive it in *Baumgartner* appeared artificial and formalistic. Indeed, the criterion for applying it proposed to the Court in *Baumgartner* by the then-Advocate General Michel Jéol struck most commentators as truly ludicrous. According to Jéol, contracts for the distribution of simple products, such as gasoline and beer, imposed obligations to transfer on the supplier, while the distribution of more elaborate products, such as automobiles or appliances, imposed obligations to do something, presumably because the supplier also provided technical assistance. This quaint distinction became the subject of

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149. For a forceful statement of this criticism, see Professor Malaurie's case note to *Facum* in D. 1991, Jur. 501, 502.
151. *Id.* at 67.
152. For Jéol's conclusions in *Baumgartner*, see D. 1991, Jur. 175.
considerable merriment, the private publishers of the Dalloz reporter going so far as to label it, rather grandiously, as the "New Yalta."\footnote{153}

Third, the \textit{Baumgartner} rule, when it finally reaches the relevant inquiry, asks the lower courts to make a nearly impossible determination. How can the lower courts determine whether the parties, bound under a long-term framework contract, can "freely negotiate and agree" on price? No doubt the Court viewed that inquiry as the basis for distinguishing between cases where the dealer needed protection and cases where the dealer did not need protection. Where the dealer is tied to a particular supplier by an exclusive supply provision, as was the case in the \textit{Pompistes de marque} and \textit{Guillaume Tell} cases, it is very unlikely that the dealer can do anything but accept the supplier's price. On the other hand, where the dealer is free to do business with other suppliers or where the supplier has given the dealer various exclusive rights, as was the case in \textit{Baumgartner} and in the earlier \textit{Société Graphic} case, it is more likely that the dealer can "freely negotiate and agree" on price.\footnote{154} Those paradigmatic cases may explain the Court's \textit{obiter}, but they do not do much to lighten the fact-finding burden imposed on the lower courts.

The \textit{Baumgartner} episode also demonstrates how the abundance of textual rules available to the courts, and awaiting interpretation, encourages judicial lawmakering. The Civil Code is a grab-bag of highly-sophisticated rules applicable, directly or by analogy, to all contracts.\footnote{155} If experience teaches the courts that one rule does not work, then the courts shift gears by applying another, as the Court of Cassation did when it revived the transfer/do-or-not-do distinction to restrict the certainty of price requirement found in Article 1129(1). This proliferation of potentially-applicable rules encourages commercial litigation by supplying parties with numerous bases for attacking contract clauses.\footnote{156} However, it also provides courts with a wide range of tools for responding to new problems. As acknowledged by one commentator, the Code's drafters had not foreseen distribution contracts, but they had the genius to draft the Code's basic texts in terms sufficiently generous that it is possible for the courts to apply those texts to them.\footnote{157} In doing so, if one article does not work, then the courts try another. Old rules never die (i.e., never get formally rejected), but just wither away.

On the negative side, the Court's flexibility in shifting from one rule to another produces a good deal of instability and delay. Take, for example, the \textit{Baumgartner} case itself. The dispute between the parties arose in the late 1970s. The lower courts initially refused to nullify the distribution contract for

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\item[153.] \textit{See} Ferrier, \textit{La détermination du prix}, \textit{supra} note 111, at 237 n.7.
\item[154.] \textit{Id.} at 238.
\item[155.] Donald Harris & Denis Tallon, \textit{Conclusions}, in \textit{Anglo-French Comparisons}, \textit{supra} note 89, at 373.
\item[156.] \textit{Id.} (conclusion drawn by authors from proliferation of rules).
\end{enumerate}
\end{footnotesize}
uncertainty of price, finding that it was not a sales contract. That result was untenable after the *Guillaume Tell* decision. Unsurprisingly, the Court of Cassation quashed the lower court’s judgment in an unreported decision of October 5, 1983. On remand, the Court of Appeals faithfully applied the *Guillaume Tell* rule, only to be reversed a second time in 1991. Both times the lower courts appeared to be one step behind the Court of Cassation’s changing case law. Pity the poor litigant whose case is subject to such vissicitudes, all retroactively applied.\(^{158}\)

On the positive side, there was a method to the Court’s seeming madness in *Baumgartner*.\(^{159}\) What the Court was trying to do was to distinguish between those contracts where certainty of price should be required and those contracts where it should not be. To draw that line, the Court placed at opposite ends of the spectrum sales contracts (certainty of price textually required by Article 1591) and service and construction contracts (certainty of price not required under the prevailing interpretation of Article 1710). Plainly, the Court was searching for some formula to distinguish between those two paradigmatic cases. Commentators had found the basis for the traditional interpretation of Article 1710 in the difficulty of ascertaining in advance of performance the appropriate price for services or construction work—a difficulty not present in the traditional, discrete sales contract.\(^{160}\)

Given more time, perhaps the Court could have devised a formula for distinguishing sales-like contracts from service-and-construction-like contracts, applying the certainty-of-price rule only to the former. Charitably interpreted, the distinction framed in *Baumgartner* between obligations-to-transfer and obligations-to-do-or-not-do was a first step in that direction. The problem with this approach, however, is that many modern contracts on the sales end of the spectrum present the same difficulty as do service and construction contracts. Long-term distribution contracts provide a prime example. Those contracts, despite the practitioners’ refinement of the framework contract, really are sales contracts; in addition, it is difficult to ascertain at contract formation the price for goods to be sold over a course of years. The continued popularity of distribution contracts thus presented the courts with a major challenge: what to do with the obsolete rule requiring certainty of price for sales contracts. *Baumgartner* had defused that rule when the sale price was open in the sense that the parties could freely negotiate the price. That resolution was incomplete.

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159. See Jacques Ghestin, Réflexions sur le domaine et le fondement de la nullité pour indétermination du prix, D. 1993, Chr. 251.
because the supplier usually seeks a framework contract which determines the price in cases where the parties can not agree.

E. Shift to Article 1134(3) in the 1990s

The four cases decided by the full Court of Cassation on December 1, 1995 put an end to the adventure in judicial lawmaking initiated nearly twenty-five years previously in the Pompistes de marque cases. One of the four cases (Vassali) involved a five-year franchise contract, while the other three cases involved long-term contracts for leasing and maintaining commercial telephone equipment. In the franchise case, the contract required the franchisee (Vassali) to pay the franchisor’s posted or catalogue price for products purchased on the day of the order. In one of the telephone cases, the contract contained a similar provision allowing the telephone company to determine the price for any modifications to the equipment; in the remaining two cases, the contract was silent on price in one and, in the other, contained an elaborate price term whose validity the parties sharply disputed. In all four cases, the purchasing party was tied to an exclusive supplier; i.e., the franchisee agreed to market only products sold by the franchisor and the telephone subscribers agreed to utilize the telephone company for any modifications to the equipment.

The lower courts had nullified the contracts in the three cases where the contract allowed the supplier to set the price. That result was correct under the prevailing interpretation of Article 1129(1), even though equipment contracts appear to be rather removed from sales contracts. Equipment contracts contain elements of several special contracts recognized by the Code (e.g., sale, agency, deposit, lease-of-things, and service contracts), but the Court’s advocate general believed it preferable to classify them as “unnamed” contracts subject to the general rules found in the Code. Viewed as framework contracts, the equipment contracts before the Court primarily involved obligations to do, rather than to transfer. That fact, however, did not save the framework contracts’ validity. Under the Court’s most recent case law interpreting Article 1129(1), the framework contract was itself invalid if the parties could not “freely debate and accept” the price for the application contracts likely to follow.

161. Both the Daltoz and Juris-Classeur Périodique reports published the full opinions in all four cases. See citations in supra note 6. For a translation of the franchise case (Vassali), see infra Appendix A.

162. See Michel Jéol’s conclusions in D. 1996, Jur. at 13, J.C.P. 1996, II, 22565, at 21. Jéol recognized that many “unnamed” contracts had acquired the names assigned them in practice (e.g., “franchise” contracts or “equipment rental and maintenance” contracts) in the cases before the full Court.

163. Dictum in Baumgartner treated a framework contract as invalid if the parties could not “freely negotiate and agree” on the price for the application contracts. See supra text accompanying note 148. While the Baumgartner Court formulated this requirement only for application contracts involving obligations to transfer (i.e., to sale contracts), commentators observed that, in later cases, the Court applied the freely-negotiated and agreed-upon requirement to all open price terms. See the
the equipment contracts before the Court failed that test because the contract allowed the telephone company to impose its price for equipment modifications sought by the subscriber.

These four cases reached the full Court of Cassation following the First Civil Section's rejection in two cases—both called Alcatel—of the Court's Pompistes de marque case law. In those cases, decided on November 29, 1994, the First Civil Section had enforced equipment rental and maintenance contracts which allowed the supplier to set the price for subsequent modifications. According to the Court, the lower court had erred in nullifying the contract for uncertainty of price because the contract contained a determinable price (i.e., the supplier's quoted price) and because there was no allegation that the supplier had set prices in violation of its obligation to perform in good faith. The Court cited Article 1134(3) as the basis for its rule. As is customary in French judicial opinions, the Alcatel Court did not indicate in any fashion that its new rule was radically inconsistent with the rule on certainty of price applied by the courts for more than two decades.

The First Civil Section's rebellion in Alcatel has a respectable pedigree. In France, stare decisis does not reign; thus, neither the lower courts nor the Court of Cassation cite precedent as a basis of decision. Rather, a court must decide a case by applying to the facts a rule extracted from a Code text. Over time, however, case law rules became well established; the same rule becomes the basis for decision in countless cases, as happened with the rules formulated by the Court of Cassation in the Pompistes de marque, Guillaume Tell, and Baumgartner cases. Nevertheless, these rules do not bind subsequent judges, who remain free to formulate and apply contrary rules. In most cases, and for lower court judges in particular, that liberty of interpretation may be no more than a liberty to decide a case wrongly, and thus to be reversed by the Court of Cassation. But refusal to apply an established rule may also be a matter of principle. If a judge believes that the established rule deserves reconsideration, the judge may prompt that review by refusing to apply it. Thus, the Alcatel Court surely expected that its deliberate rejection of the much-criticized rule on certainty of price would prompt reconsideration of the rule by the Court's other

commentary in Terré & Leguette, supra note 62, at 712. On the invalidity under Baumgartner's progeny of equipment rental and maintenance contracts which allow the supplier to set the price for modifications, see Professor Ghestin's casenote to Cass. le civ., Nov. 29, 1994, J.C.P. 1995, II, 22371, at 36 (Alcatel cases).


165. In one of the two cases, the Court upheld the lower court for refusing to invalidate the contract.

166. Jacques Maury, Observations sur la jurisprudence en tant que source de droit, in 1 Le droit privé français au milieu de XX siècle; Études offertes à Georges Ripert 28, 49 (1950) (liberty "de mal faire").
sections, or intervention by the full Court to resolve the conflict between the sections.\textsuperscript{167} As we have seen, the latter promptly occurred.

The full Court in \textit{Vassali} and its companion cases decided at least three, and probably, four things. First, it held that Article 1129(1) did not require certainty of price.\textsuperscript{168} On this point, the Court followed the conclusions of its First Advocate General Michel Jéol, that the \textit{objet} or subject matter of an obligation did not include its price. That article's definiteness requirement therefore did not apply to price.

Second, the full Court treated as valid contracts containing a price term referring to the supplier's posted price.\textsuperscript{169} This rule resembles the rule formulated by the First Civil Section in \textit{Alcatel}. However, the \textit{Alcatel} Court had treated the seller's posted price as a determinable price satisfying Article 1129, which the Court evidently assumed to require for all contracts what Article 1591 required for sales contracts. The full Court, on the other hand, was silent on what Article 1591 might require.

Third, the full Court held that if the supplier abused the power to set prices under such a clause, the other party could obtain the cancellation of the contract or damages.\textsuperscript{170} The Court cited Articles 1134 and 1135\textsuperscript{171} as the bases for this rule. Interestingly, the full Court's rule, unlike the rule formulated by the \textit{Alcatel} Court, condemns the supplier's "abuse" in setting the price and does not explicitly address the supplier's good or bad faith in performance. This shift from requiring "good faith" in price-setting (the \textit{Alcatel} approach, which used the same term—"good faith"—as does Article 1134(3)) to controlling "abuse" in price-setting appears to be of procedural significance only. As recognized by the commentators, French law treats good faith as a factual matter for the trial courts to resolve; on the other hand, whether there has been an abuse of right is a legal question. The Court of Cassation does not review factual questions; thus,

\begin{enumerate}
\item The Court's Commercial Section had decided most of the Court's cases on certainty of price. The full Court's intervention, even where there is a conflict between sections, is discretionary, the full Court convening either on its own motion or at the request of a party. Principled rebellions by lower courts may also prompt a change of course by the full Court. The most well-known example is \textit{Jandheur}, see supra note 136.
\item The Court applied this rule to uphold the lower court's refusal to invalidate, under Article 1129, the equipment contract with the disputed price term (Société Atlantique). \textit{D.} 1996, \textit{Jur.} at 18, \textit{J.C.P.} 1996, 22565, at 26.
\item For this rule, see the first "whereas" clause in \textit{Vassali} as translated in Appendix A. This rule, as recognized by First Advocate General Jéol, was unnecessary for the disposition of the case and, therefore, \textit{obiter dictum}. Given the absence of any rule of precedent in France, courts do not distinguish between holding and dictum. To the contrary, the Court's choosing to formulate a rule not necessary for the disposition of the case seems to highlight the importance of the rule.
\item C. Civ. art. 1135 states an interpretive rule:
\begin{quote}
Agreements oblige a party, not only as to what is expressly undertaken, but also as to all the consequences which equity, custom, or rules of law give the obligation according to its nature.
\end{quote}
\end{enumerate}
formulating the inquiry in terms of whether the supplier abused its right to set the price serves to allow the Court of Cassation to review the trial court's assessment of the supplier's conduct. Thus, the shift in terminology affects the scope of review but does not change the substantive standard. That standard remains good-faith performance as required by Article 1134(1). 172

Fourth, the full Court held that a contract is valid even if it contains an open price term; i.e., says nothing about price. The Court applied that rule to quash the lower court's nullifying the equipment contract with the open price term (the Cofratel case). However, in Cofratel, the subscriber had breached the framework contract by terminating. In holding the subscriber liable, the Court did not address what happens if the parties subsequently disagree on price. Will the court set a price for them, or do the application contracts fail for lack of agreement? That question remains an open one. 173

The full Court in Vassali and its three companion cases gave no reasons for the Court's four new rules. For the reporting judge, Joëlle Fossereau, the devastating effect of the Court's prior case law on the distribution of goods in France was the primary reason. 174 Responding to that problem, the full Court invoked Article 1134(3) to develop a more workable system for protecting the weaker party to distribution contracts. 175 For First Advocate General Jéol, on the other hand, the primary reason for changing course was the appalling mess generated by the Court's case law in the years since the Pompistes de marque decisions. 176 The Court's ever-changing rules on certainty of price had caused much confusion, produced caustic distinctions, and generated insolvable problems of restitution following the nullification of executed contracts. Therefore, Jéol invited the full Court to make a "clean break" with its past case law on uncertainty of price by eliminating from consideration Article 1129(1) and by relying instead on Article 1134(3). 177

The absence of reasons in the Court's opinions makes it difficult to determine the precise scope of the new rules. Do they apply only to long-term contracts, such as distribution contracts where it is difficult to determine the price

172. See the forceful argument of Professor Ghestin to this effect in his casenote in J.C.P. 1996, II, 22563, at 33. No commentators have contested this reading.
173. Judicial price-setting is permissible for certain special contracts; i.e., for agency contracts and for service and construction contracts. See supra note 98 and accompanying text. For other contracts, the French tradition is resolutely hostile to judicial price-setting. More surprisingly, courts are unwilling to use market price as a gap filler, absent some evidence that the parties intended to rely on the market. For these reasons, a leading commentator argues that the full Court did not validate open price terms. See Professor Ghestin's casenote in J.C.P. 1996, II, 22565, at 28. The majority view is to the contrary. See Terré, Les obligations, supra note 5, n° 279-3, at 235-36.
174. See Fossereau, supra note 142, at 122 (study published in Court of Cassation's Annual Report).
175. Id.
in advance and where an exclusivity provision potentially puts one party at the other’s mercy, or do they apply more generally? In particular, do they apply to contracts for discrete sales of land, securities, or businesses? Those contracts, unlike most framework contracts, remain subject to Article 1591’s specific rule on certainty of price. Of course, a certainty-of-price requirement is “less troublesome,” as even First Advocate General Jéol recognized, for single-shot sales transactions that do not involve successive performances over long periods of time.178

On this question, the reasons given by the full Court’s reporting judge and its first advocate general seem to point in opposite directions. For Judge Fossereau, the primary concern was to protect the weaker party to distribution and similar contracts, while for First Advocate General Jéol the primary concern was to develop a more coherent law of contract. The former concern seems to support a narrow application of the new rules, while the latter concern supports applying them more generally. The language of the opinions also points in both directions. No doubt the earlier Alcatel opinions were considerably clearer. In those cases, the First Civil Section held that the seller’s posted price was a determinable price and that such a price term required a seller to set the price in good faith.179 Given the generality of that rule, there seems to be little question that it applied to all contracts, including sales contracts directly subject to Article 1591. The full Court in Vassali was not as clear. In that case, the Court quashed a lower court’s invalidation of a framework contract containing a similar price term for the application contracts to follow. One might, therefore, limit to those facts the validity of allowing one party to set the price. However, the Vassali Court’s lead “whereas” clause (see Appendix A) does not reiterate, as do the opening “whereas” clauses in the equipment contract cases,180 the distinction between framework and application contracts. The wording of the Vassali opinion, therefore, suggests a general rule allowing one party to set the price, if done in good faith. On the other hand, the Court’s validation of open price terms (rule four) appears limited to framework contracts.181

179. See citations in supra note 164.
180. The opening “whereas” clause in Cofratel reads:
   Whereas when an agreement provides for the formation of subsequent contracts, the uncertainty of price for those contracts in the initial agreement does not affect, in the absence of particular legal provisions, the validity of the latter contracts, abuse in the setting of price giving rise to cancellation or compensation.
Read broadly or narrowly, the full Court's decisions in *Vassali* and its companion cases signal a transformation in French contract law. To understand that point, it is necessary to return to the *Pompistes de marque* cases. The result in those cases cannot be fully explained by the Court's desire to protect the weaker party. As noted immediately after the decisions by Professor Ghestin, one of France's leading contract scholars, the broader problem posed by the cases was that of the incomplete contract; i.e., the contract which allowed one of the parties to determine its own or the other party's performance obligation.182

American law faced a similar problem at the end of the last century. At that time, courts were confronted with new business methods for marketing goods; these methods included output and requirements contracts as well as various forms of exclusive dealerships. These new fangled contracts sought to establish an ongoing, long-term relationship between the parties. By traditional common law standards, they were incomplete (too indefinite) because they left open for future determination (often by one of the parties) the full extent of each party's performance obligations. The parties nevertheless intended to be bound. The acceptance of these contracts by the courts—Cardozo's well-known opinion in *Wood v. Lucy, Lady Duff Gordon* culminated that process—transformed American contract law.183 The hallmark of that transformation was the newly-recognized obligation of good faith performance.184 Courts employed that requirement—often interpreted objectively—to find performance obligations enforceable. At the same time, courts interpreted satisfaction clauses to require the party whose satisfaction was required to act in good faith.185 The good faith requirement not only protected the other party from arbitrariness, but permitted enforcement of the contract.

The *Pompistes de marque* cases and their progeny suggest that French law had not yet undergone a similar transformation. The courts invalidated as incomplete those contracts which allowed one party to determine a performance obligation. By this time, American courts were utilizing the good faith requirement to validate most contracts with similar provisions. Under this approach, a party's discretion to determine a performance obligation did not expose the other party to arbitrariness because the exercise of discretion had to be in good faith. Thus, courts would uphold the contract, but inquire, at the

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184. *Id.* at 419.
performance stage, whether the party exercising discretion had done so in good faith. According to Professors Burton and Anderson, the leading scholars in the field, courts treat as bad faith performance, and, therefore, as breach, efforts by a party with discretion to define performance obligations to recapture opportunities foregone at contract formation. This recapture analysis of bad faith remains controversial, but Burton and Anderson appear to be correct in recognizing that the principal role of the good faith performance doctrine is to allow judicial control over exercises of discretion in performing.

The new life breathed into Article 1134(3) by the full Court of Cassation indicates that French law is now undergoing a belated transformation similar to that experienced by American law at the beginning of the century. Certainly Vassali and its companion cases shift the courts’ role from policing contract formation under an unconscionability-type approach to controlling a party’s discretion at the performance stage. In other areas, French courts have invoked the concept of good faith to impose obligations on the parties. Indeed, the recent flowering of good faith requirements in French law has primarily occurred through the courts implying new obligations, both at the stages of contract formation and at contract performance. These obligations are policy-based and, at the performance stage, require a party to inform, advise, and cooperate with the other party in achieving the expected benefits of the contract. This new body of law treats the duty to perform in good faith as the basis for implying a contract term, an approach strikingly similar to that of American law.

French law is less clear on what constitutes good faith in price-setting. In its 1994 Alcatel opinions, the Court of Cassation treated as bad faith a supplier’s abuse of an exclusivity provision to raise its prices to obtain an “illegitimate profit.” That dictum did not reappear the following year when the full Court decided Vassali and its companion cases; those four opinions supply

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186. Burton and Anderson, supra note 185, § 1.2.1, at 4.

187. Professor Summers has argued the good-faith requirement lacks any general positive meaning and functions primarily as an excluder. Robert S. Summers, “Good Faith” in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195 (1968). His approach, like the French doctrine of abuse of rights, emphasizes a party’s motivation, especially a desire to injure, in determining whether a party performed in bad faith. The Restatement (Second) of Contracts has adopted the “excluder” analysis, while the courts have invoked both analyses, often indiscriminately. II E. Allan Farnsworth, Contracts § 7.17a, at 402-04 (Supp. 1995).

188. Terré, Les obligations, supra note 5, n° 415, at 348-50.

189. For good faith as an implied term in American law, see II Farnsworth, supra note 187, § 7.17, at 365, 368-69 (1995 Supp.). For a similar analysis of French law’s treating good faith as the basis for implying an accessorial duty, see Bénabent, supra note 63, at 294. The most well-known example is the obligation imposed on carriers to assure the safety of their passengers. Terré, Les obligations, supra note 5, n° 429, at 360. In a striking recent decision, the Court of Cassation held that good faith required a supplier to renegotiate a contract with its dealer when changed conditions made it impossible for the dealer to survive under the original contract. Cass. com., Nov. 3, 1992, J.C.P. 1993, II, 22644, note Georges Virassamy (Huard).

no hint as to what constitutes good faith. To fill this void, academic writers have suggested that a supplier acts in bad faith when its performance prevents a dealer from competing with other dealers.\textsuperscript{191} That approach, which may have been what the Alcatel Court had in mind when it condemned a supplier’s seeking an “illegitimate profit,” seems unfair to suppliers in requiring them to subsidize inefficient dealers.\textsuperscript{192} On the other hand, the Court’s long-standing solicitude for dealers tied to an exclusive supplier makes it unlikely that the Court will adopt the Uniform Commercial Code’s minimalist approach to good faith. Under the Code, a party’s “posted” or “given” price normally satisfies the good faith requirement,\textsuperscript{193} thus leaving the protection of the dealer to competition law, which in both countries generally requires that the supplier charge all dealers the same price. It will be interesting to see if the more paternalistic French law of contract will be willing to abandon in this fashion the price-setting terrain and, if not, what alternative standard it will develop for good faith.

III. CONCLUSION

The twenty-three years from the 1972 Pompistes de marque decisions until the late 1995 decisions in Vassali and its companion cases witnessed a whirlwind of lawmaking activity by the Court of Cassation on certainty of price. The Court first invalidated contracts whose price term had failed (Pompistes de marque); then invalidated contracts which allowed one of the parties to determine, or even affect, the price (Guillaume Tell); next limited the scope of those invalidations to contracts imposing an obligation to transfer (Baumgartner); and, finally, upheld contracts which allowed a party unilaterally to determine the price or left the price open (perhaps), requiring that any price determined by one of the parties to be set in good faith (Vassili). The lawmaking saga is by no means over as the Court now confronts the task of defining good faith.

The rapid pace of the Court’s case law is largely attributable to the heavy volume of cases before the Court. The Court of Cassation is the supreme court on private law matters to a nation of roughly 60,000,000 persons, a nation in which commercial litigation is relatively inexpensive and quite popular. Unlike most common-law supreme courts, the Court of Cassation has no control over its docket; the Court must decide every case in which the losing party seeks to quash a lower court judgment. As a result, the Court receives each year more than 25,000 new cases, nearly 20,000 of them civil cases. In recent years, the Commercial Section alone has decided over 2,000 cases annually.\textsuperscript{194} This volume assures opportunities for lawmaking far in excess of those available to

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  \item \textsuperscript{191} Terre, Les obligations, \textit{supra} note 5, n° 416, at 350 (citing authorities).
  \item \textsuperscript{192} Vogel, Plaidoyer, \textit{supra} note 111, at 162.
  \item \textsuperscript{193} U.C.C. § 2-305 cmt. 3 (1997), \textit{followed by} Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415 (8th Cir. 1986).
  \item \textsuperscript{194} For the Court of Cassation’s case load, see Rapport de la Cour de Cassation 1995, at 437-46 (statistics for 1988 through 1995).
\end{itemize}
common-law supreme courts, which rarely decide more than several hundred cases annually covering the whole field of law. 195 Throughout the 1970s, 1980s, and early 1990s, the Court of Cassation, normally acting through its Commercial Section, received a steady stream of cases raising the issue of the incomplete price term. The decisions appearing in the private reports constitute only the tip of the iceberg, selected for publication because the reports' professional staff believed them to be noteworthy. Few if any common-law supreme courts receive such a steady flow of cases raising timely legal issues, and the development of the common law often depends far more on chance; i.e., the luck of the draw on what cases reach the supreme court.

The Court of Cassation also receives more help in its lawmaking efforts from academic writers than do most common-law supreme courts. The Court's case law prompts an abundance of commentary in legal periodicals, and French judges cannot complain, as American judges often do, that most of what is published in the law reviews is of little interest to the courts. 196 To the contrary, contemporary French doctrinal writing focuses all too narrowly on what the courts are actually doing. This focus does produce a dialogue between the commentators and the courts, the Court of Cassation in particular; however, that dialogue is strangely muted, given the uninformative official discourse of the Court's opinions. The Court's syllogistic opinion writing style does not allow an open dialogue between the Court and its critics, but the judges appear to be quite attentive to the scholarly reactions generated by their decisions. Thus, the persistent and withering scholarly criticism provoked by the Court's Pompistes de Marque and Guillaume Tell decisions heavily influenced the Court's retreat and ultimate reversal on the certainty-of-price requirement.

The lawmaking process disclosed by this saga bears many resemblances to common-law lawmaking. Code texts do count, as judges care about the wording of the Code. At the same time, those texts impose surprisingly few restraints on what judges can do to decide cases fairly—or, as the French would express the point, to formulate a rule they can apply to decide cases fairly. The weight of the past (the text of the enacted law) is not a dead weight and may be less of a restraint than precedent under the more rigid versions of stare decisis. Decisional law can also serve as a dead weight, particularly if the judges, as did the Law Lords in England until recently, believe themselves powerless to overrule it. 197

195. The ability of common-law supreme courts to control their docket through a certiorari process helps assure that the cases they do decide raise significant legal issues. This factor redresses somewhat the imbalance in lawmaking opportunities.


197. Professor Dawson, writing in 1968, found the "conception of the force of precedent that now prevails in England is the most extreme of any to be found in the modern world." Dawson, supra note 11, at 80. Just two years previously, the House of Lords had issued a Practice Statement affirming that prior decisions were normally binding, but recognizing that the House would depart from a previous decision when it appeared right to do so. [1966] 1 W.L.R. 1234. Prior to that pronouncement, the House of Lords had considered itself infallible; i.e., powerless to overrule a prior
Two factors help explain why Code texts, or at least the text of the French Civil Code, do not freeze the law, thus preventing a court from resolving fairly contemporary disputes. First, there is the generality of many Code provisions. Article 1134(3), which requires "good faith" performance, is a prime example. That phrase, like our Constitution's prohibition of cruel and unusual punishment, invokes contemporary values. Good faith, like cruel and unusual punishment, is not just what the judges say it is, but it is also plainly more than what the drafters thought it was. Good faith is an evolving standard, and judges must take into account contemporary needs and practices in determining what is good faith. They will surely do so to determine what good faith requires when a party unilaterally determines the price.

More important than the generality of Code texts is the second factor of their multiplicity. The generality of Article 1134(3), standing alone, has had little impact on the development of the law. What has had an impact is the Court's determining how it relates to the more specific Article 1591. That article requires the parties to a sales contract to "fix and state" the price. Taken in isolation, it may be interpreted to require—quite unrealistically under today's conditions—that the parties agree on a monetary figure in their contract. Until recently, the courts did interpret that text to require the inclusion in the contract of a monetary figure, or at least a means for determining a figure (the determinable price). In 1994, in the Alcatel cases, the Court of Cassation changed its interpretation of Article 1591. It did so by considering how a party's obligation to perform in good faith affected the price term. The Court concluded that the parties adequately fix and state the price in the contract if they allow one of the parties unilaterally to set the price—in good faith, of course. This combination of the two articles surely would not have occurred to the drafters—the drafters probably expected the sales contract to contain a monetary figure for the price—but it does not appear unfaithful to the two texts. The parties "fix and state" the price by allowing one of the parties to do so unilaterally, but in good faith.

The multiplicity of Code rules thus best explains the flexibility of a Code. Viewed in isolation, enacted law texts may severely confine. Viewed as part of a whole, they provide opportunities for the courts to determine the relationship between them. Long forgotten distinctions may be invoked to temper overly rigid rules, as in Baumgardner, and slumbering provisions revived to defuse overly specific Code texts, as in Alcatel and Vassali. The Code is a grab bag of available rules, all potentially applicable (directly or by analogy) and awaiting interpretation. As put more elegantly by a leading comparativist, the subject matter of a Civil Code has been pondered, debated, and refined by jurists for the
decision. Dawson, supra note II, at 91.

last two thousand years.\textsuperscript{199} That conversation does not stop upon codification. Gény and Zimmerman are surely correct in treating codification largely as a matter of housekeeping. Proving that hypothesis scientifically is not possible, but the saga of our three articles at least provides some empirical support.

IV. APPENDIX

\textit{Text of Vassali v. Gagnaire}

\textbf{Court of Cassation—Full Court—December 1, 1995}

The Court;—See articles 1134 and 1135 of the Civil Code

Whereas, a clause in a franchise contract making reference to a tariff in force on the day of subsequent orders for supplies does not affect the validity of the contract, any abuse in the setting of the price giving rise to cancellation or damages;

Whereas, according to the judgment attacked, a Mr. Gagnaire formed a contract by which he became, for a period of five years, the franchisee of Mr. Vassali and committed himself to utilize exclusively the products sold by the latter;

Whereas, to invalidate this contract, the judgment found that article 5 of the agreement provides "that the products will be sold at the tariff in force on the day of the receipt of the order, that tariff being the catalogue price applicable to all franchisees," which is in effect a posted price and from which it results that the determination of the price is at the discretion of the franchisor;

That in so ruling, the court of appeals has violated the above cited texts.

Quash and annul . . .