



HAL
open science

Etude comparative de la cession de droits sociaux en droits français et chinois

Zhenyu Wu

► **To cite this version:**

Zhenyu Wu. Etude comparative de la cession de droits sociaux en droits français et chinois. Droit. Université Montpellier, 2018. Français. NNT : 2018MONTD006 . tel-01963611

HAL Id: tel-01963611

<https://theses.hal.science/tel-01963611>

Submitted on 21 Dec 2018

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

THÈSE POUR LE GRADE DE DOCTEUR DE L'UNIVERSITÉ DE MONTPELLIER

En droit privé et sciences criminelles
École doctorale Droit et Science politique

Unité de recherche : Centre du Droit de l'Entreprise

Titre de la thèse :
**ETUDE COMPARATIVE DE LA
CESSION DE DROITS SOCIAUX
EN DROITS FRANCAIS ET CHINOIS**

Présentée par Monsieur Zhenyu WU
Le 3 octobre 2018

Sous la direction de Pierre MOUSSERON
Professeur à la Faculté de Droit de Montpellier

Devant le jury composé de

Madame Catherine GINESTET, Professeur,
Université Toulouse-I-Capitole

Président du jury

Madame Isabelle GROSSI, Maître de Conférences,
Université d'Aix-Marseille

Rapporteur

Madame Lise CHATAIN, Maître de Conférences,
Université de Montpellier

Examineur

Monsieur Pierre MOUSSERON, Professeur,

Directeur de la thèse



UNIVERSITÉ
DE MONTPELLIER

« L'Université n'entend donner aucune approbation ni improbation aux opinions émises dans les thèses : ces opinions doivent être considérées comme propres à leurs auteurs »

A mes parents,

A Linhua.

REMERCIEMENTS

Que ce travail témoigne de ma reconnaissance à l'égard de ceux qui m'ont soutenu tout au long de mes recherches :

A Monsieur le Professeur Pierre MOUSSERON, dont la patience, le soutien et la qualité de l'encadrement m'ont permis de mener à bien ce travail de recherche et m'ont montré qu'il existait d'autres façons d'envisager le Droit.

Aux membres du Jury.

A tous ceux qui ont lu et relu ce travail et m'ont conseillé.

A toute ma famille et tous mes amis dont la gentillesse, la présence, le courage ont été précieux dans les moments de doute et de découragement.

Cette thèse est financée par le China Scholarship Council (CSC).¹

¹本研究得到了中国国家留学基金委的资助，特此鸣谢。

Sommaire

| | |
|---|------------|
| Introduction | 1 |
| Part I. Components | 17 |
| Title I. Purchase | 18 |
| Chapter I. Elements..... | 19 |
| Chapter II Effects | 104 |
| Title II. Shares..... | 127 |
| Chapter I. Identification of shares..... | 128 |
| Chapter II. Originalities of shares..... | 182 |
| Part II. Implementations | 212 |
| Title I. Legal interventions | 213 |
| Chapter I. Legal protections | 214 |
| Chapter II. Legal restrictions | 260 |
| Title II Conventional arrangements..... | 332 |
| Chapter I. Anti-overpricing techniques | 333 |
| Chapter II. Anti-competition techniques | 365 |
| General conclusion | 395 |

Introduction

1. The topic of purchases of shares heatedly discussed among French legal authors and practitioners, has received little attention in China. However, in spite of the seeming ignorance of the importance of the topic on the part of Chinese scholars and practitioners, we believe the Chinese experience in this regard, or sarcastically the lack thereof, could actually to some extent be beneficial to the French jurists, and accordingly a comparative work thereon might be somewhat meaningful.

Before we conduct the comparison, a preliminary problem to be solved is to specify what exactly is to be compared in the long process of purchases of shares, which we will later reveal to be the issues involving the protection of buyers of shares (I). Intuitively, we may assume that in order to protect the interests of people, legal provisions should be sufficiently sophisticated, elaborated or even intricate. However, we will present that somewhat counter-intuitively, the Chinese experience is interesting just because of its simplicity (II). And in order to demonstrate this idea, a two-parts structure will accordingly be constructed (III).

I. Research scope

2. In an abstract sense, there are many topics able to be discussed related to the theme of our thesis (A). However, our research will focus on and be confined to only one of them: the protection of buyers of shares (B).

A. Possible topics

3. Our thesis is about “purchases of shares”. However, the word “purchases” was not the one initially chosen. In fact, we have considered to use a series of words such as “transfers”, “transmissions”, “acquisitions” and “sales”, and it is only recently that we were finally determined to choose the word “purchases”. The multiple possible words to be chosen indicates the multiple possible themes to be discussed, which can be roughly categorized into

two types: those concerning the internal relation and those concerning the external relation (1). This thesis is to discuss only the internal relation. Yet on the internal relation alone, it is possible to discuss either from the side of purchases or from the side of sales (2).

1. Possible topics on two relations

4. In a trade by which shares are transferred from one patrimony to another, there are actually two kinds of relations in place (i). To the two kinds of relations, French and Chinese jurists have different concerns and thus prefer to discuss different themes (ii).

i. Presentations of the two relations

5. In the process by which shares are transferred from one patrimony to another, there are actually two kinds of legal relations that are involved: those between the parties (a) and those between a party and a non-party (b).

a. Internal relation

6. - Main issue: the arrangement of rights and obligations between buyers and sellers. By internal relation, we mean the relation between parties to the contract, i.e. the relation between buyers and sellers of shares. In view of contractual liberty, the rights and obligations between the two parties should be in principle arranged by themselves or by their counsels, and accordingly, it seems not to be an object of traditional discussions of legal scholars who usually focus on positive laws instead of conventional practices. However, legal interventions may exist as restrictions to the contractual liberty: it may be either in the form of default legal protections for buyers when there is no conventional stipulation; or in the form of pure legal restrictions to the contractual liberty, which prohibits practitioners from stipulating certain conventional clauses. In countries where there are many legal interventions, the main topics when it comes to trade of shares are usually about the reasonableness of a given legal intervention.

7. - Minor issue: the moment of transfer of ownerships. Without special stipulations, the moment of transfer of ownership of shares would affect, sometimes gravely affect, the interests of the seller and buyers of shares: as the famous Chinese scholar Mr. Zhao

has said: “the transfer of ownership of shares indicates the transfer of benefits and risks attached thereto, in a similar way to the transfer of benefits and risks attached to objects of contracts of purchases and sales; with a minor difference that the risks attached to shares do not refer to the risks of physical loss, but rather the risks of a crucial change in value of shares. The benefits and risks before the transfer of ownership belongs to the seller of shares and that after the transfer of ownership belongs to the buyers. Many disputes in transfer of shares arises simply for this issue.”²

b. External relation

8. - Main issue: the belonging of ownerships to a party or a non-party. By external, we mean the relation between a non-party and one of the parties to the contract. The most typical category of issues concerning external relation is about the eventual belonging of the ownership of shares. Sometimes, it concerns a context between a buyer of shares and a third party; sometimes the context is between a seller of shares and a third party.

A buyer would compete for the ownership of shares with a third party, if the seller in this case has no authority to sell the shares: it can be either a double sale which necessitates two buyers to vie for the sold shares; it can also be an unauthorized sale by a nominal shareholder which entails a contest between the real shareholder and an innocent buyer; it can in addition be a sale of shares encumbered with security interests whereby the buyer would have be confronted with a secured creditor; it can further be a sale without the fulfilment of the procedure of *agrément* whereby it is other shareholders of the target company that the buyer of shares would rival with. In all these situations, the legal relations in question would be between the buyer of shares and a third party to the contract of purchase of shares and the issue is about the eventual belonging of the shares.

A seller of shares and a third party would see their interests in conflict when the initial contract by which the buyer acquired the shares has been annulled; yet, before the annulation the buyer has already resold the shares. Here, the seller would have to vie for the shares with the sub-acquirer of the shares.

² See X. ZHAO, *The transfer and actual delivery of shares*, People’s courts daily, 5 December 2002 (参见 赵旭东: “股权转让与实际交付”, 《人民法院报》, 2002年12月5日).

9. - Minor issue: the relevance of external validity and internal validity.

Disputes may also arise as to whether a problem presumed to affect only the external relation would also affect the internal relation. For example, the lack of ownership of seller, objectively speaking, only prevents him from eventually convey the ownership; when he has failed to do so he would simply have to assume the liability of damages. However, it is also a possibility that legislators may subsume the ownership into the category of conditions for a valid contract, which means a contract transferring things of others would automatically be invalid. Having no valid contract, the legal basis for damages that the buyer may evoke would be changed from a contractual one to a tort one, which may severely affect the amount and scope of the damages.

ii. Preferences of the two relations

10. When it comes to trade of shares, Chinese legal scholars prefer to discuss the external relation (a) whereas their French counterparts prefer the internal one (b).

a. Chinese preference: external relations

11. - Preference reflected in the default meanings of “transfer of ownership”. In China, doctoral thesis with the title of “transfer of shares” discuss mainly, if not exclusively, the problems preventing buyers from eventual acquiring the shares, including the ones concerning procedure of *agrément* and that concerning the mode of transfer of ownerships (*solo consensu* or formalism).³ Also, for those with the title of “acquisition of shares”, the main topic would be about what is called “*bona fide* acquisition”, which in essence is about the effect of article 2276 of the French *code civil* (*en fait de meubles, la possession vaut titre*), involving only the relation between an innocent buyer of shares and the real owner of the shares.⁴

³ See L. MA, *A research on legal issues in the transfer of shares*, Jilin University doctoral thesis, 2014 (马莲: “股权变动法律问题研究”, 吉林大学博士论文, 2014年); B. ZHANG, *The effects of transferring of shares of limited liabilities companies*, Jilin University doctoral thesis, 2010 (张彬: “有限责任公司股权转让效力研究”, 吉林大学博士论文, 2010年); H. ZHOU, *On the transfer of shares*, Jilin University doctoral thesis, 2009 (周海博: “股权转让论”, 吉林大学博士论文, 2009年).

⁴ See A PENG, *An analysis of the constituting elements of bona fide acquisitions of shares*, Jilin University Master thesis, 2017 (王啊鹏, 股权善意取得的构成要件分析, 吉林大学硕士论文, 2017年).

If we do not limit ourselves to literatures about trade of shares, we can see that in China, words designating the process of transferring the ownership from one patrimony to another are nearly all understood to focus only on the external relation. For example, the word *abusus* as designating one of the *attributes* of ownership (*usus, fuctus* and *abusus*), albeit *lato sensu* denoting all the possible ways of disposing the thing on which the ownership is established, in its most common sense signifies only the “act of disposition”. Here, it concerns a fundamental distinction transplanted from German law: the distinction between --- *Verpflichtungsgeschaef*t and *Verfuegungsgescdhaeft*. *Verpflichtungsgeschaef*t, translated by us as “act of undertaking”, refers to the contract which creates the abstract obligation of transferring ownership of something; and *Verfuegungsgescdhaeft*, translated by us as “act of disposition”, refers to the separate and individual act whereby the said ownership is actually transferred from one patrimony to another.⁵ As a very famous Taiwanese scholar Mr. Wang Zejian widely revered in mainland China has pointed out: “the word *abusus* has three different meanings, in its broadest sense, it refers to all the ways of disposing a thing, including both physical ways and juridical ways. In a narrower sense, it refers to only the judicial ways, yet including both the *Verpflichtungsgeschaef*t and *Verfuegungsgescdhaeft*. In the narrowest sense, it means only *Verfuegungsgescdhaeft*, excluding all causal contracts such as contracts of sales, contracts of exchange and etc.”⁶ The destine of the word “*abusus*” (disposition) can exemplify the destines of all words with similar meanings such as “transfer”, “conveyance”, “transmission” and “acquisitions”, which in China would be by default understood from the perspective of external effects.

12. - Preference reflected in the default meaning of “defects of shares”. As opposed to France where the expression “defects of shares” is generally understood as refer to the defects in value of shares, which would entail disputes between buyers and sellers; the same expression “defects of shares” is often understood as “defects in the process of capital contribution” in China, where the main concerns are whether the defective shares, i.e. shares

⁵ See L. HUANG, *The distinction and its adoption in practice of Verpflichtungsgeschaef*t and *Verfuegungsgescdhaeft* ---as exemplified by the judicial interpretations and judgments made by the supreme court, Hebei law science, may 2015, p.144 (参见 黄泷一:“负担行为与处分行为区分的实务继受——以最高人民法院的司法解释和裁判文书为分析对象”,《河北法学》, 2015年第5期,第144页); M. YANG, *On the meaning of article 15 of the Chinese Law of Things and the distinction between Verpflichtungsgeschaef*t and *Verfuegungsgescdhaeft* --- comments on article 3 of the judicial interpretations on contracts of purchases and sales by the Supreme People’s Court, Jinan Journal (Philosophy & Social Science Edition), September 2013, p.103 (杨明宇:“<物权法>第15条的涵义与负担行为、处分行为的区分——兼评最高人民法院买卖合同司法解释第3条”,《暨南学报》2013年第9期,第103页).

⁶ Z. WANG, *Sales of things of others and unauthorized dispositions, in Doctrines of civil law and study of jurisprudence* vol.4, China University of Political Science and Law Press, 1998, p.144-145 (王泽鉴:“出卖他人之物与无权处分”,载《民法学说与判例研究》第4册,中国政法大学出版社1998年版,第144-145页).

whose capital contribution have not yet fully paid, can be legally sold or not; if not, whether the contract *per se* is invalid or whether it is only the actual transfer of ownership is invalid; if yes, whether the credits of the company can be opposable to the buyer or whether they are only opposable to the seller.⁷

13. - Possible causes for the preference. The Chinese interests in the external relation are caused partially by the effect of “path dependency” and partially by the lack of clear provisions in Chinese law. For one thing, the topics on external relations, exemplified by the topic of sale of things of others, are traditionally discussed in countries heavily influenced by German law. As Mr. Wang Zejian has mentioned: “the topic of unauthorized disposition is the quintessence of the science of law.”⁸ Influenced by this academic tradition, Chinese scholars tend to discuss everything from the perspective of external relation, including when it comes to trade of shares. For another, Chinese law do sometimes have ambiguity in this regard that dictate thorough discussions to remove the ambiguity.⁹

On the other hand, the lack of interests in internal relation in China is caused by the lack of special regulations in Chinese law restricting contractual liberty. For one thing, as would be discussed *infra*, the contractual liberty is a principle held high in China, and in reality, there is nearly no successful judicial intervention in trade of shares except for enforcing a conventionally stipulated clause. As there is no judicial intervention, there is no room for an academic discussion from a legislative perspective. For another, perhaps due to the relatively shorter history of the adoption of western legal system, nowadays the focus of Chinese legal scholars is still mainly on statutes, jurisprudences, and legal doctrines. When a

⁷ See H. XIAO, *The legal effects of transfer of shares whose contribution is defective*, Tribunal of Political Science and Law, March 2013 (肖海军: “瑕疵出资股权转让的法律效力”, 《政法论坛》2013年第3期); L. ZHANG, *A research on the legal issues on defective shares*, China University of Political Science and Law master thesis, 2011 (张丽红: “瑕疵股权法律问题研究”, 中国政法大学硕士论文, 2011年). In fact, the only literature we have found on the defects in value of patrimony of shares is a master dissertation, See L. CHENG, *The liability of hidden defects of the quality of the assets of the company in sale of shares*, Eastern China University of Political Science and Law, 2016 (程丽娅, “股权转让中的公司财产质量瑕疵担保责任”, 华东政法大学硕士论文, 2016).

⁸ Z. WANG, *Sale of things of others and unauthorized disposition*, in *Doctrines of civil law and study of jurisprudence vol.4*, China University of Political Science and Law Press, 1998, p.144 (王泽鉴: “出卖他人之物与无权处分”, 载《民法学说与判例研究》第4册, 中国政法大学出版社1998年版, 第144页).

⁹ Examples are the conflicts of the procedures of *agrément* and that of the legal preemptory rights (See D.JIANG, *The mechanism of determination of price where other shareholders have exercised their preemptory rights*, Law science, June, 2012 (蒋大兴: “股东优先购买权行使中被忽略的价格形成机制”, 《法学》2012年第6期)); the effects of the procedure of *agrément*, i.e. whether it also affects the validity of the contract of sales or only the actual transfer of shares (See Q. XU, *The effects of restrictions on transfer of shares --- an analysis of the function of article 71 of Chinese Company Law*, Global Law Review, January 2015 (徐强胜: “股权转让限制规定的效力——<公司法>第71条的功能分析”, 《环球法律评论》2015年第1期)); *the bona fide acquisitions of shares* (See X. ZHANG, *The revision of bona fide acquisitions of shares --- illustrated by the third judicial interpretations on Chinese Company Law*, Tribune of Political Science and Law, June 2013 (张笑涵: “股权善意取得之修正——以《公司法》司法解释(三)为例”, 《政法论坛》2013年第6期)).

field is left to the pure discretion of the parties, it is the conventional practices that are the only possible objects to be discussed. To some extent, conventional practices can be regarded as usages or “soft law”. Yet, usages and soft law are not in the scope of interests of modern Chinese jurists.

b. French preference: internal relation

14. - French preference of internal relation over external relations. In France, when it comes to the topic of *cession de droits sociaux*, there are several topics constantly discussed: the validity of clauses of price; the legal warranties; the consents, etc.¹⁰ All these topics have one thing in common: they all concern the internal relation, i.e. the arrangement of rights and duties between the sellers and buyers of shares, instead of the various external relations as are interesting in China.

15. - Possible causes for the French interests in internal relation. The main reason why French authors would like to spend their energy on internal relation in trade of shares, is because there are too many legal provisions allowing judicial interventions, either under the pretext of providing default protections to buyers not protected by conventional stipulations; or for the purpose of prohibiting certain kinds of conventional stipulations. Thus, the main concern in almost all the French literatures on this topic is all about the possible way to sidestep the regulatory interventions or to make a better use of it, as would be discussed in the main block of this thesis. On top of the discussions on the positive law, perhaps because of the highly-developed French legal science, the French authors now have more energies to spend on things other than hard-laws and thus they are also interested in soft laws like common practices invented by practitioners, which also partially explains why internal relation are so concerned in France.

16. - Possible causes for the French absence of interests in external relation. The lack of interests in France over external relation should be in the firstly place explained by the highly sophisticated French legal provisions which in most cases eliminates the possibility of ambiguity. In fact, the topic of *vente de la chose d'autrui* used to be an interesting one in

¹⁰ V. P. MOUSSERON, *Les conventions de garantie dans les cession de droits sociaux*, NEF, 1992; M. CAFFIN-MOI, *Cession de droits sociaux et droit des contrats*, Economica, 2009; S. LACROIX-DE SOUSA, *La cession de droits sociaux à la lumière de la cession de contrat*, LGDJ, 2009.

France in 19th century as we have found many doctoral dissertations thereon on the website of Gallica,¹¹ which indicates that the sophisticated French positive law did not come into existence out of blue. But nowadays, as the legal system is sophisticated enough, and the lack of academic tradition in heavily discussing the topic of *vente de la chose d'autrui*, it is not unusual to see a lack of interests thereon in France.

2. Possible topics on two sides

17. A little spoiler: in this thesis, we will choose the internal relations in trade of shares as our main topic. However, in internal relation alone, there are still more than one possible topics able to be the main topic. As the contract by which the ownership of shares is transferred is a bilateral contract (*contrat synallagmatique*), it seems that both the purchasing side and the selling side should be discussed when it comes to trade of shares (i). However, as most of the topics discussed in France are actually about various problems in protecting buyers of shares, it is also possible to discuss only the purchasing side of the trade (ii).

i. Possible topics on both the purchasing and selling side

18. - A misnomer: “contract of sales” as designating in fact “contract of sales and purchases”. In France, when it comes to trade of shares, the titles of literatures are usually “*cession de droits sociaux*”. Also, in the *code civil*, the category of contract whereby things are exchanged for price is called “*contrat de vente*”. Here, the words “*cession*” and “*vente*” have one thing in common: both of them nominally emphasize the selling side of the contract, as if the purchasing side is not important at all. However, in our opinion, here it concerns a misnomer. In fact, in Roman time, the name of the category of “*contrat de vente*” as provided in the French *code civil* was “*emptio venditio*”, designating both the purchasing side and the selling side, with the purchasing side even mentioned before the selling side.¹² The modern short name of *contrat de vente* is actually a product of efficient communication which requires shorter and more concise expression and thus simply dropped a word from the double names to achieve this end. But in reality, it does not change the substances of this

¹¹ To name a few: H. CASTILLARD, *De la vente de la chose d'autrui en droit romain et droit français*, thèse Nancy, 1879, disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k5493766j?rk=21459;2>; C.-A. AUDIBERT, *Nullité des actes de disposition entre vifs qui ont pour objet la chose d'autrui*, thèse Lyon, 1877, disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k54010075?rk=42918;4>; D. De FOLLEVILLE, *Essai sur la vente de la chose d'autrui*, thèse Paris, 1872, disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k5702493b?rk=107296;4>.

¹² See T. G. WATKIN, *An historical introduction to modern civil law*, Routledge, 1999, p.293.

category of contracts and accordingly, by *cession* or *vente*, it actually means the relation of *vente (cession) / achat*.

19. - Issues on both the purchasing and selling side. As the expression *cession de droits sociaux* and *contrat de vente* covers both the aspect of sales and the aspect of purchase, a discussion thereon should seemingly concern the rights and obligations of both sellers of shares and buyers of shares.

ii. Possible topics only on the purchasing side

20. Previously, after we are determined to discuss only the internal relation, we entitled our thesis as “a comparative study of sales of shares”. But a friend questioned the reasonableness of this choice of words, as she believes that since the entire thesis focuses on mainly the protection of buyers of shares, the word in the title should be “purchases” instead of “sales”. At first, we insisted on our word choice, as the word “sales” designates actually “sales and purchases (*emptio venditio*)” and thus the purchasing side is in theory signified by the word “sales”. However, latter we began to realize the reasonableness of this advice, as our thesis covers little the protection of sellers of shares whereas nearly all our research is dedicated to the protection of buyers of shares. If a thesis covering equally the protections of buyers of shares and the protections of sellers of shares can be entitled “sales of shares”, a thesis covering only the purchasing side would be inappropriate to be so entitled. Therefore, eventually we replaced the word “sales” in our title with the word “purchases”.

But why do not we discuss the protections of sellers of shares? We would explain this immediately.

B. Chosen topics

21. The choice of the main theme of our thesis should be in accordance with certain criteria (1); and with the criteria, the main theme of our thesis would be determined (2).

1. Presentation of the criteria for choosing theme

22. This thesis is about trade of shares. Therefore, the theme chosen should be about those related to the originalities of shares that would make trade of shares different from trade of other things (i). Also, because most of the readers of this thesis would be French, the theme chosen should be those interesting in a French context instead of those interesting only in a Chinese context (ii).

i. Topic chosen should be about inherent features of shares sold and purchased

23. In this thesis, we will not cover all the possible themes commonly attached to trade of shares. Instead, we would discuss only those directly inherent to this topic: some of the previously mentioned topics possible to be discussed should actually be discussed in a higher level --- they should be discussed in a general thesis about “transfer of objects” instead of in a more specific one about “transfer of shares”.

The most typical example is those about the external relations heatedly discussed in China, as we believe *vente de la chose d'autrui* is not much different from *vente des droits sociaux d'autrui*, in view of the fact that any solutions to the problem of *vente de la chose d'autrui* is sufficient to solve those in the *vente des droits sociaux d'autrui*.

Similarly, the selling side in a trade of shares is not quite different from the selling side of any other “sales and purchases”. The main obligation assumed by buyers of shares are the payment of price, and the main obligations assumed by any other buyers are also the payment of price. Therefore, any problems in the protection of sellers of shares can be well solved by a solution to the general problems in the protection of any other sellers; and it has no particular interests to discuss particularly the protection of sellers of shares.

ii. Topic chosen should be interesting in a French context

24. As this thesis is mainly for French readers and of a comparative nature, any topics to be discussed should be interesting in both countries, or at least interesting in a French context. Thus, all those topics interesting only in China would be excluded from the scope of our discussions. An example of this category is the topic on procedure of *agrément* in China, focusing upon purely domestic problems in Chinese law. Also, the heatedly

discussed topic of unauthorized disposition (*vente de la chose d'autrui*) in China also belongs to this category.

2. Application of the criterion for choosing theme

25. - Our chosen theme: the purchasing side of internal relation. This theme is to be chosen because it fits the two criteria aforementioned. For one thing, as we would demonstrate *infra* in the main block of the thesis, buyers of shares are particularly more vulnerable than buyers of other objects and thus need more protections, which means the protections of buyers of shares is a topic inherent to the trade of shares; for another, the fact that nearly all French literatures are about the protections of buyers of shares indicates that it is an interesting topic in France.

As the internal relation is chosen, in the title of our thesis, the ambiguous words, such as “transfer” “transmission” and “acquisitions”, which suggest a possibility to focus on external relations, will not be chosen. This leaves us only two options: “sales” and “purchases”. As only the purchasing side would be discussed, the word “sales” would also be eliminated, leaving only the word “purchases”. Ergo, our thesis is entitled “a comparative study of purchases of shares in French and Chinese laws”.

26. - Moment of transferring of ownership as excluded from our discussion. It should be noted that the topic of the moment of transferring of ownerships of shares, albeit usually discussed under the title of *cession de droits sociaux* in France and belonging to the purchasing side of the internal relation, would also be excluded from the scope of discussion of the thesis, as we believe the risks brought to buyers of shares by the different moment of transferring of shares are nothing different in nature from other risks in purchases of shares, and can be solved in a similar way. Thus, there is no need to discuss separately this topic in our thesis.

II. Research interests

27. Legal provisions concerning purchases of shares under French laws are sophisticated. Yet, compared with the simple Chinese ones, we can see that it is actually the sophisticated legal provisions that makes purchases of shares particularly difficult in France

(A). In studying the relevant Chinese provisions, or the lack thereof, on this topic long disturbing our French jurists, the redundancy of French provisions and the artificialness of many issues discussed in France will become clear (B). On top of that, the Chinese practices in this regard will provide a good insight for our French readers as to what conventional mechanisms would develop and evolve to, if the concerns of jurists shift from the “only-interesting-in-France question” of how to sidestep legal restrictions on their freedom, to the more interesting question of how to protect buyers of shares from already-in-place risks inherent to this kind of trades and universal in every corner of the world (C).

A. Sophisticated French legal provisions: “a theatre with chains”

28. Compared with other researches on the same topic in France, the originality of this research is the comparison of relevant French laws and practices with their Chinese counterparts. *Prima facie*, this seems not to be very intriguing inasmuch as the current legal system of China has a relatively shorter history than its French counterpart and accordingly seems to be simpler. However, we believe that the seemingly advanced and sophisticated legal provisions in French law actually only makes things more complicated when it comes to purchases of shares: jurists should focus on how to protect vulnerable buyers of shares against risks in the already trap-riddled trades, which requires nothing more than the respect of contractual liberty or the recognition of the enforceability of contracts on the part of judges and legislators. The seemingly sophisticated French legal provisions, by contrast, except for those inherently impotent legally prescribed protections of buyers, are mostly restrictions on the freedom of practitioners to invent conventional mechanisms protecting buyers.

In a figurative speech, we can describe the judicial practitioners in France, when they come to the task of protecting buyers of shares, as dancers who are obligated to “dance with chains”. Their attentions along with that of legal scholars in France, accordingly, have to be given to how to adapt to the “chains” (the legal restrictions on contractual liberties) instead of to how to deliver an outstanding rendition to the audience (the drafting and invention of good conventional mechanisms protecting buyers).

B. Simple Chinese legal provisions: “a theatre without chains”

29. - The possibility of French jurists to remove the “chains” in their own ways.

It should be noted that the unnecessary and redundancy of the current legal interventions under French law in purchases of shares can be eliminated in a pure domestic way and it is at least part of the core arguments of nearly all literatures on this topic in France that the legal restrictions should be solved in this or that way. For example, a French author has pointed out that: “*certains contentieux sont naturels, résultant de la complexité du réel. D'autres sont artificiels, liés aux imperfections de la règle légale.*”¹³ With time goes by, driven by the doctrinal discussions and practical urges, we believe French positive laws would eventually adapt to the demands and itself evolve into a reasonable situation where all the excessive regulatory interventions would disappear. In a figurative speech, French dancers have themselves found the unreasonableness of the “chains” they have to wear when they “dance”; and eventually it is sure that they would themselves get rid of the “chains” and all fret thereabout.

30. - An obstacle to the possible evolution of French law: the “rationality of reality”. As Hegel has said: “what is rational is real; and what is real is rational.”¹⁴ Accordingly, the positive laws are *a priori* rational and reasonable simply because that they are “real” or in other words, because they are the *status quo*. This is understandable as the legal provisions existent in the legal system of a country must have gone through a process of “natural selection” and their very existence justifies their reasonableness or rationality. Any changes will thus be assumed as a threat to the stability of the current legal system and thus harmful, unless the changes are otherwise supported by compelling justifications.¹⁵ The Regulatory interventions in purchases of shares, as based upon positive laws, are thus *a priori* rational and reasonable. Any legal evolution that may challenge them thus needs to be supported by compelling justifications. Figuratively, although “chains” are annoying to dancers, it should be cautious to remove them because the very fact that they exist now implies that it may cause some troubles to remove them. Scholars and practitioners thus bear the burden of proof that removing the chains would not be problematic.

¹³ M. A. FRISON-ROCHE, *L'indétermination du prix*, RTD civ. 1992. 269, n° 7.

¹⁴ G. W. F. HEGEL, *Grundlinien der Philosophie des Rechts* (Hegel's philosophy of rights), trans. S.W. DYDE, George bell and sons, 1896, p. xxvii. Available at <https://archive.org/details/cu31924014578979>.

¹⁵ Laws as a sort of culture, observe a similar law of evolution of genes. Professor Richard Dawkins baptized the gene-like clips of culture as “meme”. According to him, any existent meme must have been selected by nature and is thus reasonable, or in other words has a *raison d'être*. See R. DAWKINS, *The selfish gene*, Oxford University Press, 2006, p. 189s.

31. - The interests of the comparison with Chinese law: to show the possible outcome of smashing the “chains”. It is in the rebuttal of the rationality of the legal interventions that the Chinese experience is helpful. The lack of legal interventions under Chinese law in purchases of shares, in our opinion, is primarily due to its relatively short history of adoption of western legal system instead of due to a conscious deliberation by jurists. However, no matter what has caused the simplicity of Chinese law, the fact is that China is a country without many legal interventions in purchases of shares. And in this sense, it serves as a good “treatment group” where legal provisions permitting regulatory interventions are removed, with the French law as the “control group” where the legal interventions are maintained. If we manage to demonstrate that the special vulnerability of buyers of shares are well solved in China and no extra problem has been caused, it would be tantamount to having carried out an experiment on removing all the legal interventions under French law, with a positive outcome acquired. Figuratively, China can be subsumed under a category of theatre without any chains on stage. And the very fact that in the Chinese “theatre” the dancers perform better and the theatre does not “collapse”, at least reinforces, if not justifies, the argument to remove all the chains in the French theatre.

C. Insightful Chinese conventional mechanisms: “dances without chains”

32. Not only the Chinese positive law with respect to purchases of shares (or the absence thereof) is insightful to French jurists, the conventional mechanisms invented or adopted by Chinese practitioners are also interesting in a French context: for one thing, they adumbrate what French conventional mechanisms would evolve to in a world where the ingenuity of practitioners would not be throttled (1); for another, Chinese conventional mechanisms, as developed independently of their French counterparts, may be used as “mirrors” for French jurists, to understand better the pros and cons of their own ones¹⁶ (2).

1. “Herald” of the future French practices

33. Currently, a large portion of efforts and ingenuities of French practitioners are directed to how to sidestep various legal restrictions and maintain the validity of the clauses they have drafted. As the French positive law would eventually evolve into a restrictions-free

¹⁶ As a famous Chinese saying goes: “using copper as a mirror allows one to keep his clothes neat. Using history as a mirror allows one to see the future trends. Using a person as a mirror allows one to see what is right and what is wrong.”

situation, we believe the focus of French practitioners would see a shift from the collateral concern of compliance with legal restrictions to the more to-the-point ones of protection of vulnerable buyers from inherent risks in the trade. By comparison, the Chinese conventional mechanisms, as developed in a restriction-free wild-west-like environment, are invented out of no concern of possible legal restrictions; instead, they have come into existence purely in line with the inherent vulnerability of purchasers of shares. In this sense, Chinese practical experience is helpful to imagine what it would be like the future French conventional mechanisms developed without the chains currently imposed upon them. For example, in view of the fact that Chinese experience do not deal with any legal restrictions, it can be used to pinpoint the redundant conventional mechanisms currently in place in France aiming purely at circumventing legal restrictions and to estimate their eventual disappearance. Figuratively, as Chinese dances are designed without concerns about chains, it provides a picture to French dancers about what dances would be like if they can discard the restrains.

2. “Mirror” of the current French practices

34. Albeit the concerns dedicated to the legal restrictions only endemic to France, French practitioners do direct some of their attentions to the inherent problems in purchases of shares and have accordingly invented and developed many conventional mechanisms. The Chinese conventional mechanisms serving the same purposes, as foreign experience, can thus be used as a “mirror” reflecting their own advantages and disadvantages of French ones and the practitioners of the two countries can accordingly learn from each other. Figuratively, French dancers, by observing the Chinese performance, can understand better in what aspects their choreography is good and in what aspects it can still be improved.

III. Research structures

35. From the “research domains” and “research interests” we have just presented, we can obtain the gist of our thesis (A), the demonstration of which is to be carried out according to a two-parts plan (B).

A. Thesis

36. Our main thesis is: because of the originalities of shares, buyers of shares are especially vulnerable and need special protection. Yet the protection should be purely conventional, free of any regulatory interventions. In other words, it is the principle of “*caveat emptor* (buyers beware)” that should hold in purchases of shares.

B. Plan

37. Our entire comparative research is dedicated to demonstrating the main thesis just mentioned. In order to fulfil this object, the research would be conducted in a two-steps arrangement.

In the first step, we will have a thorough examination of the expression serving as the object of our thesis --- “purchases of shares”. This expression can be reduced into two components: “purchases” and “shares”. We will see that whereas the legal regimes for purchases are quite different in the two countries, the features of shares are universal in the two countries, which give rise to the special problems and needs in purchases of shares (**Part I**).

In the second step, we will implement the legal provisions for purchases in a context of shares. In particular, we will see that how the difference in legal provisions for purchases in the two countries has resulted in the different regulatory interventions in purchases of shares. Besides that, we will also compare the different conventional practices developed by practitioners of the two countries (**Part II**).

Part I. Components

38. Since the expression “purchase of shares” serving as the title and main theme of our thesis consists of two components, it is appropriate for us to explore the features of the global theme of our thesis by exploring separately its two components: purchase (**Title I**) and shares (**Title II**).

Title I. Purchase

39. - Relation between legal regimes for purchase and those for its hypernym.

As purchase is a hyponym of contract, *prima facie*, there are two kinds of legal provisions applicable to a contract of purchase: the general provisions for contracts and the specific provisions for contracts of purchase. Here comes a noticeable difference in the two countries: It is easy to distinguish the general provisions for contracts from the specific provisions for purchase in France; yet the distinction is not that obvious under Chinese law, as the legal provisions applicable to contracts of purchase are little different from those applicable to other contracts.

In this title, our task is to compare the legal regimes for purchase in the two countries. Under French law, the legal regimes for purchase include both the common provisions for contract law and the specific provisions for the contract of purchase; by contrast, under Chinese law, the legal regimes for purchase are identified with the legal regimes for contracts, and with the legal regimes for the hypernym of contracts --- the juristic acts (equivalent to *acts juridiques* as provided in new article 1100 and 1100-1 of French *code civil*). Therefore, in this title, what we will compare are actually the general provisions for *contracts* and specific legal regimes for the *contrat de vente* under French law and the general legal regimes for *acts juridiques* and contracts under Chinese law, both of which can be divided into those concerning the elements (**Chapter I**) and those concerning the effects (**Chapter II**).

Chapter I. Elements

40. - Elements as provided in the general provisions for contracts. As purchase is a kind of contracts, the elements of the contract, or in other words the conditions for the validity of the contract, apply to purchase. This is true in both countries, and we will thus firstly present their respective conditions for validity of contracts.

Under French law, article 1128 of *code civil* enumerates three elements for a valid contract: “*le consentement des parties*”, “*leur capacité de contracter*” and “*un contenu licite et certain*”. Under Chinese law, article 143 of the General Provisions for Civil Law lists also three conditions for the validity of a juristic act: “the persons of the civil conduct have a corresponding capacity for civil conduct”, “the expression of intention is true” and “not violating the mandatory provisions of laws and administrative regulations, and not violating the public order”. We can see that in spite of the different wordings, the two countries actually share the same conditions. Given that most of our readers are supposed to be French and the language we use to write this thesis is English, we will use the English equivalents of the French designations to refer to both the French conditions and their Chinese counterparts; and thus we can say that under the law of both countries, the conditions for validity of the contract are: “consents” (corresponding to “*le consentement des parties*” under French law and “the expression of intention” under Chinese law), “content” (corresponding to *un contenu licite et certain* and “not violating the mandatory provisions of laws and administrative regulations, and not violating the public order”) and “capacity” (corresponding to “*leur capacité de contracter*” and “the persons of the civil conduct have a corresponding capacity for civil conduct”).

As far as this thesis is concerned, we will only discuss two elements: the consents and the content, leaving the element of capacity aside. This is because the element of capacity raises little problem unique to purchase of shares and should not be discussed here.

41. - Element as provided in the specific provisions for purchase. In France, the application the element of content (the requirement for *countrepartie serieux* and the requirement for *objet déterminable*) in the *contrat du vente* imposes special requirements to its clause of price, and it is thus worth to consider price as a separate element for the contract of purchase. This seems to be not compatible with Chinese law, as price is never an indispensable element for contract of sale and purchase or any other categories of contracts. However, as this thesis is of comparative nature and most of our readers would be French, we will compare the rules related to price under French law with the lack of any provisions thereabout in China.

42. - Reiteration of the elements. To sum it up, in this chapter, we will compare three elements: the consent (**Section I**), the content (**Section II**) and the price (**Section III**).

Section I. Consents

43. Any contracts, including contracts of purchase of shares, find their enforceability in the fact that they are “*accord de volonté*” of the parties (article 1101 of French *code civil*). Concerning this “*accord de volonté*” or in other words the *consentement*, instead of the positive side about the definition of *consentement* or the process of its conclusion (offer and acceptance, *avant-contrat*, etc.), what is interesting is actually its negative side, i.e. the defects that hinder its validity, at least as far as this thesis is concerned, as it is the defects of consents that serve as the weapons that unsatisfactory buyers of shares can resort to and as the foundations for the legal protections to be discussed *infra* in the Part II. Accordingly, in this section, we will limit our comparison (III) to only the provisions concerning *vices du consentement* under French law (I) and Chinese law (II).

I. *Vices du consentement* under French law

44. - **Scope of discussion: exclusion of *violence* in general.** As provided in article 1130 of *code civil*, under French law, there are three *vices du consentement*: *erreur*, *dol*, and *violence*, the first two ones concerning the correctness of the *volonté* of a person and the last one concerning its reality. As we will present *infra*, as what is inherent in purchase of shares is the risks for a buyer of shares to incorrectly evaluate their value, it is the correctness of the *volonté* of the buyer that is particularly in danger in purchase of shares. As for *violence*, certainly there are also many cases concerning disputes in purchase of shares based thereupon, yet these cases, as cases concerning purchase of shares, are nothing particular, in that the reality of *volonté* is not a risk inherent to purchase of shares. Accordingly, *violence* will be excluded from our scope of discussion of the *vices du consentement*.

45. - **Scope of discussion: exclusion of *violence économique*.** The reform of *code civil* in 2016 adds a new type of *violence*. Article 1143 of *code civil* provides: “*Il y a également violence lorsqu'une partie, abusant de l'état de dépendance dans lequel se trouve son cocontractant, obtient de lui un engagement qu'il n'aurait pas souscrit en l'absence d'une telle contrainte et en tire un avantage manifestement excessif.*” This *violence économique* has an interest in a particular kind of purchase of shares: purchase of shares from minority

shareholders where the vulnerable ones are the selling shareholders instead of the buyers and the sellers are protected by this new foundation as they often are of *l'état de dépendance* upon the buyers and the buyers often have *un avantage manifestement excessif* against the sellers. However, this particular kind of purchase, as its particularity is about the vulnerability of the seller instead of the buyer, falls out of the scope of this thesis and thus will not be discussed herein.¹⁷

46. - Scope of discussion: limitation and extension of the notion *dol*. Article 1137 of the French *code civil* provides two kinds of *dol*: those consisting of “*des manœuvres ou des mensonges*” and those consisting of “*la dissimulation intentionnelle par l'un des contractants d'une information dont il sait le caractère déterminant pour l'autre partie*”. The first kind of *dol* (*dol actif*) will be excluded from our presentation as exaggeration of the quality of the thing sold is a phenomenon found in all kinds of purchases and the issue about the distinction between *dolus bonus* and *dolus malus* is not unique to purchase of shares. Rather, it is the second kind of *dol* (*dol passif*) --- *réticence dolosive* --- that is the locus of our discussion, as it concerns the allocation of the risks and obligation of information between the two parties, an inherent issue in purchase of shares. Accordingly, about *dol*, our discussion will be limited only to *réticence dolosive*.

The expression *réticence dolosive*, or the expression “*dissimulation d'une information déterminante*” as used in the text of article 1137, implies that the person held to be *dolosive* bears an obligation of disclosure of information and he has violated such an obligation, as an author put it: “*sous le dol a percé le devoir d'information.*”¹⁸ However, aside from article 1137, there is another foundation on the same obligation: *l'obligation précontractuelle d'information* as provided in article 1112-1 of *code civil*. Technically speaking, this foundation has its own autonomy and is independent of the *réticence dolosive* provided in article 1137. However, as both article 1112-1 and article 1137 in essence governs the same subject matter, we can subsume *l'obligation précontractuelle d'information* as provided in article 1112-1 in the category of provisions for *réticence dolosive lato sensu*. In this sense,

¹⁷ The particular interest of the *violence économique* in purchase of shares from minority shareholders is only our theoretical conjecture. In reality, this new foundation is rarely applied in this situation. V. A. COURET et A. REYGROBELLET, *Le projet de réforme du droit des obligations: incidences sur le régime des cessions de droits sociaux*, Bull. Joly sociétés 2015. 247, n° 36.

¹⁸ H. LECUYER, note sous CA. Lyon, 8 décembre 2005, *Dr. sociétés* avril 2006. 14.

when it comes to *dol*, we are to extend the scope of our discussion to provisions technical speaking not concerning *dol*.

47. - Enumeration of the *vices du consentement* to be discussed in this section.

Accordingly, in this section, we will discuss *erreur* (A) and *réticence dolsive lato sensu* (B) under French law.

A. *Erreur*

48. *Erreur*, as a foundation to render invalid a contract, can be defined as “*appréciation inexacte soit des qualités ou de l'existence d'un fait (erreur de fait), soit de l'interprétation ou de l'existence d'une règle de droit (erreur de droit)*”.¹⁹ Yet, in order to be able to render a contract invalid, not all aforementioned *appréciation inexacte* are acceptable: the *code civil*, along with giving the criterion for *erreur* able to render invalid a contract (1), also enumerates the *erreurs indifferentes* which, in spite of being *erreurs*, are unable to achieve the same effect (2).

1. *Erreur acceptable*

49. - *Erreur sur les qualités essentielles de la prestation.* Article 1132 of *code civil* provides that: “*l'erreur de droit ou de fait, à moins qu'elle ne soit inexcusable, est une cause de nullité du contrat lorsqu'elle porte sur les qualités essentielles de la prestation due ou sur celles du cocontractant.*” Between the two kinds of *erreurs* that are acceptable, as far as this thesis is concerned, only those that “*porte sur les qualités essentielles de la prestation due*” are interesting, as the special problems in purchase of shares are caused by the shares instead of the persons of the sellers. Accordingly, we will only discuss those about the *prestation* and set aside those about the *cocontractant*.

50. - *Qualités essentielles.* The criterion “*qualités essentielles*” is defined as “*celles qui ont été expressément ou tacitement convenues et en considération desquelles les parties ont contracté*” in article 1133 of *code civil*. In our opinion, this criterion is nothing special. In

¹⁹ <https://www.larousse.fr/dictionnaires/francais/erreur/30846>.

essence, it requires that an *erreur* should be significant enough so as to be accepted as an *erreur acceptable*.

51. - *Prestation due.* The requirement that *erreur* should be about *les qualité essentielles de la prestation due* is a product of the reform of *code civil* in 2016, which has replaced the requirement that “*elle tombe sur la substance même de la chose qui en est l'objet*” as provided in former article 1110 of *code civil*.

When it is *la substance même de la chose* instead of *les qualité essentielles de la prestation due* that was in place, the application of *erreur* was restrictive in purchase of shares in that the requirement of *la substance même de la chose* prevented the application of *erreur* in situations where it is the enterprises underlying the shares instead of the shares *per se* that are the objects of *erreur*.

After the reform, some authors believe that “*l'erreur ne porte plus nécessairement sur la substance de la chose mais aussi sur une prestation : la prestation est ici la transmission de l'entreprise représentée par les droits sociaux. On peut donc espérer que les juges profitent d'une rédaction qui est beaucoup plus accueillante pour la notion d'erreur*”.²⁰ Whereas others believe that “*si la lettre laisse effectivement place à une marge d'interprétation, il paraît peu probable que le législateur ait souhaité rompre avec la jurisprudence traditionnelle et déstabiliser ainsi un grand nombre d'opérations de cession. La qualité essentielle des droits sociaux réside dans le transfert de droits, sauf clause expresse faisant de l'exploitation de la société une qualité substantielle expressément convenue (C. civ., art. 1133, al. 1^{er}, nouv.) ou un motif entré dans le champ contractuel (C. civ., art. 1135 nouv.)*”.²¹

In our opinion, this dispute about whether the replacement of *la substance même de la chose* by *les qualité essentielles de la prestation due* should facilitate the application of *erreur* in purchase of shares, is of little interest: the main obstacle in applying *erreur* in the context of purchase of shares does not reside in the positive condition as we have just presented, but in the negative conditions we will immediately present --- i.e. the situations

²⁰ A. COURET et A. REYGROBELLET, *Le projet de réforme du droit des obligations: incidences sur le régime des cessions de droits sociaux*, Bull. Joly sociétés 2015. 247, n° 34.

²¹ M. MEKKI, *Les incidences de la réforme du droit des obligations sur le droit des sociétés : rupture ou continuité?*, Rev. sociétés 2016. 483, n° 25.

where the application of *erreur* is explicitly excluded. Therefore, in this thesis, especially in Part II where we will discuss the legal protections against overpricing, we will not mention much about this change of the definition of and criterion for *erreur* but treat it as unchanged.

2. *Erreur indifférent*

52. If certain negative conditions are to be met, the application of *erreur*, even if considered to be about *les qualités essentielles de la prestation due*, will be excluded. In particular, the negative conditions can be either subjective (i) or objective (ii).

i. *Erreur indifférent* for subjective reasons

53. - ***Erreur inexcusable***. To evoke the foundation *erreur*, a preliminary, or self-evident condition is that there is an *erreur*. Thus, if it is proved that the buyer is well aware of the fact he alleged to have mistaken about, his action is not to be accepted.²² However, the mere existence of an *erreur* is not enough, it is further required, pursuant to article 1132, that the *erreur* the buyer has committed is not *inexcusable*.

The text of *code civil per se* does not define the meaning of the word “*inexcusable*”. M. Caffin-moi defines “*erreur inexcusable*” as the one “*par légèreté, ce dernier (cessionnaire) avait contribué à.*”²³ In other words, French law imposes a duty of due diligence on the part of the seller the violation of which will prevent him from evoking the foundation of *erreur*. However, there is no fixed criterion as to the scope of this duty of due diligence. Generally speaking, the accessibility to the necessary information to make a prudent decision²⁴ and the professionalism²⁵ of the buyer will make it more possible for the judge to deny the case based upon *erreur*.

ii. *Erreur indifférent* for objective reasons

²² V. CA Versailles, 10 avril 1992, Rev. bancaire et bourse, 1993. 91, obs. M. GERMAIN et M.-A. FRISON-ROCHE; CA Paris, 24 juin 1994, RJDA 1994. 1300.

²³ M. CAFFIN-MOI, Cession de droits sociaux et droit des contrats, Economica, 2009, n° 41.

²⁴ V. Cass. com., 15 novembre 1983, n° 82-13470; Cass. com., 16 novembre 2004, n° 02-12636.

²⁵ V. Cass. com., 13 janvier 1998, n° 95-17697.

54. - Erreur sur valeur. Article 1136 of *code civil* provides: “*l'erreur sur la valeur par laquelle, sans se tromper sur les qualités essentielles de la prestation, un contractant fait seulement de celle-ci une appréciation économique inexacte, n'est pas une cause de nullité.*” In our opinion, the exclusion of *erreur sur valeur* from the scope of *erreurs acceptables* is the principal cause for the difficulty in applying *erreur* in the context of purchase of shares: as we will present *infra*, one of the special risks in purchase of shares is the difficulty in determining the value of shares and accordingly the *erreur* that buyers of shares tend to commit most frequently is exactly *erreur sur valeur*. To some extent, we believe the *erreur sur les qualités essentielles de la prestation* and *erreur sur valeur* are mutually exclusive: at least when it comes to purchase of shares, the fact that an *erreur* is proved to be not *sur valeur* is tantamount to the fact that the *erreur* is *sur les qualités essentielle de la prestation* and thus eligible to render the contract of purchase of shares null.

55. - Erreur sur motif. Article 1135 of *code civil* provides: “*l'erreur sur un simple motif, étranger aux qualités essentielles de la prestation due ou du cocontractant, n'est pas une cause de nullité, à moins que les parties n'en aient fait expressément un élément déterminant de leur consentement.*” Technically speaking, we believe there is an issue as to what constitutes *un simple motif* and what constitutes *qualités essentielles de la prestation due*. Yet, in reality, the blurred distinction makes no difference, as we believe the aforementioned *erreur sur valeur* includes *erreur sur motif*, at least as far as purchase of shares is concerned. As *erreur sur valeur* is generally excluded, there is no need to further discuss whether an *erreur* is an *erreur sur motif*.

B. Réticence dolosive

56. Under French law, there are two mechanisms that can be subsumed under the category of *réticence dolosive lato sensu*. Accordingly, we will present the two foundations for *réticence dolosive* under French law (1) before elaborating the conditions for applying them (2).

1. Foundations for *réticence dolosive*

57. - Identification of *réticence dolosive* and breach of obligation of disclosure. As its name indicates, the *réticence dolosive* as provided in article 1137 of *code civil* is in essence a silence on a fact known to one party who wishes to provoke an *erreur* on the part of the

other party by the silence, which is serious enough that the law regards it as a *dol*. Here comes a question: what is the criterion to identify a silence with a *dol*? As the silence means a failure to disclose certain information, the scope of information to be disclosed is a vital element in determining whether a silence constitutes a *réticence dolosive*; and similarly, the existence of a *réticence dolosive* presumes the existence of a violation of an obligation of disclosure.

58. - Autonomy of a legal foundation for obligation of disclosure: *l'obligation précontractuelle d'information* provided in article 1112-1 of *code civil*. The reform of *code civil* in 2016 has provided a foundation for a universal obligation of disclosure required for applying *réticence dolosive*, as article 1112-1 of *code civil* provides: “*celle des parties qui connaît une information dont l'importance est déterminante pour le consentement de l'autre doit l'en informer dès lors que, légitimement, cette dernière ignore cette information ou fait confiance à son cocontractant.*” However, article 1112-1 serves more than the function of legal basis for *réticence dolosive*: for one thing, *l'obligation précontractuelle d'information* as provided in article 1112-1 is equipped with legal sanctions different from that of *dol*; for another, the two mechanisms have different applying conditions, as we will present *infra*.

59. - Identification of *réticence dolosive* with *l'obligation précontractuelle d'information*. As we have already mentioned, since the two mechanisms *réticence dolosive* and *l'obligation précontractuelle d'information* govern similar subject matters, in this section we will discuss them together, in pointing out their differences when necessary.

2. Conditions for *réticence dolosive*

60. In order to apply *réticence dolosive lato sensu* (including *réticence dolosive* as provided in article 1137 and *obligation précontractuelle d'information* provided in article 1112-1), both subjective conditions (i) and objective conditions (ii) should be met.

i. Subjective conditions for *réticence dolosive*

61. - Unnecessity for excusability of the *erreur* on the part of the aggrieved party. Article 1139 provides: “*l'erreur qui résulte d'un dol est toujours excusable.*” This means that in contrast to *erreur* which excludes *erreur inexcusable*, whether the aggrieved party has fulfilled the duty of due diligence is irrelevant in the applicability of *réticence dolosive*.

However, if it is *l'obligation précontractuelle d'information* as provided in article 1112-1 instead of *réticence dolosive* that is to be applied, the obligation of due diligence might be still required, as the same article provides that a condition for the existence of *l'obligation précontractuelle d'information* is “*légitimement, cette dernière ignore cette information ou fait confiance à son cocontractant.*” No matter what it means by the word “*légitimement*” here, one thing is clear: the ignorance and trust (*confiance*) by the aggrieved party is not “*toujours excusable*”.

62. - Necessity for subjective bad faith on the part of the defrauding party.

Although the aggrieved party might be spared of the necessity of proving the fulfilment of his own obligation of due diligence as provided in article 1139, he is nonetheless held to prove that the silence supposed to be a *réticence dolosive* is out of bad faith on the part of the defrauding party. As article 1137 provides: “*constitue également un dol la dissimulation intentionnelle par l'un des contractants d'une information dont il sait le caractère déterminant pour l'autre partie.*”, the aggrieved party has to prove the awareness by the defrauding party of the information failed to be disclosed; to prove that the silence is intentional; and to prove that the defrauding party knows the determinant characteristic of the information to the aggrieved party.

ii. Objective conditions for *réticence dolosive*

63. - Objective conditions based upon a literal interpretation of current article 1137 and article 1139 of *code civil*. Article 1137 provides that the *réticence dolosive* consists of all “*dissimulation intentionnelle par l'un des contractants d'une information dont il sait le caractère déterminant pour l'autre partie*” and article 1139 provides that “*l'erreur qui résulte d'un dol ... est une cause de nullité alors même qu'elle porterait sur la valeur de la prestation ou sur un simple motif du contrat.*” Read together, the two articles basically state that all information, as long as its importance to one party is known to the other, the other has an obligation to disclose; otherwise he will be held to commit a *réticence dolosive*.

64. - Contradiction between article 1139 and article 1112-1. Article 1139 provides explicitly that “*l'erreur qui résulte d'un dol ... est une cause de nullité alors même qu'elle porterait sur la valeur de la prestation*”. However, this wide scope of application is

contradicted with a narrow one provided in article 1112-1, which reads “*néanmoins, ce devoir d'information ne porte pas sur l'estimation de la valeur de la prestation.*” So, which one between the two should prevail? To answer this, we should firstly explore the relation between the mechanism provided in article 1137 and the one provided in article 1112-1.

If article 1112-1 is considered as proving the scope of obligation of disclosure to article 1137, article 1112-1 should prevail. As article 1137 makes the failure to disclose information a type of *dol*, the scope of information to be disclosed is not too limited. However, if we interpret article 1112-1 as delineating the scope of information to disclose in article 1137, the scope therein will be limited to that “*ne porte pas sur l'estimation de la valeur de la prestation*”. With such an interpretation of the relation between article 1112-1 and article 1137, article 1139 should be interpreted as governing only *dol actif*, to be excluded in *réticence dolosive*.

Otherwise, it should be article 1139 that should prevail. If article 1137 is interpreted to have laid down its own scope of information to be disclosed, not relying on article 1112-1, article 1139 should be interpreted as a reinforcement of the unlimited scope of obligation to disclose as provided in article 1137 and *réticence dolosive* covers also the *erreur porte sur l'estimation de la valeur de la prestation*.

65. - Disappearance of the contradiction with the taking effect of the new reform on October 1st, 2018. The contradiction between the texts of article 1137 and article 1139 on the one hand and article 1112-1 on the other leads to the dispute as to the scope of obligation of disclosure when it comes to applying *réticence dolosive*. However, this dispute will not last long, as the contradiction will soon be eliminated with the taking effect of *Loi n° 2018-287 du 20 avril 2018* which adds the following text to article 1137: “*néanmoins, ne constitue pas un dol le fait pour une partie de ne pas révéler à son cocontractant son estimation de la valeur de la prestation.*” Since then, the two articles, previously contradicted with each other, will match and there will be no doubt that the scope of obligation to disclose, as far as *réticence dolosive* is concerned, excludes information about value of the *prestation*, which means *réticence dolosive* will have a scope of application similar to *erreur*.

II. *Vices du consentement* under Chinese law

66. - Particularity of the provisions for *vices du consentement*: no provisions so denominated. Although “expression of intention is true” is also an element for a valid contract under Chinese law, unlike French law, there is no block of provisions explicitly designated as regulating defects to expression of intention (*vices du consentement*). Rather, Chinese laws (three acts or statues concerning contract law: General Provisions of Civil Law, General Principles of Civil Law; and Chinese Contract Law) choose to put all the causes for the annulment of the contract together under the block denominated as “effects of juristic acts (or effects of contracts)”, regardless of whether they are *vices du consentement* or of other nature. Therefore, from the structure of texts alone, we are unable to identify the provisions related to *vices du consentement*. However, taking French law as a reference, we can find the counterparts of nearly all the *vices du consentement* as provided in French law in Chinese law: *erreur*, *dol* and *violence*. In order to avoid confusion, in this section, we will use the French names to refer to the Chinese mechanisms. There is one thing that needs to be noted. Under Chinese law, there is a cause for annul the contract called “obvious unfairness”. As its regime and function is similar to both *violence économique* and *l’exigence de contrepartie non illusoire ou dérisoire* as provided in article 1169 of French *code civil*, it is situated in the grey area between *vices du consentement* and *contenu*.

67. - Scope of discussion: exclusion of *violence*. For the same reason as we have presented when elaborating the *vices du consentement* under French law, we will not discuss *violence* under Chinese law in this thesis.

68. - Scope of discussion: exclusion of obvious unfairness. Obvious unfairness will be excluded from the scope of discussion, for one thing because of the same reason why we exclude *violence économique* from the scope of discussion of French law; and for the other because we are to discuss it in the next section dedicated to *contenu*.

69. - Scope of discussion: limitation of the notion *dol*. For the same reason as we have presented when elaborating the *vices du consentement* under French law, we will limit our discussion of *dol* to only *réticence dolosive*.

70. - Enumeration of the *vices du consentement* to be discussed in this section. Accordingly, in this section, we will discuss *erreur* (A) and *réticence dolosive* (B) under Chinese law.

A. *Erreur*

71. The statutory law of China provides no clear criterion for *erreur* (A) and *erreur* is rarely applied in practice (B).

1. Unclear criterion in statutory law

72. - Texts of the provisions for *erreur*. Article 147 of General Provisions of Civil Law provides that: “for juristic acts based upon substantial misunderstanding, the actor has the right to request the People's Court or arbitration organisations to revoke it.” Article 59 of General Principles of Civil law provides that: “a party shall have the right to request a people's court or an arbitration agency to alter or rescind the following civil acts: (1) those performed by an actor who substantially misunderstood the contents of the acts...” and Article 54 of Chinese Contract law provides that: “either party has the right to request a people's court or an arbitration institution to alter or rescind any of the following contracts: (1) any contract which is made under substantial misunderstanding...”

73. - Absence of clear criterion in the provisions. Unlike French law, the provisions for *erreur* under Chinese law are rather simple: none of the articles aforementioned has defined what it means by “substantial misunderstanding” and there is no enumeration of *erreurs indifferentes*. A statute of judicial interpretation has interpreted the meaning of the expression “substantially misunderstood”: “where the actor has made a mistake about the nature of the act, the identity of the other party, the type, quantity, standard and quality of the objects, etc. which makes the effects of the act is contrary to his own intention, which causes serious loss, it can be considered to be a substantial misunderstanding”. Obviously, compared to the French provisions, the judicial interpretation has not made things any clearer, as it says nothing about the most important issue: whether *erreur sur valeur* should be accepted as “substantial misunderstanding” (the Chinese expression for *erreur*) or not. Thus, it is safe to say that Chinese law provides no clear criterion for *erreur* able to render a contract null.²⁶

²⁶ See P. SUI, On substantial misunderstanding in Chinese Contract Law, China Legal Science, 3- 1999. (隋彭胜: “关于合同法中‘重大误解’的探讨”, 《中国法学》1999年第3期).

2. Rare application in positive law

74. - **Presentation of the rare application.** At least when it comes to purchase of shares, *erreur* is never resorted to by any aggrieved buyer. For the purpose of this thesis, we believe it is safe to say that *erreur* is not a useful foundation.

75. - **Causes for the rare application.** But what causes the rare application of *erreur* in China? Is it because of the lack of unclear criterion for *erreur*? We believe the answer is probably negative, as there is neither a clear criterion for *réticence dolosive* as well. To be honest, we do not know why *erreur* is used so rarely, but as this thesis does not focus on theory about *erreur*, all we need to know is the fact that *erreur* is seldom used in purchase of shares.

B. *Réticence dolosive*

76. Similar to *erreur*, under Chinese law there is no clear criterion for *réticence dolosive* either (1). However, *réticence dolosive* is commonly resorted to in practice (2).

1. Unclear criterion in statutory law

77. - **Texts of the provisions for *réticence dolosive*.** Article 148 of General Provisions for Civil Law provides that: “where one party, by fraudulent manoeuvres, has made the other party to conduct juristic acts contrary to his real intention, the aggrieved party has the right to request the People's Court or arbitration organisations to revoke it.” General Principles for Civil Law and Chinese Contract Law has similar provisions.

78. - **Absence of clear criterion in the provisions.** Unlike French law, the Chinese texts has mentioned nothing but the word “fraudulent”. A judicial interpretation has interpreted the meaning of this word: “where a party intentionally imparts false information to the other party, or intentionally hide true information from the other party, it can be considered as a fraud.” This judicial interpretation is of little use, as it says nothing but the fact that *dol* can be consist of *réticence dolosive*. As for what kind of true information is aimed by the provision for *dol*, it is mute. Accordingly, we believe it is safe to say that under Chinese law, there is no clear criterion for *réticence dolosive*.

2. Common application in positive law

79. - Presentation of the common application. Although *réticence dolive* under Chinese law has no clear criterion either, similar to *erreur*, the destine of *réticence dolive* is quite different from *erreur*, as at least in purchase of shares, the former is relatively wide used. To be honest, we have failed to figure out why *réticence dolive* is widely used whereas *erreur* is not so.

80. - Methods of the common application. As there is no clear criterion for the required obligation to be disclosed when it comes to *réticence dolive*, in order to determine whether there is such a *dol passif*, judges have to adopt a case-by-case method, where in every single case, the judges use his discretion to fulfil this task, relying on vague norms such as good faith.

III. Comparison

81. Comparing the provisions about *erreur* and *réticence dolive* in the positive laws of the two countries, we can see two differences: difference in the applicability of the two foundations (A) and difference in their criterion (B).

A. Difference in the applicability

82. Under French law, both *erreur* and *réticence dolive* are used. When it comes to purchase of shares, *erreur* is even used more frequently than *réticence dolive*. Whereas under Chinese law, *réticence dolive* is the exclusive foundation, to the exclusion of *erreur*, at least as far as this purchase of shares is concerned. The cause for the difference in the two countries is kind of beyond our understanding.

B. Difference in the conditions

83. The two foundations under French law, although have different conditions for application, have one thing in common: they have quite clear criterion that restrict the discretion of judges yet allow them to render predictable judgements with certainty. On the

other hand, as there is no clear criterion in China, Chinese judges have much greater discretion in determining whether there is a *vice du consentement*, yet the judgements they render is sure to be without coherency and certainty.

Conclusion of Section I

84. The most important conclusion of this section is that when it comes to determine whether there is a *vice du consentement* in a contract of purchase, Chinese judges have more discretion than their French counterparts.

Section II. Content

85. Restrictions on contents of contracts are explicitly provided under a *sous-section* of the French *code civil* entitled “*le contenu du contrat*” (I) whereas under Chinese law the similar provisions are referred as something else (II). The difference in name does not prevent a comparison of the said legal provisions and relevant doctrines in the two countries (III).

I. Content under French law

86. The function of *contenu* is to restrict the *liberté contractuelle* (A). However, before the reform of *code civil* in 2016, it is two other conditions that served the same function (B). After 2016, the function is carried out by *contenu*, which is realized in three conditions serving as its substance, yet only two of them will be discussed (C).

A. Functions of *contenu*

87. In principle, a person has the liberty to determine the content of the contract he is going to engage in (1). However, a *sous-section* of *code civil*, entitled “*le contenu du contrat*”, constitutes a restriction on this liberty (2).²⁷

1. Principle: “*liberté de déterminer le contenu du contrat*”

88.- **Statues of the principle.** The “*liberté de déterminer le contenu du contrat*” is just one of the three aspects of the global *liberté contractuelle* provided in article 1102, with the other two being the “*liberté de contracter ou de ne pas contracter*” and the “*liberté de choisir son contractant*”,²⁸ which are of no particular interests as far as this thesis is concerned. The principle of *liberté contractuelle* is of the constitutional nature, as have been

²⁷ There are dissenting opinion against the idea that the *liberté contractuelle* is the principle and the restrictions to it are exceptions. V. G. ROUHETTE, *La force obligatoire du contrat, Rapport français*, in *Le contrat aujourd’hui: comparaisons franco-anglaises*, dir. D. TALLON et D. HARRIS, LGDJ, 1987, n° 4, p. 27; C. JAMIN, *Une brève histoire politique des interprétations de l’article 1134 du Code civil*, D. 2002, p. 901.

²⁸ V. G. CHANTEPIE et M. LATINA, *La réforme du droit des obligations*, Dalloz, 2016, n° 88.

constantly confirmed by the *conseil constitutionnel*.²⁹ In spite of its constitutional nature, the reform of *code civil* in 2016 has also integrated it explicitly in the text of *code civil*.³⁰

89.- Substance of the principle. In our opinion, the principle of *liberté de déterminer le contenu du contrat* can be boiled down to two aspects.

The first aspect is reflected in the principle of *force obligatoire du contrat*, as provided in article 1103 of *code civil*: “*les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits*”.³¹ In other words, the rights and obligations of the parties to a contract should be conventionally determined by themselves. And once determined, the content of the contract has a binding effect upon them. As M. Wicker has put it: “*Il n'appartient pas au juge, ni même au législateur de se substituer aux auteurs de l'acte pour en déterminer le contenu.*”³²

The second aspect is reflected in the suppletive nature of contract law, which means that legal rules with respect to contracts are in most cases for the purpose of supplement the intentions of the parties instead of imposing upon them imperative norms not be able to derogate from.³³ The suppletive nature of contract law is recognized in the *rapport au président de la république* concerning the reform of *code civil* in 2016, which mentions explicitly that the existence of the expression “*sauf clause contraire*” cannot be interpreted *a contrario* so as to refute the general suppletive nature of rules in contract law. According to this *rapport*, the suppletive nature of contract law is demonstrated in three articles in *code civil*: article 6 (*ordre public et bonnes moeurs*, interpreted *a contriori*), article 1102 (*liberté contractuelle*) and article 1103 (*force obligatoire du contrat*).³⁴

²⁹ V. Cons. const., 3 août 1994, n° 94-348 DC; Cons. const., 10 juin 1998, n° 98-401 DC; Cons. const., 19 décembre 2000, n° 2000-437 DC; Cons. const., 13 juin 2013, n° 2013-672 DC.

³⁰ V. G CHANTEPIE et M LATINA, La réforme du droit des obligations: commentaire théorique et pratique dans l'ordre du Code civil, Dalloz, 2016, n° 86 et 87.

³¹ It should be noted that the expression “*force obligatoire*” is now used as the title of a *sous-section*, which is not relevant to article 1103 of *code civil*, or its predecessor former article 1134 al. 1 as presented here. However, as the phrase “*force obligatoire du contrat*” is commonly and traditionally used as to refer to the effect attached to article 1103, it is also used in this sense here.

³² G. WICKER, Les fictions juridiques: contribution à l'analyse de l'acte juridique, LGDJ 1997, n° 17, p. 27; V. J. Ghestin, La notion de contrat, Droits ; revue de théorie juridique, n° 18, 1993, p. 13.

³³ V. J. FLOUR et al., Les obligations 1 l'acte juridique, Sirey, 16e éd. 2014, n° 101; F. TERRE et al., Droit civil, Les obligations, Dalloz, 11e éd. 2013, n° 24; C. PERES, Règles impératives et supplétives dans le nouveau droit des contrats, JCP G 2016, 454.

³⁴ V. Rapport au président de la république relatif à l'ordonnance n° 2016-131 du 10 février 2016, disponible à <https://www.legifrance.gouv.fr/eli/rapport/2016/2/11/JUSC1522466P/jo/texte>.

In particular, the suppletive nature of contract law is reflected in many aspects. For example, it allows the parties to liberally conclude contracts *sui generis*, i.e. to arrange the rights and obligations in such a way that do not correspond to the those legally provided in nominated contracts, as provided in article 1105 of *code civil*.³⁵ Also, the principle allows the parties to liberally derogate from the given legal rules for a particular category of nominated contracts, either by creating new rights or obligations not in place in the legal rules or by changing the rights or obligations prescribed by the legal rules.

2. Exceptions: restrictions on the content of the contract

90.- Restrictions on the content as reflected in both suppletive rules and imperative rules. The “*liberté de déterminer le contenu du contrat*”, albeit applicable in most cases, is restricted by both suppletive rules and imperative rules, although with different degrees.

In the first place, it may be somewhat counterintuitive that suppletive rules may constitute restrictions on contractual liberty. However, this is the truth. Suppletive rules imposes restrictions on the contractual liberty by providing default rules: the principle of *force obligatoire du contrat* requires that rights and obligations are conventionally created by the parties. Yet with suppletive law “*qu'elle régleme dans leur silence*”³⁶, the parties will see legal obligations imposed upon them if they do not choose to conventionally opt them out in some situations.

In the second place, the liberty will be *a fortiori* restricted by imperative rules. This is understandable, as by “imperative” it means something that must be observed and cannot be conventionally derogated. These restrictions are varied and scattered all the way in the *code civil*.³⁷

91.- The sous-section “le contenu du contrat” as constituting restrictions on the content by imperative rules. The sous-section “*le contenu du contrat*”, in our opinion, can

³⁵ V. B. PETIT et S. ROUXEL, *Contrat– classification des contrats*, JCL civ., art. 1105, n° 8 – n° 16.

³⁶ C. PERES, *Règles impératives et supplétives dans le nouveau droit des contrats*, JCP G 2016, 454.

³⁷ Ibid.

be understood as a collection of a general provision for the effect of imperative rules and two specific imperative rules, as we will present in more detail *infra*.

92.- Indifference to the methods of realizing the effects of imperative rules, i.e. the disinterest of the distinction between *nullité absolu* and *nullité relative* of the contract. Under French law, the imperative rules take their effects through the sanction of *nullité*. More specifically, any violation of imperative rules will lead to a *nullité du contrat*. According to article 1178 of *code civil*, “*un contrat qui ne remplit pas les conditions requises pour sa validité est nul*” and “*le contrat annulé est censé n'avoir jamais existé*”. However, *contrats annulés* are not treated alike, as there are two kinds of *nullités*: *nullité absolue* and *nullité relative*, which, according to article 1179, are different in their conditions --- “*la nullité est absolue lorsque la règle violée a pour objet la sauvegarde de l'intérêt general; elle est relative lorsque la règle violée a pour seul objet la sauvegarde d'un intérêt privé*”; and according to article 1180 and 1181, in their effects --- “*la nullité absolue peut être demandée par toute personne justifiant d'un intérêt, ainsi que par le ministère public*” whereas “*la nullité relative ne peut être demandée que par la partie que la loi entend protéger*”.

The distinction between *nullité absolu* and *nullité relative* seems to oblige us to address it in discussing every violation of imperative rules, as the two *nullités* differ drastically in the scope of persons who can demand them. However, at least as far as this thesis is concerned, this is in fact not necessary and the discussion thereof has no particular interest, as the two *nullités* will actually lead to the same consequence from the perspective of the formation of the contract. If a conventional clause is threatened by a possible *nullité absolu*, we can expect that no rational persons would put it in a contract. However, this is also true when it comes to *nullité relative*, as if the law provides one party to a contract with the right to unilaterally annul a conventional clause, the other party is by no means willing to accept the clause in the first place. To the extent that the two *nullités* both prevents a conventional clause from coming into existence, we believe they are in essence the same thing and will not spend our effort to distinguish them in this thesis.

B. Predecessors of *contenu*

93.- *Contenu* as a replacement of “*objet*” and “*cause*”. Currently, “*un contenu licite et certain*” is one of the three conditions for the validity of a contract, as provided in

article 1128 and in the *sous-section* entitled “*le contenu du contrat*” including article 1162 and following of *code civil*. However, before the reform of *code civil* in 2016, the role of the condition of *contenu* was played by two other conditions: “*un objet certain qui forme la matière de l’engagement*” and “*une cause licite dans l’obligation*”, as provided in former article 1108 and in two *sections* entitled “*de l’objet et de la matière des contrats*” and “*de la cause*”.³⁸

94.- Brief presentation of “*objet*”. *Objet*, before the reform of *code civil* in 2016, used to be a “*condition autonome*”. Yet gradually, the *contenu* began to “*relègue sa représentation au sein d’une fraction du contenu*” in doctrine³⁹ and eventually completely replaced it in the 2016 reform of *code civil*. However, this replacement is mainly to improve the “*compréhension de la structure du contrat*”.⁴⁰ In other words, although technically speaking, “*objet*” is now no longer an independent condition for a valid contract but only a component of the new condition of *contenu*, its substance has been largely retained. For the purpose of this thesis, there is no particular interests in exploring in detail the legal evolution from *objet* to *contenu*.

95.- Prolonged presentation of “*cause*”. Similar to the term “*objet*”, the term “*cause*” has also been absorbed in *contenu*. Yet as this notion was a notion original in French law and of high significance thereunder, we believe it is necessary to use more words to elaborate it.

The term *cause* is an ambiguous notion (1). In spite of its ambiguity, this notion used to be used as a condition for the validity of the contract (2). As a condition for the validity of the contract, this notion has already been absorbed in the new condition “*contenu*”. However, this term has another function that allows its autonomy: the function of identifying the contract with a pre-existing category of contracts (3).

1. Notion of *cause*

³⁸ *Rapport au président de la république relatif à l’ordonnance n° 2016-131 du 10 février 2016*, disponible à <https://www.legifrance.gouv.fr/eli/rapport/2016/2/11/JUSC1522466P/jo/texte>.

³⁹ V. V. FORTI, *L’absorption de l’objet par le contenu du contrat*, LPA 31 octobre 2014, n° 2.

⁴⁰ V. FORTI, *L’absorption de l’objet par le contenu du contrat*, LPA 31 octobre 2014, n° 19.

96. The term *cause* albeit used as a condition for the validity of the contract, was not given any legal definition in the *code civil* (i). However, to some extent there is a consensus as to the meaning of this term: it refers to *cause finale*, or in other words the purpose of a party to the contract to initially engage therein (ii). Nevertheless, there is also a dispute as to the meaning of the term: whether the word designate *cause subjective* or *cause objective* (iii).

i. Absence of legal definition of *cause*

97. *Cause* as a condition for the validity of the contract was mentioned in four articles of the *code civil*: former article 1108 where it was enumerated as one of the four conditions; former article 1131 where three defects of *cause* that would render a contract invalid was listed; former article 1132 where it provides that “*la convention n'est pas moins valable, quoique la cause n'en soit pas exprimée*”; and former article 1133 where one of the defects of *cause*, the *illicéité*, is given a definition. However, it seems that the text of the code did not give a precise definition to the most important term, which has led to a plethora of doctrinal discussions and jurisprudence dedicated to defining this term: “*l'obscurité de cette notion, la diversité de ses définitions selon la fonction qu'elle est appelée à remplir, en font la providence des plaideurs, parfois des juges, et même des auteurs, en peine d'arguments juridiques.*”⁴¹

ii. Consensus to the definition of *cause*: *cause* as *cause finale*

98. Albeit the absence of a definite definition for the term *cause* in the *code civil* which necessarily led to disputes thereabout, we find that French authors have reached one consensus: the term *cause* used in *code civil* refers to the *causa finale* instead of the *causa efficiente*. The *cause efficiente* is a direct legal event, a *fait juridique* or a *acte juridique*, that leads to an obligation, or in other words the *fait générateur* thereof.⁴² For example, the *cause efficiente*, or the *causa*, for the obligation or the effect of transferring the ownership of something was the formal act “*mancipatio*” or “*tradition*” in Roman law⁴³. This formalist definition identified with the notion “*causa*” in Roman law is obviously not what the modern

⁴¹ J. GHESTIN, *Traité de droit civil, La formation du contrat*, LGDJ, 3e éd. 1993, n° 921.

⁴² V. G. WICKER, *Les fictions juridiques: contribution à l'analyse de l'acte juridique*, LGDJ 1997, n° 102, p. 100.

⁴³ V. J. CARBONNIER, *Droit civil, Les biens*, Dalloz, 19e éd, 2005. p. 294

French scholars would attach to the term *cause* as used as a condition for the validity of the contract in *code civil*.⁴⁴

Rather, the term *cause* as the French jurists would commonly understand means *cause finale*, or the economic purpose that one can expect from assuming a particular obligation.⁴⁵

iii. Disputes as to the definition of *cause*: *cause objective* or *cause subjective*

99. We now know that the notion *cause* is the purpose of a party to assume his obligation or as the benefit he expects to acquire. However, under this definition alone, the notion *cause* can still arouse questions as to whether the benefits received should be objective or subjective.

If the term *cause* is understood as *cause objective*, it means the reciprocal obligation that the other party is to assume, or in other words the *contrepartie convenue*, should fall into a schema of pre-existent categories.⁴⁶ The adjective *objective* here refers to the fact that *contreparties convenues* are categorized into objective pre-existent categories for most nominated contracts.

On the other hand, if the term *cause* is understood as *cause subjective*, it denotes the more remote motive that inspires the party to engage in the contract. The adjective *subjective* here refers to the fact that the motives are not institutionalized and categorized, and should be appreciated subjectively on a case-by-case basis.

2. Function of *cause*: determining the validity of a contract

100. As we will present *infra*, *contenu* as a condition for the validity of the contract has roughly three components: the conditions of *contenu licite*, *contenu commutatif* and *contenu certain*. The last one among the three --- *contenu certain* --- is actually a replacement of the former condition of *objet*. And the other two conditions, *contenu licite* and *contenu*

⁴⁴ V. E. CHEVREAU, *La cause dans le contrat en droit français: une interprétation erronée des sources du droit romain*, RDC 2013, p. 11; J. GHESTIN, *Cause de l'engagement et validité du contrat*, LGDJ 2006, n° 13 à n° 15; F. TERRE, *Les obligations*, Dalloz, 11e éd. 2013, n° 332 à 335.

⁴⁵ V. J. GHESTIN, *Cause de l'engagement et validité du contrat*, LGDJ 2006, n° 149.

⁴⁶ V. J. GHESTIN, *Cause de l'engagement et validité du contrat*, LGDJ 2006, n° 149

commutatif actually corresponds to two aspects of a former condition for the validity of the contract: *cause*. It is generally believed that with respect to the condition of *cause*, the reform of the *code civil* is not substantive.⁴⁷ Rather, “*il est proposé de ne plus faire appel à la notion de « cause » mais de préciser les différentes fonctions régulatrices ou correctrices jusqu'à présent assignées à cette notion par la jurisprudence*”.⁴⁸ As the functions of a condition for controlling the validity of the contract has been retained in the condition of *contenu*, we will discuss them *infra* in the paragraphs dedicated to “substances of the condition of *contenu*”.

3. Function of *cause*: determining the category of a contract

101. The function of determining the category of the contract is carried out by what is called “*cause catégorique*” (i), which is necessarily of an objective nature (ii). The objective nature of “*cause catégorique*” constitutes another restriction on the *liberté contractuelle* (iii).

i. Presentation of the “*cause catégorique*”

102. We have just mentioned that as a condition for the validity of the contract, *cause* has been already absorbed in the new condition *contenu*. Yet the notion *cause* has more than one function: in doctrines, the notion is also used as a tool to identify a contract, or in other words to determine the category of contracts that the said contract belongs to.⁴⁹ The notion *cause*, in this sense, is commonly referred to as “*cause catégorique*”:⁵⁰ When the category of a given contract is not straight-forward and when it is necessary to determine it, judges will look at the *cause* of the main obligation, or the *contrepartie convenu* as expected by the debtor of the obligation and conventionally stipulated by both parties. In doing so, judges are able to find the pre-existent category of contracts most similar to the contract in question and thus consider the contract as one of the said category.

ii. Nature of the “*cause catégorique*”: *cause objective*

⁴⁷ V.G. WICKER, *La suppression de la cause par le projet d'ordonnance: la chose sans le mot?*, D. 2015, p. 1557, n° 2; C. GRIMALDI, *Les maux de la cause ne sont pas qu'une affaire de mots*, D. 2015, p. 814, n° 3.

⁴⁸ *Exposé de motif, projet de loi relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures*.

⁴⁹ V. J. ROCHFELD, *Cause et type de contrat*, LGDJ 1999; J. GHESTIN et al., *La formation du contrat: t. 2, L'objet et la cause*, LGDJ, 4e éd. 2013, n° 925 et 1062.

⁵⁰ V. L. BOYER, *La notion de transaction: contribution à l'étude du concept de cause et d'acte déclaratif*, thèse Toulouse, 1947, p. 162s.

103. We have mentioned *supra* that *cause finale*, i.e. the purpose of a party to assume an obligation, can be subjective or objective. When it comes to determine the validity of a contract, there are room for the debate as to whether the condition *cause* should be understood as *cause subjective* or as *cause objective*. However, when the notion *cause* is used to determine the category of a given contract, it is without doubt that the notion should be understood in an objective way: here, it is by comparing the *cause* of the contract in question with the *causes* of the typical contracts so as to find the most similar one, which is supposed to be the category of contracts that the contract in question belongs to. This process naturally requires that the notion *per se* be preliminarily categorized into several types, which “*embrasse tout cadre contractuel préexistante suffisamment connu pour proposer aux volontés un modèle*”.⁵¹

iii. Consequence of the “*cause catégorique*”

104. - Implications for the objective nature of the “*cause catégorique*”: *liberté contractuelle* reduced to a liberty of choosing from a series of predetermined *causes catégoriques*. Because of the objective nature of the “*cause catégorique*”, the *liberté contractuelle* of the parties is somewhat restricted.⁵² As “*la nature du contrat n'est rien d'autre que le moule préfabriqué à partir d'une volonté-type*”,⁵³ the room left for the parties are sometimes only to choose from a series of predetermined typical *causes*, or in other words a series of “*moule préfabriqué à partir d'une volonté-type*”, instead of fixing a non-typical obligation on a case-by-case basis. Essentially, the reduction of the liberty to determine the *cause* to the liberty of choosing from pre-existent categories of *cause* has an un-ignorable effect: the *cause* of an obligation, or in other words the obligation to be assumed by a party to the contract, has to meet certain pre-determined criteria so as to be qualified as “*obligation essentielle et caractéristique du contrat*”.⁵⁴

105. - Risks attached to the reduction of the liberty to determine the *cause* to the liberty to choose the *cause*. If the parties dare to stipulate themselves the *cause* of the

⁵¹ J. ROCHFELD, *Cause et type de contrat*, LGDJ 1999, n° 44.

⁵² V. E. GOUNOT, *Le principe de l'autonomie de la volonté en droit privé: contribution à l'étude critique de l'individualisme juridique*, thèse Dijon, p. 201.

⁵³ P. JESTAZ, *L'obligation et la sanction: à la recherche de l'obligation fondamentale*, in mël. P. RAYNAUD, Dalloz et Sirey 1985, p. 294.

⁵⁴ G. VINEY et al., *Les conditions de la responsabilité*, in *Traité de droit civil*, dir. J. GHESTIN, LGDJ, 4e éd. 2013, n° 489.

obligation of one party instead of choosing from the pre-existent categories of *causes*, they risk missing the *obligation essentielle*. According to M. Poithier, “*les choses qui sont de l'essence du contrat sont celles sans lesquelles ce contrat ne peut subsister. Faute de l'une de ces choses, ou il n'y a point du tout de contrat, ou c'est une autre espèce de autre.*”⁵⁵ Here we can see that there are two risks attached to the non-choice of a pre-determined *cause*.

The first risk is that the contract may be identified with a category not intended by the parties or by one of the parties. In order for a contract to be identified with a particular category of contracts, the obligation assumed by one party (or the obligations assumed by both parties) should correspond to the *cause catégorique* of that category. If the parties fail to stipulate the *cause catégorique* of the category of contracts in their contract, it is more than natural that without special stipulation, the judges will not regard the contract in question as one of the category in question. Sometimes the obligation stipulated does not correspond to any pre-determined *causes catégoriques*. In this situation, the contract is “*aventurées sur le terrain de l'innomé*”⁵⁶ In this thesis, the risk is mainly about the lack of serious price that may lead to a loss of the identification of the contract of *cession de droits sociaux* with a *contrat de vente*. As we will discuss in more detail in the section dedicated to price, we will see that the French jurists care about the identification because there are special provisions only applied to *contrat de vente*.

The second risk concerns the validity of the contract. Although as we have just mentioned, a contract without a typical cause will be re-identified with another category of contracts or as a *contrat innomé*, there is also a risk that “*il n'y a point du tout de contrat*”. As this risk involves the validity of the contract, a function that has been absorbed in the notion *contenu*, we will discuss this risk *infra*, or more precisely in the place where we discuss “*contenu commutatif*”.

106. - Source of the concern of price in France: the re-identification of the contract due to an unserious price. The aforementioned risks generated by *cause catégorique* generate in turn a special concern in France: the seriousness of price.

⁵⁵ R. -J. POITHIER, *Traité des obligations*, vol. 1, n° 6, p. 10, disponible à <https://books.google.fr/books?id=MY1EAAAACAAJ&printsec=frontcover&hl=fr#v=onepage&q&f=false>

⁵⁶ V. P. HEEBRAUD, *Rôle respectif de la volonté et des éléments objectifs dans les actes juridiques*, in *Mél. J. MAURY*, t 2, Dalloz et Sirey, 1960, p. 436.

As we will present *infra*, article 1169 of *code civil* requires that the *contrepartie convenue* be serious. Since price is the *contrepartie convenue* of the obligation of the seller, it should also meet the requirement of seriousness as provided in article 1169. In France, the requirement imposed by article 1169, thus the validity of the contract, is usually not a problem, as even if the monetary price paid is not serious, it will always be rendered so by being accompanied with other obligations assumed by the buyer, such as the assumption of all the company's liabilities.

Rather, if the requirement of seriousness of price is not met, it is the identification of the contract of purchase of shares as a *contrat de vente* that is in peril. To be identified with a *contrat de vente*, it requires that the *contrepartie* given by the buyer be nothing but monetary price, the *cause catégorique* of *contrat de vente*. Thus, even if the global *contrepartie* given by the buyer is sufficient, as long as the part of *contrepartie* consisting of monetary price is not serious, the contract in question risks to be re-identified with a category of contracts other than *contrat de vente*. Since due to some reasons (which we find unreasonable), French jurists really care to maintain the identification of the contract of purchase of shares as a *contrat de vente*, they accordingly are really discreet about the seriousness of price and try to avoid a unclear portion of price in the total *contrepartie*.

C. Regimes of *contenu*

107. If we compare current article 1128 with former article 1108, both of which enumerate the conditions for the validity of the contract, we can see that the current condition “*contenu licite et certain*” corresponds to the two former conditions *cause licite* and *objet certain*. Accordingly, we can rename the former condition *cause licite* as “*contenu licite*” and “*objet certain*” as “*contenu certain*”. Maybe disappointingly, in this section we will not discuss the provisions related to *contenu certain*. This is because as far as this thesis is concerned, the most interesting provisions related to *contenu certain* are those about price. Since we have already make “price” a separate section under the chapter of element of contract, we believe it is more appropriate to discuss it there.

The leaves us with the provisions related to *contenu licite*, which consist of only two articles: article 1162 and article 1169 of *code civil*. If we have a close look at the two articles, we can see that only the article 1162 is compatible with the name “*contenu licite*”; article

1169, on the other hand, is nothing but a requirement of reciprocal benefits. Thus, we will call it “*contenu commutatif*”, with the ‘*contenu licite*’ only referring to article 1162.

Now, we will explore the requirement of *contenu licite* (1) and the requirement of *contenu commutatif* (2).

1. *Contenu licite*

108. One of the articles in the *sous-section “le contenu du contrat”* --- new article 1162 of *code* --- along with articles in other places in the *code civil*, establishes the general provisions of imperative norms that restrict the contractual liberty (i). As we have previously mentioned, the same function used to be carried out by the condition *cause*. However, the replacement of *cause* with *contenu* is of only a formal nature; the substantive provisions remain largely intact (ii).

i. *Contenu licite* as the general principle for imperative norms

109. The current requirement of *contenu licite* can be identified with a requirement of *ordre public* (a). However, in the 2015 version of the proposal (*projet*) of the law aiming at the reform, aside from the mention of *ordre public*, another restriction called “*droits et libertés fondamentaux*” was inserted, which is not adopted in the final version of the proposal to reform the *code civil*. As “*libertés fondamentaux*” are the foundations of the specific restrictions to contractual liberty in purchases of shares, we believe it is worthwhile to also spend some time in discussing the seemingly abandoned restriction, although in fact its absence does not make much difference as far as this thesis is concerned (b).

a. *Ordre public* as the current provision

110. - Presentation of the texts related to *ordre public*. Article 1162 provides that: “*Le contrat ne peut déroger à l'ordre public ni par ses stipulations, ni par son but, que ce dernier ait été connu ou non par toutes les parties*”. The same provision is reiterated in other places in the *code civil*. Article 6 provides that: “*On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes moeurs.*” And article 1102, in enumerating the aspects of *liberté contractuelle*, also mentions that the phrase “*dans les*

limites fixées par la loi”; besides, it consecrates also an entire *alinéa* to emphasize the restriction, which reads: “*La liberté contractuelle ne permet pas de déroger aux règles qui intéressent l'ordre public.*”

111. - Analysis of the texts related to *ordre public*. *Prima facie*, the meaning of the three articles are quite straightforward: the liberty to determine the content of the contract is restricted by some imperative norms, the violation of which will lead to the invalidity of the contractual stipulation. However, a thorough analysis will show that there are two inconsistencies among them that seem to need our further examination.

The first inconsistency consists of the difference between article 6 and the two new articles --- article 1102 and article 1162, with respect to the existence or absence of the expression “*bonnes mœurs*”. In article 6, both “*ordre public*” and “*bonnes mœurs*” are mentioned whereas in the two new articles, there is only “*ordre public*” without any reference to “*bonnes mœurs*”. The removal of the expression of “*bonnes mœurs*” in fact reflects the tendency in French law of restricting or even removing moral restrictions, although even without this expression, moral restrictions can still survive by masquerading as a requirement of *ordre public*.⁵⁷

The second inconsistency consists of the different choice of word in article 6 and the two new articles. In referring to the same thing, article 6 uses the expression of “*lois qui intéressent l'ordre public...*” whereas article 1102 changes the word *lois* with *règles*. The change brought up by new article 1102 is of great significance: in French, the word *loi* usually refers to legislative statutes and thus technically speaking, article 6 can be explained as meaning that only legislative statutes can laid down imperative norms for protecting *ordre public*. By contrast, the word “*règles*” employed in article 1102 can be used to refer to rules of any sources of law, including both legislative statutes and jurisprudence, which thus justifies the authoritative foundations for some imperative rules in French jurisprudence that we will discuss *infra*.⁵⁸ It should be noted that the significance of this inconsistency is only in

⁵⁷ V. D. FENOUILLET, *Les bonnes mœurs sont mortes! Vive l'ordre public philanthropique!*, in Études P. CATALA, Litec, 2001, p. 487; G CHANTEPIE et M LATINA, *La réforme du droit des obligations: commentaire théorique et pratique dans l'ordre du Code civil*, Dalloz, 2016, n° 96.

⁵⁸ V. M. MEKKI, *La réforme au milieu du gué. Les notions absentes? Les principes généraux du droit des contrats – aspects substantiels*, RDC 2015, p.651, n° 33.

a doctrinal sense, as in practice, although not explicitly provided, French judges have long created praetorian rules based upon the foundation of *ordre public*.

112. - Functions of the texts related to *ordre public*: legislative foundations for imperative rules, legislative or praetorian. We believe the bloc of articles related to *contenu licite* serves two functions. For one thing, it is the ultimate legislative foundations and doctrinal justifications for all the specific imperative rules scattered in *code civil* and other statutes. In this sense, the three articles constitute an abstract and general principle, with every specific imperative rule being its application and concretization. The other two requirements of the condition *contenu* --- *contenu commutatif* and *contenu certain* --- are the examples in this sense. For another, the three articles, as a principle instead of a rule, play the role of an interface allowing judges to create specific rules based upon “*ordre public virtuel*” according to specific situations. The restriction on *clause de non-concurrence* based upon the *liberté du commerce et de l’industrie* as we will discuss *infra* is the example in this sense.

b. Droits et libertés fondamentaux as a would-be provision

113. - Presentation of the would-be article 1102. The current article 1102, *alinéa 2* of *code civil* is as follows: “*la liberté contractuelle ne permet pas de déroger aux règles qui intéressent l’ordre public.*” However, in a previous draft of the proposal to reform the *code civil*, the article was also accompanied by such a clause: “*ou de porter atteinte aux droits et libertés fondamentaux reconnus dans un texte applicable aux relations entre personnes privées, à moins que cette atteinte soit indispensable à la protection d’intérêts légitimes et proportionnée au but recherché.*”

114. - Analysis of the would-be article 1102. *Prima facie*, the clause in the would-be article 1102 that was abandoned in the final version makes little difference, as it aimed to juxtapose a parallel foundation to *ordre public*, yet the parallel foundation can be well absorbed in *ordre public* since the parallel foundation, i.e. the *droits et libertés fondamentaux*, is nothing but a subtype or hyponym of *ordre public*. However, the parallel foundation actually serves an independent function: it allows a judge to follow a logic of degree instead of a logic of “all or nothing”.⁵⁹ In other words, according to the would-be article 1102, the

⁵⁹ V. G. CHANTEPIE, *La liberté contractuelle: back to basics*, blog Réforme du droit des obligations, Dalloz, 16 février 2016, disponible à

judge is able to maintain the validity of a conventional stipulation even if he finds that the conventional stipulation contravenes a *droit ou liberté fondamentale*, as long as the degree of contravention is tolerable according to the proportionality test.

On the other hand, since the final version of article 1102 has not adopted the foundation “*droits et liberté fondamentaux*”, there are two possibilities where French judges will exercise their power: either they have to obey a logic of “all or nothing” in determining the legality of a conventional stipulation suspect to hinder a fundamental right or liberty; or they can still adopt the logic of degree by identifying a fundamental right or liberty as public order only if the right or liberty is severely harmed to the extent that a proportionality test would fail.⁶⁰ To sum it up, the absence of the clause in the would-be article 1102 leads to an uncertainty when it comes to fundamental rights or liberties.

ii. *Contenu licite* as a replacement of *cause licite*

115. - Insignificant changes related to the replacement of *cause licite*. We have mentioned *supra* that in substance, the provisions about judicial controlling of legality of the contract remains largely the same after the reform. However, technically speaking, there is a noticeable change after the reform in 2016. Two years ago, it is the condition *cause* that serves the function of controlling the legality. As we have mentioned, the “*cause finale*” is synonymous with ‘the purpose of engaging’ in a contract, thus at that time, to determine the legality of a contract is tantamount to determine the legality of the purpose of the party to engage in the contract. Since after the reform, both the “*stipulations*” and the “*but*” are to be taken into consideration, it seems that the reform has extended the scope of application of the restrictions related to legality. However, as M. Wicker has pointed out, the restriction on the *stipulations* is interchangeable with that on the “*but*”, as “*il paraît bien évident que le résultat, juridique ou matériel, résultant de l'exécution du contrat aura nécessairement motivé l'engagement*”.⁶¹ Therefore, the replacement of *cause licite* with *contenu licite* has no significant effect.

<http://reforme-obligations.dalloz.fr/2016/02/16/la-liberte-contractuelle-back-to-basics/>

⁶⁰ V. G CHANTEPIE et M LATINA, La réforme du droit des obligations: commentaire théorique et pratique dans l'ordre du Code civil, Dalloz, 2016, n° 97.

⁶¹ G. WICKER, *La suppression de la cause par le projet d'ordonnance: la chose sans le mot?*, D. 2015, p. 1557, n° 3.

116. - Insignificant changes other than the replacement of *cause licite per se*. On top of the replacement of *cause licite*, the reform has also brought up other changes. Former article 1131 of *code civil* reads as: “*L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.*” And former article 1133, by explaining what is a *cause illicite*, provides: “*La cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes moeurs ou à l'ordre public.*” Here, we can observe two changes. For one thing, the reference to *bonnes moeurs* has been removed; for another, the word *lois* has been substituted by *règles*. However, we have already addressed the changes, as the changes brought to former article 1131 and former article 1133 are identical with the inconsistencies between article 6 and the two new articles (article 1102 and article 1162), which we have already presented in detail.

2. Contenu commutatif

117. - Requirement of *contenu commutatif* as an application of the requirement of *contenu licite*. We have just mentioned that *liberté contractuelle* under French law, is restricted by the requirement of *contenu licite*, which is itself a principle whose application requires the transformation into a specific imperative rule, either legislatively or judicially. Exactly in the *sous-section* of “*le contenu du contrat*” where the provision for the principle of *contenu licite* is located, there is one of such imperative rules: the requirement of *contenu commutatif*, or more precisely, the requirement where “*un contrat à titre onéreux est nul lorsque, au moment de sa formation, la contrepartie convenue au profit de celui qui s'engage est illusoire ou dérisoire*”, as provided in article 1169 of *code civil*.

118. - Requirement of *contenu commutatif* as the successor of the requirement of *cause existante*. Similar to the relation between *cause licite* and *contenu licite*, the requirement of *contenu commutatif* is essentially the same thing as the requirement it has replaced: the requirement of *cause existente* (i). However, we believe the two are not exactly identical, to the extent that the requirement of *contenu commutatif* may solve a problem susceptible to exist when it is the requirement of *cause existente* that is in place (ii).

i. Identification of *contenu commutatif* with *cause existante*

119. The function carried out by current article 1169 used to be carried by former article 1131, which provides that: “*L’obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.*” This article enumerates three conditions of validity of the contract based upon the notion *cause*, with the first one being that the obligation cannot be without cause, which *a contrario* can be referred to as the requirement of *cause existante*. Even closer than the relation between *cause licite* and *contenu licite*, which differ in some minor respects, the relation between *contenu commutatif* and *cause existante* can be described as “identical” and the two notions can be said to be interchangeable (a), which means that the requirements based upon the two notions have exactly the same substances (b).

a. Interchangeable requirements

120. - Presentation of the identification of the two requirements. Unlike *contenu licite* provided in current article 1162 and 1102, which has made changes to the requirement of *cause licite* by removing the reference to “*bonne moeurs*”, changing the word *lois* to *règles* and extending the scope of application from only purpose of the contract (*cause*) to both the purpose (*but*) and substance (*stipulations*), it is generally believed that “*la substitution de l’article 1169 (actuelle) ... à (l’ancien) article 1131 du code civil ne modifierait guère les solutions concernant la justification de l’engagement dans les contrats à titre onéreux.*”⁶² The identification can also be demonstrated in a retrospective manner, as when the *cause* was in place, the notion as used in the requirement of *cause existante* is interpreted to be a synonym of *contrepartie convenu*, the expression currently employed in article 1169.⁶³

121. - Reasons for the identification of the two requirements. The provision for *contenu commutatif* and those for *cause existante* are almost identical because the latter is the very *raison d’être* of the former. This is different from the situation of *cause licite* and *contenu licite*: this pair of notions are for the purpose of controlling the legality of the contract, which can be realized by purely focusing on the objective content of the contract without any reference to subjective purpose (*cause*). By contrast, the requirement of *contenu commutatif*, i.e. the requirement of a reciprocal advantage received for the purpose of the validity of the contract, can be only justified by also adopting the requirement of *cause finale*; otherwise it is

⁶² G. WICKER, *La suppression de la cause par le projet d’ordonnance: la chose sans le mot?*, D. 2015, p. 1557, n° 22.

⁶³ V. J. GHESTIN, *Cause de l’engagement et validité du contrat*, LGDJ 2006, n° 149.

impossible to explain why a contract fulfilling all other conditions for the validity of contracts except for the requirement of *contrepartie*, which means that the contract fully and correctly reflects the intentions of the parties, will be invalid.⁶⁴

122. - Doctrinal attacks to the *raison d'être* of the pair of requirements. So far, two things are clear: firstly, the current requirement for *contrepartie convenue* and the former requirement for *cause* are in essence the same things; and secondly, both of them are based upon a causalist theory where the obligation of one party is justified not only by the valid consents of the parties, but also by the existence of some advantages the debtor can expect to receive, which serves as the *cause* because of which the debtor has *ab initio* chosen to engage in the contract. However, with only the causalist theory, the pair of requirements is not justified, as the causalist theory *per se* needs to be justified. Some French authors, by attacking the justification of the causalist theory, have tried to rebut the reasonableness of the requirement of *contenu commutatif* or *cause existante*.⁶⁵

Their arguments can be summarized as follows. Intuitively, an obligation should be enforceable only if its debtor has consented to assume the obligation. If the law is to impose other conditions to the enforceability or the validity of the obligation, it must be justified by reasons. We can imagine that the requirement of *cause*, or any other advantage as a preliminary condition for the validity of the contract, can be justified by two ways: either that “*l'objectif est le respect des volontés des parties et ... une protection du consentement*”.⁶⁶ In this sense, *cause* serves the function of the condition *consentement*. Or that the requirement of *cause* is for the purpose of “*une certaine équivalence entre les prestations des parties*.”⁶⁷ In this sense, the function of *cause* is similar to that of the provision for *lésion*. It is obvious that it does not serve the function of the condition *consentement*, as it is an autonome condition. Thus, it is only to protect the substantive equivalence between the obligations of the two parties.

⁶⁴ V. G. WICKER, *La suppression de la cause par le projet d'ordonnance: la chose sans le mot?*, D. 2015, p. 1557, n° 9 et 12.

⁶⁵ It should be noted that some authors, although formally are against the notion *cause*, in fact support the idea that obligations should be sustained by some expected advantage aside from the intention to assume it. What they advocate is actually the change the name of the notion serving the function of *cause*, in order to avoid “*une notion « subtile », « incertaine », « difficilement intelligible » et « délicate »*” (D. MAZEAUD, *Réforme du droit des contrats: haro, en Hérault, sur le projet!*, D. 2008, p.2675, n 9) V. aussi PLANIOL, *Traité élémentaire de droit civil*, t.II, LGDJ, 11e éd. 1931, n° 1037 s, p.394s, disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k1159982j/f416.vertical>. These authors should be distinguished from those oppose the causalist theory *per se*, who possess the radical idea to remove completely the requirement of *contrepartie* provided in article 1169 of *code civil*.

⁶⁶ X. LAGARDE, *Sur l'utilité de la théorie de la cause*, D. 2007, p. 740, n° 11.

⁶⁷ X. LAGARDE, *Sur l'utilité de la théorie de la cause*, D. 2007, p. 740, n° 11.

This is obviously unacceptable, as the French law has a tradition of limiting the application of *lésion*. As M. Aynes has pointed out: the notion *cause* serving as a tool to ensure substantive equivalence between reciprocal obligations, “*n’a pas sa place dans un système juridique fondé sur l’autonomie de la volonté.*”⁶⁸ In fact, historically speaking, “*c’est essentiellement par méfiance à l’égard de la volonté que Domat suivi par Pothier ont inventé ce qui allait devenir les articles 1108 et 1131 du Code civil.*”⁶⁹ As it is obvious that “*le marché constitue la meilleure garantie du juste prix*”,⁷⁰ legislators should have confidence in the rationality of common people, and thus the desirable provision should be something similar to those in Roman time, when “*la volonté est la seule source de l’obligation conventionnelle sans autre soutien*”.⁷¹

b. Identical regimes

123. Now, we are clear that the former requirement *cause existante* provided in former article 1131 and the current requirement *contenu commutatif* are essentially the same thing. But what exactly do the pair of requirements mean? In other words, what are we supposed to care about when it comes to applying the requirements? As article 1169 provides that: “*Un contrat à titre onéreux est nul lorsque, au moment de sa formation, la contrepartie convenue au profit de celui qui s’engage est illusoire ou dérisoire*”, we can firstly discuss the meaning of *contrepartie convenue* (synonymous with *cause existante*) before the meaning of the two adjectives “*illusoire*” and “*dérisoire*”. It should be noted that so far, we presume that the contract we are talking about is all of the nature “*commutatif*”; however, if the contract is considered as “*aléatoire*”, the requirement for valid *contrepartie convenue* will be different from the one for ordinary *contrat commutatif*.

124. - Meaning of *contrepartie convenue*. As we have mentioned *supra*, the word *cause* can designate both *cause subjective*, meaning all the advantages one may imagine that can be acquired by engaging in a contract; and *cause objective*, meaning reciprocal obligation assumed by the other party and categorized into a pre-existing schema. We are now pretty

⁶⁸ L. AYNES, *La cause, inutile et dangereuse*, Dr. et patr. octobre 2014.

⁶⁹ L. AYNES, *La cause, inutile et dangereuse*, Dr. et patr. octobre 2014.

⁷⁰ X. LAGARDE, *Sur l’utilité de la théorie de la cause*, D. 2007, p. 740, n° 11.

⁷¹ L. AYNES, *La cause, inutile et dangereuse*, Dr. et patr. octobre 2014.

sure that the expression in current article 1169 “*contrepartie convenue*” is synonymous with the word *cause*, but it needs to clarify in which one of its two senses.

Fortunately, now there is a consensus in France that the expression “*contrepartie s'entend de l'avantage attendu par chacune des parties en contrepartie de l'avantage qu'elle procure.*” And “*la contrepartie serait également susceptible d'être appréciée, plus concrètement, en considération de l'ensemble des rapports qu'entretiennent les parties.*”⁷² In other words, the *contrepartie convenue* should be appreciated in a subjective manner and as long as the debtor of an obligation can get anything that he subjectively considers as beneficial, the contract in question is valid, if other conditions are also met.

125. - Meaning of “*illusoire*” and “*dérisoire*”. Initially, we believed that the expression “*illusoire ou dérisoire*” is nothing more than a legal doublet like “null and void” “ways and means” or “terms and conditions”, which means that the two words have exact the same meaning. However, according to M. Wicker, the adjective *dérisoire* focuses on the existence of the *contrepartie convenue*⁷³ whereas *illusoire* focuses on its reality.⁷⁴ In our opinion, both of the two words designates situations where the *conterpartie convenue* is so low that no one can take them seriously. The nuance in the meanings of the two words is indifferent in most cases as the issues discussed in France seldom, if not never, entail a necessity to distinguish them. Accordingly, we believe that, in spite of their possible difference, it is not too inappropriate to treat them alike. Thus, in this thesis, we will collectively refer to them as unserious and nominalize the condition based upon them as “the seriousness of counterpart” when necessary.

126. - Seriousness of *contrepartie* of the *contrat aléatoire*. Hitherto, we have limited our discussion to only the *contrepartie convenue* of *contrat commutatif*, which means the contract where the two parties have to both offer some concrete benefits. However, it is possible that the benefit that one party expect to receive in exchange for the assumption of his obligation, is nothing but a chance to receive something. In this case, the seriousness of the *contrepartie* should be appreciated according to whether the *contrepartie aléatoire* is really *aléatoire*: if the supposed uncertainty has already disappeared before the formation of the

⁷² G. WICKER, *La suppression de la cause par le projet d'ordonnance: la chose sans le mot?*, D. 2015, p.1557, n° 13.

⁷³ V.G. WICKER, *La suppression de la cause par le projet d'ordonnance: la chose sans le mot?*, D. 2015, p.1557, n° 19.

⁷⁴ V.G. WICKER, *La suppression de la cause par le projet d'ordonnance: la chose sans le mot?*, D. 2015, p.1557, n° 20.

contract, it is just to say that the *contrepartie* is not serious and thus the contract in question is null.⁷⁵

ii. Advantage of *contenu commutatif* over *cause existente*

127. Although we have mentioned that the current requirement *contenu commutatif* is in substance identical with the former requirement of *contenu existante*, the former does have an advantage over the latter. When the word *cause* was officially used as the name of a condition for validity of the contract, it is possible that a contract otherwise valid would be rendered invalid (a). The reform in 2016 has eliminated such a possibility of improper invalidity (b).

a. Presentation of a problem under the requirement of *cause existante*: the risk of invalidity due to unserious price

128. - **Presentation of the confusion between *cause* for the validity of the contract and *cause catégorique*.** As we have mentioned *supra*, when the notion *cause* is used as the tool to categorize contracts, it is necessarily objective in the sense that *causes* should be *per se* categorized. By contrast, when the notion *cause* is used to control the validity of a contract as the *contrepartie* of one of its obligations, it should be interpreted as referring to the subjective purpose of the debtor. However, we have observed that before the reform in 2016, more often than not, the notion *cause*, even used as the condition for validity of a contract, would be interpreted as objective in nature and categorized preliminarily.⁷⁶

129. - **Problems from the confusion between *cause* for the validity of the contract and *cause catégorique*.** As we have mentioned *supra*, the failure of the criteria of a *cause catégorique* should only lead to a re-identification of the contract involved; it should have nothing to do with its validity, as long as the obligation involved is supported by other kinds of *causes* that are globally calculated as sufficient. However, the confusion of the notion *causes* in the two senses is possible to lead to an illogical invalidity in the situations where the *cause* of an obligation consists of several different forms of reciprocal obligations and if

⁷⁵ V.G. WICKER, *La suppression de la cause par le projet d'ordonnance: la chose sans le mot?*, D. 2015, p. 1557, n° 21.

⁷⁶ V. J. ROCHFELD, *Cause et type de contrat*, LGDJ 1999, n° 44; J. GHESTIN, *Cause de l'engagement et validité du contrat*, LGDJ 2006, n° 789s.

viewed separately, not serious for a particular category of contracts, yet if viewed globally, serious for another category or as a *contrat innomé*.

The most typical example is the situation where the buyer of a supposed *contrat de vente* gives a mixture of monetary price and other non-monetary *contreparts* as the global *contreparts*. If the monetary price is considered as invalid either because of its unseriousness or its indeterminability, a defect we will present *infra*, we would expect that the contract is still valid, with the only consequence being that the category of *contrat de vente* cannot be maintained. However, we have found a case with the same facts, yet the judgement is that the contract is invalid because the *cause* of a *contrat de vente*, i.e. the price is invalid.⁷⁷ The confusion of the notion *cause* in the two senses, thus adds the anxiety of invalidity to the already existent anxiety of re-identification of the contract.

It should be noted that this kind of illogical invalidity is rarely found in French jurisprudence. Yet we believe as long as the notion *cause* in the two senses is possible to be confused, the illogical invalidity is sure to occur.

b. Solution to the problem by the replacement of *cause existant* by *contenu commutatif*

130. After the reform, the *cause* playing the role of condition for validity of the contract is renamed as *contrepartie convenue*, which nominally is distinct from “*cause*”. Now, even if the notion *cause* is mistakenly identified with *cause catégorique*, it cannot furtherly and mistakenly identify *cause catégorique* with *contrepartie convenue*, which means *contrepartie convenue* can continuously to be appreciated in a subjective manner, without interfering with the objective *cause catégorique*. In this way, the illogical invalidity is prevented.

II. Content under Chinese law

131. Under Chinese law, there is no such an expression as “*contenu*” or “content”. However, as the provisions under the *sous-section* “*le contenu du contrat*” in France are

⁷⁷ V. Cass. com., 5 avril 2005, n° 99-13.224. This case will be discussed in more detail in the section “price”.

mainly about the legal restrictions to contractual liberty, for the purpose of comparison, we can enumerate all the provisions under Chinese law with the same objective: i.e. all the factors affecting the validity of the contract except for the condition of consents (in Chinese it is called “authenticity of the manifestations of intentions”) (A). On top of the factors affecting the validity, in France there is a similar concern: the concern that a contract, albeit valid, will be re-identified with another kind of contract. For a comparative purpose, we will also discuss this here (B).

A. Factors affecting the validity of the contract

132. The principle of contractual liberty without doubt form the corner stone of Chinese contract law (1), whose restrictions by law are accordingly mere exceptions (2).

1. Principal contractual liberty

133. - Substance of contractual liberty. Article 5 of “General Provisions of Civil Law” (GPCL) provides that: “the parties to civil legal relations shall conduct civil activities under the principle of free will, and create, modify, or terminate civil legal relations according to their own wills.” And article 4 of “Chinese Contract Law” (CCL) provides that: “the parties have the rights to conclude contracts, nobody shall intervene in any illegal manners.” The GPCL was promulgated in 2017 and CCL in 1999. The principle written in CCL is rather perfunctory, as it does not specify content of the liberty in detail. By contrast, the principle in GPCL, in our opinion, has improved a lot. Its text is just another way of paraphrasing the “*force obligatore du contrat*” or the “*liberté de déterminer le contenu du contrat*”.

134. - Status of contractual liberty. Formally speaking, the principle of contractual liberty in China does not have a very high status in the hierarchy of norm, as it is by no means constitutional or fundamental. However, in doctrines and in practice, this principle is widely regarded as the most important principle in civil law.⁷⁸

2. Exceptional legal restrictions

⁷⁸ See L. WANG, *Civil law*, Ren Min University Press, 5ed., 2010, p. 29 (参见 王利明主编:《民法》, 中国人民大学出版社(第五版)2010年版, 第29页); K. LI, *Study on general provisions of civil law*, Law Press China, 2003, p.71 (李开国《民法总则研究》, 法律出版社2003年版, 第71页); Z. WEI, *Civil Law*, Beijing University Press, 2007, p.26 (魏振瀛主编《民法》, 北京大学出版社2007年版, 第26页).

135. The two aspects of the condition *contenu* replacing the condition *cause* under French law do not both have counterparts in China. The requirement of *contenu licite* has its equivalence under Chinese law (i); whereas the requirement of *contenu commutatif* does not (ii)

i. Existence of requirement of *contenu licite*

136. - Text. Under Chinese law, two articles impose restrictions on contractual liberty. Article 143 of General Provisions of Civil Law (GPCL) provides that: “The civil juristic acts with the following conditions are valid: ...Not violating the mandatory provisions of laws and administrative regulations, and not violating the public order and social customs.” Article 52 of Chinese Contract Law (CCL) provides that: “A contract is invalid in any of the following circumstances: (i) One party induced conclusion of the contract through fraud or duress, thereby harming the interests of the state; (ii) The parties colluded in bad faith, thereby harming the interests of the state, the collective or any third party; (iii) The parties intended to conceal an illegal purpose under the guise of a legitimate transaction; (iv) The contract harms public interests; (v) The contract violates a mandatory provision of any law or administrative regulation.”

137. - Analysis. The legal condition as provided in article 143 is quite straight forward: there are two groups of imperative norms that will restrict the contractual liberty: the first group being rules written in legislative or administrative statutes; the second group, essentially *ordre public* and *bonnes mœurs* being principles that allow judges to create praetorian rules. In essence, article 143 serves as both a legal justification and foundation for scattered legal and administrative imperative rules; and an interference by which judges can add praetorian rules to the system of positive law.⁷⁹ Article 52 of CCL, although written in a distorted way, in essence has the same meaning.⁸⁰ With the passing of GPCL, it is estimated that article 52 of CCL will eventually yield to article 143 of GPCL, therefore it is sufficient to only mention article 143 of GPCL when it comes to the requirement of *contenu licite*.

⁷⁹ See X. LIU, *Interpretation on the taxonomy of norms in article 143 of GPCL*, Journal of Dalian University of Technology (Social Sciences), Apr. 2018 (刘小砚: “民法总则第 143 条法规范类型的解释论”, 大连理工大学学报 (社会科学版), 2018 年第 4 期).

⁸⁰ See L. GENG, *Imperative rules and social interests*, Private Law Review, Feb. 2012 (耿林: “强制性规定和社会公共利益”, 《私法研究》, 2012 年第 2 期)

A seemingly noticeable point is that Chinese judges tend not to distinguish *ordre public* and *bonnes moeurs*, in other words, the two expressions seem to be a legal doublet. This allows them sometimes to annul a contract based upon moral considerations masquerading as *ordre public et bonnes moeurs*. For example, they have annulled a contract of donation whereby a man has given a large portion of his assets to a mistress, initiated by the claim of the man's wife, in holding that the contract contradicts with *ordre public et bonnes moeurs*.⁸¹

ii. Absence of requirement of *contenu commutatif*

138. Under Chinese law, as the causalist theory is not adopted, normally the validity of a contract is purely based upon the consents of the parties instead of the *cause*, which means existence of counterpart is not a factor in determining the validity of an onerous contract (a).

As we have mentioned *supra*, requirement of *contenu commutatif*, or in other words *cause existante*, is for the purpose of maintaining a certain degree of equivalence. Under Chinese law, there used to be a provision serving similar function --- “obvious unfairness”, although it has already been removed (b).

a. Absence of the requirement of counterpart

139. Under Chinese law, counterpart is never enumerated in the list of conditions for validity of contract. This is because in the eyes of Chinese jurists, the binding force of a contract comes from and only from the intention of the parties.

140. - Absence of the requirement in the legislative list of conditions. Conditions for the validity of the contract are located mainly in two statutes --- GPCL and CCL. In GPCL, its article 143 enumerates three conditions, which we can describe as “capacity”, “authenticity of manifestation of intentions” and “not violating imperative norms”, none of which has anything to do with counterpart. In CCL, there is no provision directly dedicated to the

⁸¹ See G. YAN, The application of legal rules on the donation made by a husband to a mistress, *Journal of Tongji University*, Jun. 2014 (严桂珍: “丈夫赠与‘第三者’财产纠纷的法律适用”, 同济大学学报 (社会科学版), 2014年06期).

condition for the validity of the contract. Rather, we can figure out the conditions by interpreting *a contrario* the provisions aiming at annulling contracts, where we would fail to notice the requirement of counterpart either.

141. - Absence of the requirement as indirectly reflected in the doctrine about the source of the binding force of the contract. In explaining why a contract is enforceable or binding, aside from mentioning “consents”, French authors would add “*cause*” and American authors would add “*consideration*”. However, the prevalent view in China is that the source of the binding force of the contract is nothing but the manifestation of intentions of the parties⁸²

b. Disappearance of the requirement of fairness

142. - Former provisions of “obvious unfairness” as regulating the objective substantive non-equivalence. The current General Provisions of Civil Law was promulgated in 2016. Before that it was another status that served as the “general provision” of civil law --- “General Principle of Civil Law”. In the “General Principle”, article 59 provides that: “A party shall have the right to request a people's court or an arbitration agency to alter or rescind the following civil acts... those that are obviously unfair.” The expression “obviously unfair” is generally understood as concerning only substantive non-equivalence between the counterparties given by the two parties to a contract, irrespective of other factors such as the fault of the other party.⁸³

143. - New provisions of “obvious unfairness” as regulating both the objective non-equivalence and subjective defects on the part of the consents, similar to *volence économique* in French *code civil*. However, the new statutes General Provisions of Civil Law has replaced this mechanism with one conditioned upon both subjective and objective condition. Article 151 of the statutes provides that: “The injured party has the right to request a people's court or the arbitration organisations to revoke the conducts, if one party uses the state of danger or lack of judgment of the other party resulting in the obvious unfairness in the

⁸² See Y. LI, Contract law, China law press, 2005, p.3 (参见 李永军: 《合同法》, 法律出版社, 2005 年版, 第 3 页).

⁸³ See dir. J. ZHANG, Principle of civil law, CUPL Press, 2000, p.264 (参见 张俊浩主编: 《民法学原理》, 中国政法大学出版社 2000 年版, 第 264 页); H. LIANG, General provisions for civil law, China law press, 2011, p. 202 (梁慧星: 《民法总则》, 法律出版社 2011 年版, 第 202 页); S. HAN, General introduction to contract law, China law press, 2011, p.201 (韩世远: 《合同法总论》, 法律出版社 2011 年版, 第 201 页).

establishment of the civil juristic acts.” New article 151, by adding the condition “if one party uses the state of danger or lack of judgment of the other party”, eliminates the provision conditioned on purely substantive unfairness.⁸⁴ Since then, in China, there is no legal recourse specifically for substantive non-equivalence.

144. - Exceptional case where over-inequivalent counterparts allow a judicial intervention: the contract being identified with a gratuitous contract. There is only one situation where the pure unbalance of the counterparts given by the two parties will allow a judicial intervention: that is when the counterpart given by one party is so worthless that the contract constitutes an onerous contract (contract of donation). Under Chinese law, the legal provisions for gratuitous contract and onerous contract are different, with the debtor of the former has way less obligations and a right of revocation at his own will.⁸⁵

If the counterparts given by the parties to a contract are too uneven, in an abstract sense, it is possible that the judge presiding over the case will find the contract to be a “*gemischte Schenkun*” (mixed donation): “for the purpose of donation, at the price lower than the value, a half-sale half donation).⁸⁶ There are some debates as to the consequence of this identification. Some authors believe it is a combination of a separate gratuitous contract and a separate onerous contract.⁸⁷ Some, on the other hand, believe it to be a special kind of gratuitous contract.⁸⁸ No matter what is the real consequence of the identification, one thing is certain: the supposed donner will be way less protected than if the contract is identified otherwise.

However, judicial intervention in the case where a nominal “onerous” contract is in fact supported by extreme uneven counterparts, is really rare. In most cases, the onerous nature or the gratuitous nature of a contract is chosen by the parties and the judges generally

⁸⁴ See L. WANG, The internal system of the principle of obvious unfairness, Science of law, Feb. 2018 (王磊, “论显失公平规则的内在体系”, 《法律科学》2018年第2期).

⁸⁵ See M.LAN, The Gratuitousness Impact on the Rules for Donation Contract, thesis Southwest university of finance and economy, 2012 (兰美海, “无偿性对赠与合同规则的影响”, 西南财经大学 2012 年博士论文).

⁸⁶ See SHI, Specific contracts, CUPL press 2000, p.137 (史尚宽:《债法各论》, 中国政法大学出版社 2000 年, 第 137 页).

⁸⁷ See L. WANG, Research on the difficult cases in contract law, CUPL press 1997, p. 47 (王利明, 《合同法疑难问题研究》, 中国政法大学出版社 1998 年版, 第 47 页).

⁸⁸ See M. GUO et Y. WANG, A new discussion of contract law: specific contracts, CUPL press 1998, p. 90 (郭明瑞、王轶:《合同法新论·分则》, 中国政法大学出版社 1997 年版, 第 90 页).

will respect this choice, as long as it is out of the “authentic manifestations of intentions”.⁸⁹ We have consulted a judge friend about the reason for the reluctance of the judicial intervention in the issue of determining the onerous or gratuitous nature of a contract. He responds that it is because Chinese judges are not confident enough about their judgements in business cases, which means that they are not sure whether the price given is really higher or lower than the value, or whether the seemingly donor can benefit from the transaction. Therefore, due to the respect to business judgements, they tend to refrain from determining the onerous or gratuitous nature of a contract.

What we have mentioned above demonstrates that in China, as long as a contract is labelled as onerous contract, it is very difficult, if not impossible, for a party to annul the contract only based upon the objective insufficiency of the counterpart to his obligation.

B. Factors affecting the category of the contract

145. In China, it is possible that the judges will change the category of the contract chosen by the parties (1). However, this is not a problem that needs too much heed (2).

1. Risk of re-identification

146. In China, contracts are categorized in the same way as in France (i). And it is possible that the judges will change the category of the contract chosen by the parties (ii).

i. Categorization of contracts by *cause catégorique*

147. Article 125 of CCL provides that: “In the event that the parties dispute about the understanding of a clause of the contract, the actual meaning of the clause shall be inferred and determined on the basis of ...purpose of the contract...” The “purpose” as written here is understood as the “typical trade purpose”, which is “identical in the same category of contracts, irrelevant to the specific motives of a party to engage in the contract... Interpreting the contract pursuant to the principle of observation of the purpose of the trade, the nature and category of the contract can be determined, which in turn determines the rules applicable to

⁸⁹ See Y. YU, *On the issues related to tax on accommodation in China, dissertation South-west China university of political science and law*, 2012 (于洋: 《中国住房税收问题研究》, 西南政法大学硕士学位论文, 2012).

it.”⁹⁰ We can see that the expression “typical trade purpose” is in essence the same thing as the *cause catégorique* in France, to the extent that both of them are preliminarily categorized into different types and both of them serve the function of categorizing contracts into different types.

ii. Re-identification of contracts by *cause catégorique*

148. As the “typical trade purpose” is always fixed in a pre-determined schema and the category that a contract belongs to is determined solely by it, the judicial admitted category that a contract belongs to may differ from the one that the parties (or one of the parties) would like to designate to initially. An example is the situation where a contract is entitled “contract of joint-venture” yet the real purpose of one of the party is just to rent a building; and thus, the judge determines that the contract is a contract of rent instead of joint venture.⁹¹ As the judge presiding over the case put it: “The nature of the contract cannot be determined merely by the name. Rather, the nature of the contract should be determined by the legal relations that its content (main clauses) concerns, i.e. by the rights and obligations created by the parties.”⁹² If the name reflects the willing of the parties, we can say that the power of the willing of the parties is restricted when it comes to determine the category of a contract.

2. Harmlessness of re-identification

149. Under Chinese law, even if there is a risk that a contract will be re-identified with another category of contract, it is never a problem, at least as far as this thesis is concerned. This is because of three reasons: firstly, all legal provisions for *contrat de vente* is also applicable to any other onerous contracts (i); secondly, most of rules in contract law is of the suppletive nature, which are of little use when the parties are sophisticated merchants (ii).

i. Universal rules

⁹⁰ See. dir. J. CUI, *Contract law*, China law press, 2003, p.308 (崔建远主编: 《合同法》, 法律出版社 2003 年版, 第 308 页).

⁹¹ See. Z. LIN, *How to determine the nature of a contract with incongruent name and content*, *People’s court daily*, 9 April 2007 (林振通, “合同名称与合同内容不一致时合同性质如何认定”, 《人民法院报》2007 年 4 月 9 日); P. ZHOU, *the insignificance of the name of a contract in determining its nature*, *People’s court daily*, 13 April 2017 (周平江, “合同名称不影响对合同性质的认定”, 《人民法院报》2017 年 4 月 13 日).

⁹² Z. LIN, *How to determine the nature of a contract with incongruent name and content*, *People’s court daily*, 9 April 2007 (林振通, “合同名称与合同内容不一致时合同性质如何认定”, 《人民法院报》2007 年 4 月 9 日).

150. In France, the concern of the category of the contract of purchase of shares comes from the different rules applicable to *contrat de vente* and other kinds of contracts. In Chinese law, the cause for the concern does not exist, as the *contrat de vente*, or the purchase and sale contract as designated in CCL, by its article 174, explicitly provides that: “Any other onerous contract shall comply with laws containing relevant provisions and in the absence of such provisions, shall be handled with reference to the provisions governing purchase and sale contracts.”⁹³ The Applicability of the provisions for “purchase and sale contracts” in other kinds of contracts, has even earned the reputation of “small general provisions”⁹⁴ for it. As from the perspective of applicable rules the “purchase and sale contract” is not different from a contract *sui generis*, there is no reason to concern about whether a contract should be categorized as a purchase and sale contract or not.

ii. Suppletive nature

151. Another reason why re-identification is not a problem, is because of the suppletive nature of contract law. To categorize a contract with a given category of contracts is to apply the rules applicable to that category. However, as most of the rules are suppletive in nature, the parties are free to opt them out. If the parties find a legal rule for another category of contracts is desirable, they can also simply opt it in, by either copying it in the text of the contract or by simply stipulating that the rule for the category of contract should be applied in the contract in question. In fact, some Japanese authors have since long pointed out the uselessness of the categorization of contracts into different types.⁹⁵

III. Comparison

152. By comparing the provisions and doctrines in the two countries concerning the subjects regulated by the *sous-section le contenu du contrat* in the French *code civil*, we can

⁹³ For a reference about how to apply article 174, see J. YI, *The application by analogy of the provisions for purchase and sale contracts in the context of other contracts*, Chinese journal of law, Jan. 2016 (易军, “买卖合同之规定准用于其他有偿合同”, 《法学研究》2016年第1期).

⁹⁴ See. dir. X. XI, *The understanding and application of the Judicial Interpretations about sales and purchase contracts by SPC*, People’s court press, 2012, p.1 et 2 in the part of preface (奚晓明主编: 《最高人民法院关于买卖合同司法解释理解与适用》, 人民法院出版社 2012年版, “序言”部分第1-2页) .

⁹⁵ See J. ZHOU, *Typical contracts and the perfection of the provisions for specific contracts in contract law*, SJTU Law Review, Jan. 2017 (周江洪: “典型合同与合同法分则的完善”, 《交大法学》2017年第1期).

see that the two countries are similar in the requirements of legality (A), yet differ in the requirements of counterparts (B).

A. Similarity in the requirement of legality

153. Legality is the condition for the validity of the contract in both countries (1). The similarity of the two countries in terms of this condition lays the foundation for our task of comparison (2).

1. Presentation of the similarity

154. The provisions for the requirement of legality in the two countries are essentially the same (i). It is not to say that there is no difference. Yet the few differences are insignificant to the extent that they are irrelevant to the objective of this thesis (ii).

i. Essential similarity

155. The provisions in the two countries for the requirements of legality has similar status (a) and serve similar function (b).

a. Similar status

156. In both countries, provisions for the requirement of legality serves as exceptions to the principle of contractual liberty. This sentence has two meanings: for one thing, in most cases and in most time, people are free to determine the contents of their contracts; for another, if legislators or judges or any other competent persons attempt to establish an imperative rule, he must have a compelling reason to do so. The compelling reason in both countries are referred as *ordre public et bonnes moeurs*.

b. Similar methods

157. In neither of the two countries, the provisions for the requirement of legality contain an exclusive list enumerating all the acts prohibited or required. Rather, the provisions are of the nature of authorizing norms, to the extent that basically they just establish a

principle and confer somebody to create imperative rules pursuant to the principle. The rule creator can be either legislators and in this case the requirement of legality serves as a foundation and justification for the rule created. Or the rule creator can be judges who would create jurisprudence or “praetorian law”, by evoking the principle of *ordre public et bonnes moeurs* as provided in article 6, article 1102, article 1162 of the French *code civil* and article 143 of Chinese GPCL.

ii. Insignificant differences

158. The trivial differences are of little direct interests for the purpose of this thesis. But presenting them can reinforce the impression of the similarity of the two countries in this point and we will thus do it. In particular, the differences in the provisions of the two countries lay in the targets (a) and the sources (b) of the imperative rules.

a. Difference in the target of imperative rules

159. Another difference in the two countries is that under French law, both the *buts* and the *stipulations* are governed by imperative rules, as provided in article 1162; whereas under Chinese law, only the *stipulations* are relevant. The impact of this difference is that a contractual stipulation legal *per se* yet illegal in its purpose would incur the destine of nullity in France --- for example if a person has bought a knife to kill somebody, the *contrat de vente* may be found invalid because the purpose of the buyer is illegal albeit purchase *per se* is more than legal; whereas such a stipulation would not in China. However, this difference is insignificant, as none of the specific legal restrictions we will discuss *infra* concern the purpose of the contract.

b. Difference in the sources of imperative rules

160. - Difference concerning “règles”. Article 1102 of French *civil code* requires the observance of “*règles qui intéressent l'ordre public*”, whereas article 143 of Chinese GPCL requires the observance of two distinct groups of things: “mandatory provisions of laws and administrative regulations” and “the public order and social customs” If we use the French word *règles* and *ordre public et bonnes moeurs* to replace respectively the two groups, we can see that in French law, *ordre public* is the foundation for *règles*; whereas *ordre public*

and *règles* are two distinct notion, similar to the text of former article 1133 of French *civil code*. The different relations reflect different logics how the abstract principle is transformed into concrete rules: in French law, *ordre public* is the underlying justifications for all imperative rules. By contrast, in China, technically speaking *règles* are a distinct source of imperative rules and *ordre public* is evoked only when there is no specific *règle*, which literally speaking means that imperative rules written in law and administrative regulations have foundations other than the principle in question. However, this difference is insignificant in our thesis, as what we will discuss is the underlying substantive justifications for specific imperative rules. For a comparative thesis, there is no need to categorize the substantive justifications and discuss in detail the justification belongs to what category (*ordre public* or *bonnes moeurs* or something else).

161. - Difference concerning “*droit fondamentaux*”. The aforementioned uncertainty in French law concerning the status of “*droit fondamentaux*”, *prima facie*, seems to be significant for this thesis, as one of the legal restrictions to contractual liberty in purchase of shares, as to be discussed *infra*, falls within the scope of restrictions based upon *libertés fondamentaux*. If a liberty restricting contractual liberty is considered as fundamental in both countries, we need to discuss the attitudes of judges and scholars in both countries to solve the uncertainty. However, this seemingly sound fret is actually unnecessary, as the *libertés fondamentaux* as will be discussed *infra* is not considered as such in China. Thus, the real divergence between the countries is whether the liberty should be considered as fundamental or not instead of how to treat a *liberté fondamentale* already so recognized; and it is safe for us to ignore this difference.

162. - Difference concerning “*bonnes moeurs*”. With respect to *bonnes moeurs*, the two countries differ in that the French law has eliminated any reference to it (except in the not-touched article 6 of *code civil*) whereas Chinese jurists treat it as a synonym of *ordre public*, which means Chinese judges are more prone to invalidate a contract on moral basis. This difference seems huge, yet it is of little interest in this thesis, as none of the imperative rules we will discuss is susceptible to be based upon *bonnes moeurs*, thus it is not too inappropriate to simply ignore this difference.

2. Implications of the similarity

163. In this thesis, our objective is to compare three subjects in the two countries: the conventional techniques invented by practitioners, the imperative rules constituting restrictions on the contractual liberty and the suppletive rules serving as protections of buyers by operation of law (*de plein droit*). The similarity as we have just presented provides us with the foundation to compare two of them: the contractual techniques (i) and the legal restrictions (ii).

i. Similarity in contractual liberty, as justifying the comparison of conventional arrangements

164. - Contractual liberty as a pre-requisite and as a fertile soil for the production of various and diverse contractual techniques. In both countries, the humble nature of the requirement of *contenu licite*, serve as a foil (*faire-valoir*) to the splendid principle of contractual liberty. It matters a great deal the appreciated status of the liberty to determine the content of a contract by the sole willingness of the parties thereto, as it is the ultimate justification for why it make sense to compare the conventional arrangements. Let's prove our opinion by the method of contradiction.

165. - Demonstration of the aforementioned opinion by the method of contradiction. Suppose there is a country where the contractual liberty is completely lacking, which has never existed in the world, there would be even no contract, no companies, no any other elements essential for the very existence of the subject matter that we are here discussing --- the purchase of shares. China in the period of planned economy was very similar to such a country: at that time, what is emphasized in contract law, if that could be called so, is the observance of the economic plan and the obedience to the intervention of the state.⁹⁶ At that time, in the very rare and small-scale business acquisitions or investments, what protected the buyers are usually alternative measures other than legal institutions. It was both cumbersome and impotent to even try to enforce a contract through the judicial system. Naturally, nobody would bother to waste their intelligence to invent and refine contractual techniques.

⁹⁶ L. WANG, On the contractual liberty, *in* The research on the modernization of legal system, Nanjing Normal University press, 1996, p. 359 (王利明:“论合同自由”, 《法制现代化研究》, 南京师范大学出版社 1996 年, 第 359 页).

Even if we make a concession and assume that in the country the contractual liberty is not inhibited to such an extent that people would abandon the recourse to contractual protections, as long as the contractual liberty is not the principle, which means that there are overwhelmingly more situations restricted by imperative norms than situations reserved to the freewill of people, we can imagine that the main concern for legal practitioners would be how to circumvent the annoying legal restrictions and most of the so called contractual techniques would be about how compliance. The real issues that hinder the interests of the parties, especially the buyers might not have even discovered, not to mention solved by contractual techniques.

It is now clear: only in countries where people are in most time free to create obligations for themselves and accordingly extent rights to others will have incentives and ability to care about the development of contractual techniques to protect the buyers of shares --- the objects of our comparison. Thus, it is safe to say that the similar importance of contractual liberty in the two countries is one of the foundations for the feasibility of this thesis.

ii. Similarity in legality requirements, as justifying the comparison of legal restrictions

166. Another subject matter of our comparison is the imperative rules. In order for imperative rules to be meaningful objects research, two conditions have to be met: firstly, they exist (a); second, they exist in a restrictive manner (b), both of which are satisfied in both countries.

a. Existence of imperative rules

167. The comparison of the imperative rules in the two countries will be interesting only if there are imperative rules. In other words, only if the contractual liberty is not absolute in the sense that it cannot be restricted in any manner. Suppose in a country where such is the case, where judges there would even enforce a contract whereby one party promises to assassinate another person (of course, the enforcement would be in the form of damages instead of specific performance even if such a crazy country), there would be no imperative rules, legislative or praetorian, at all. If either France or China is such a country, we will thus

have no object to compare. The provisions for the requirements of legality in the two countries, as the foundations, justifications and even sources of imperative rules, guarantees their existence.

b. Restrictiveness of imperative rules

168. On the other hand, if imperative rules are not limited at all, i.e. if the principle of contractual liberty does not exist, there would be no interest for discussing the imperative either, as our purpose is to find out whether a particular imperative rule is supported by sufficient rational justifications. In a country where there is no contractual liberty, i.e. where the slogan “evil law is law” and “law is the command of the sovereign” is adopted, the *raison d’être* for an imperative rule is nothing but it is commanded by the prince, king, emperor or great leader, instead of the sort that we are seeking: those based upon really convincing forces, such as rationality of human, the efficiency of the market, the reduction of costs, etc. The provisions for the requirements of legality in the two countries, by being an exception to the principle of contractual liberty and emphasizing on the idea of *ordre public*, dictate the sort of justifications that we need, which makes it possible to appreciate the reasonableness of the justifications in order to determine the reasonableness *de lege ferenda* of a given imperative rule.

B. Difference in the requirement of counterpart

169. The existence of a serious counterpart is a condition for the validity of the contract in France, whereas not a condition of this sort in China (1). This difference, however, is not significant. The real significant one lies in the function of the notion counterparts in categorizing contracts (2).

1. In terms of the validity of the contract

170. The requirement of counterparts, as a condition for the validity of the contract, seems to be a significant difference between the two countries (i). However, as we will see, this difference has little practical impact as far as this thesis is concerned (ii).

i. Difference as seemingly significant

171. *Prima facie*, with regarding to counterparts, the two countries differ greatly: the party to a French contract is able to annul an undesirable contract, even if he has fully and *ab initio* aware of its consequence, as long as he manages to demonstrate that what he would receive is the so slender to the extent that it can be qualified as *illusoire* or *dérisoire*; whereas the party to a Chinese contract has to assume all the consequence of the contract, even if it is of little interest to him, as long as he has concluded the contract out of his free will.

In our opinion, the French requirement of counterpart is unreasonable. The justification of our opinion will be omitted here, as our justification is similar to those of many French opponents of the causalist theory as have already been mentioned *supra*. Another reason for our reluctance of giving our own reasons against the French requirement is because it is not important for the purpose of this thesis.

ii. Difference as actually insignificant

172. - Presumption of the insignificance. Our opinion that the difference in the two countries regarding counterpart as conditions for the validity of contracts is not important, is based upon the presumption that French judges do not confuse *cause catégorique* with *cause* used for controlling the validity of the contract, otherwise the fake concern about the category of the contract will be turned into a real one concerning the validity of the contract. As we will present in the section “price”, rarely would French jurists make such a mistake, and here we will just put this issue aside.

On top of that, it is fair to say that the difference is not important, because for one thing, the effect of the difference is seldom noticed (a); secondly, even if the effect of the difference is to occur, it should not be solved in this thesis (b).

a. Insignificance due to rarity

173. Discussion and research in the field of legal science should focus on the issues that occur at a high frequency, otherwise the discussion or research is of little practical use. The issues suspected to be caused by the difference is just one of the example: The difference in the law of two countries will turn to different interests of the parties in the two countries

only if one of the party has regretted about his decision in engaging in the contract. This may occur on a daily basis in ordinary transactions as the parties involved are very likely to be not sophisticated enough to take care about themselves. However, this is not the case when it comes to purchase of shares, as both buyers and sellers are supposed to be sophisticated merchants, who are really the best judges of their own interests, which means seldom would a party attempt to annul the contract on the sole basis that the global counterpart he would receive is unserious.

b. Insignificance due to irrelevance

174. Even if the rare cases are to occur where a party to the contract, usually the buyer, finds that the transaction is really unattractive and would like to annul the contract under the foundation of unserious counterpart, the discussion and research of the difference in the requirements of counterpart is still useless, as this issue should be discussed in a more global level. We have mentioned in the introduction of the thesis, if a legal problem can be solved by discussing a hypernym, there is no need to discuss its hyponym. Here, the originalities of shares have nothing to do with the difference or its effects, therefore, the issue should be discussed in a higher level, for example in thesis dedicated to hypernym such as “contract of purchase” “contract” or even “civil law” in general; anything aside from the “purchase of shares”.

2. In terms of the category of the contract

175. - The real source of the issue of the seriousness of price in purchase of shares. The real reason why some French jurists like to discuss the issue of counterpart is because the counterpart of a contract sometimes may affect its category and these French jurists are really concerned about the category of the contract. In our case, they are really concerned that the contract of purchase of shares be always categorized as a “*contrat de vente*”. By contrast, Chinese jurists do not care about whether to categorize a contract as “*contrat de vente*” or purchase and sale contract. The reason underlying this difference lies in two other differences: the difference in the laws of the two countries (i) and the difference in the attitudes of practitioners to suppletive rules in contract law (ii).

i. Difference in terms of the legislative perspective

176. - Different applicability of the provisions for *contrat de vente*. The ultimate reason why French jurists care about the category of the contract of purchase of shares, is because to be categorized as *contract de vente* will allow the applicability of some provisions only applicable to the contracts of this sort. By contrast, the provisions for the *contrat de vente* (purchase and sales contracts) in CCL is the “small general provisions” and also applicable to other contracts, which makes it of little interest to discuss whether a particular contract is *vente* or not.

177. - Whether, *de lege ferenda*, should the special provisions for *contrat de vente* also be applicable to other onerous contracts? We believe the answer is affirmative. Let’s have a look at each one of the special provisions for *contract de vente*. Mainly, there are two special provisions.

The first is the special requirements of price. In the section “price” of our thesis, we will see that *contrat de vente* is subject to special requirements regarding the determinability of price in France. Our stance is that the special requirements should be abandoned and the current rule in the general provisions for contract law should also be applied to *contrat de vente*. The justifications of our stance have been given accordingly.

The second is the special warranties *de plein droit*. In the chapter “effects”, we have described that under French law the special warranties *de plein droit* are technically reserved to *vente* instead of to all the onerous contract as provided in Chinese law. Our stance is that the different treatment of *contrat de vente* and other onerous contracts in French law in this regard is not reasonable, and we have given justifications to our stance.

As the special provisions reserved to *contrat de vente* should either be replaced by the general rule or be applied to other kinds of contract, thus, *de lege ferenda*, the autonomy of the provisions for *vente* is unreasonable, we believe if the French *code civil* is to evolve to a more reasonable situation, the necessity of maintaining or discarding the category of *vente* would disappear, along with the French concern of counterpart in the sense of *cause catégorique*.

ii. Difference in terms of the practical perspective

178. We can see that in France, there are actually two positions regarding the category of the contract of purchase of shares. The first is to try to discard its categorization as *contrat de vente* in order not to apply the special requirements of price; the second, on the other hand, is to try to maintain such a categorization so as to maintain the applicability of the special warranties *de plein droit*. We believe if the French provisions are transplanted in China, Chinese scholars and practitioners would concur with the first position in discarding the categorization so as not to see the special requirements of price imposed. No one will support the second position.

The second position in France, in our opinion, is out of a pure concern of the losing the protection of suppletive rules. Yet as we have mentioned, suppletive rules are useless to the extent that they can be derogated conventionally. And even if the practitioners are determined that the warranties *de plein droit* are necessary to protect the interests of buyers of shares, they can simply opt them in, without having to maintain the identification of the purchase of shares with the category of *contrat de vente*.

If the second position in France is to disappear, the concern of the serious counterpart from the perspective of the category will disappear accordingly: in the cases of purchases of shares with serious global counterparts on the part of the buyers yet without serious monetary prices, the contracts involved will be automatically disqualified from being *contrat de vente*. So far, French practitioners are trying to avoid the unseriousness of monetary price for the fear of negative price.⁹⁷ If the desire of maintaining the categorization as *vente* is to disappear, naturally all the efforts and worry attached thereto will disappear as well.

Conclusion of Section II

179. In this section, we have mainly compared two requirements attributed to the condition “*contenu*” under French law. The first requirement is the requirement of legality. We can see this requirement is similar in the two countries and the similarity is the foundation for the feasibility of a large portion of our research. The second requirement is the

⁹⁷ J. PAILLUSSEAU, *La garantie de conformité dans les cessions de contrôle*, JCP E 2007. 1238, n° 40.

requirement of counterparts. In presenting the obvious different requirements in the two countries, we pointed out that the concern in France about the seriousness of counterpart is out of the fear that the contract of purchase of shares will be categorized as something other than *contrat de vente*, and this concern of category is actually of little reason even under French law.

Section III. Price

180. Price is an important element of contract and a major topic when it comes to formation of contract in France (I), whereas it lacks such an importance in China (II). A comparison of the positive laws of the two countries (III) would reveal the cause for the difference and help us to predict possible evolutions of the law thereof.

I. Requirement of price in France

181. Price as an indispensable element in formation of contract under French law, is subject to some particular recruitments (A), which in turn have some non-ignorable impacts (B).

A. Presentations of requirements of price

182. Under the positive law of French, when it comes to discuss the requirements of price for the purpose of formation of sales, authors would generally categorize the requirements into two kinds: the determinability and the seriousness⁹⁸. However, as we believe that the requirement of determinability is actually cobbled together from two distinct requirements that do not have much bearing with each other, and for the purpose of a clear discussion, we would discuss them separately: the requirements of precision (1) and the requirements of objectivity (2), along with the requirement of seriousness (3).

1. Requirement of precision of price

183. Under French law, the requirement of precision, as is interpreted from article 1591, annuls a contract of sale where the parties fail to reach a price (i). However, such risk of annulment only exists in contracts of sales. For other contracts, a judicial intervention is available to solve the problem of lack of precise price (ii).

i. The requirement of precision in sales

⁹⁸ V. M. CAFFIN-MOI, *op. cit.*, n° 78; S. LACROIX-DE DOUSA, La cession de droits sociaux—à la lumière de la cession de contrat, LGDJ, 2010, p.70, n°64; M. STOCLET, *Le prix dans les cessions de droits sociaux*, Thèse Lille II, 2008, p.221, n°307.

184. Logically speaking, in order to execute a contract of sale, a precise amount of price is always needed: without a clear price, it is objectively impossible for a judge to enforce a sale even if he would like to do so. The necessity of a precise price, in this sense, holds in everywhere in the world. However, the necessity of a precise price does not equal to the necessity of a precise price only agreed upon by the parties: as long as the law provides a supplementary mechanism to fill the gap, a contract without any conventional price is still enforceable. This is also the solutions of most countries in the world.

What makes French law particular compared to laws of other countries, is that as far as contracts of sales are concerned, French law does not provide supplementary measures to fix the price for those whose price is not agreed upon by the parties.⁹⁹ The prevailing interpretation of article 1591 of *code civil*,¹⁰⁰ which governs the price of sales, is that the conventional stipulation should be clear enough that a literal reading of it may be able to instruct judges on how to enforce them: it is not necessary that the parties agree on a precise amount of cash to be paid to the seller; instead, what is necessary is that the parties stipulate a mechanism, with which price can be automatically calculated without further intervention of the parties. The mechanism can either constitute of some elements of reference which is sure to be certain before the moment of execution of the sale, or constitute of assigning a third-party evaluator who would fix the price (article 1592). Yet, if the conventional mechanism has failed to determine the price, either because the element of reference turns out to be unclear or that the third-party evaluator has failed to give an acceptable price, no supplementary mechanisms exist to rescue the sale: the price cannot be determined unilaterally by one party, by the judges, or in the case of assigning a third-party evaluator, by the assigned evaluator again.

⁹⁹ We find that most French authors believe what makes French law particular is its requirement of determinable price at the formation of a sale instead of at the execution of a sale, in order for such sale to be valid. However, we do not believe this to be the core distinction of French law because from a practical point of view, an invalid sale is little different from a valid yet enforceable one. Some may argue that validity of a sale without price prevents the party who no longer what to honour the contract from annulling it on the basis of invalidity of contract. We do not believe this argument cogent: without a supplementary mechanism to fix the price, a contract without price, even if artificially considered valid, would be non-enforceable, and its annulation is necessary if one of the parties has lost interest to honour it. It makes no real difference if an unsatisfied party demand to annul the contract on the basis of invalidity or on the basis of non-enforceability (whose sanction we believe, under French law, is *résolution*). An author mentioned one tiny difference however, that we believe worth mentioning: a valid contract latter become *caduque* may serve the basis for a contractual liability (which is transposable to *résolution*), whereas a contract invalid *ab initio* cannot (V. M. CAFFIN-MOI, op. cit., n° 220). Yet we believe that this difference is ignorable.

¹⁰⁰ Article 1591 of code civil: “*Le prix de la vente doit être déterminé et désigné par les parties.*”

ii. The requirement of precision in other contracts

185. It should be noted that under French law, the absence of supplementary mechanisms only haunt contracts of sales. For other contracts, supplementary mechanism to fill the gap of lack of precise price is always available (a). With the new reform of *code civil*, we believe it is now clear that the defaulting mechanism to rescue a contract without a precise price is a judicial fixation of price (b).

a. The existence of a defaulting supplementary mechanism to fix the price

186. Article 1591, i.e. the legal basis denying supplementary mechanisms of fixing price, is only applicable to contracts of sales and excluded from being applied to other contracts.¹⁰¹ Yet, the same problem used to be posed by another legal basis – former article 1129, of which article 1591 was considered to be a transposition in the special context of sales. Fortunately, thanks to jurisprudence derived from four judgements of *assemblée plénière*, the application of article 1129 has been explicitly excluded from problems related to price, which can be explained as an acceptance by French law of a universal supplementary mechanisms. The new reform, as we believe does not change this stance of the jurisprudence.

187. - Former article 1129 as basis of denial of supplementary mechanisms of fixing price. Article 1591 is considered to be a transposition of former article 1129 of *code civil*, a general rule in contract law, which provides that: “*Il faut que l'obligation ait pour objet une chose au moins déterminée quant à son espèce. La quotité de la chose peut être incertaine, pourvu qu'elle puisse être déterminée.*” This article requires that *chose* of a contract be determinable and if price is considered as a *chose*, it should be determinable as well. Therefore, the logic and reasoning related to article 1591, can be transposable to article 1129, which would lead to a denial of supplementary mechanisms of fixing price.

188. - Former article 1129 excluded from situations related to price by jurisprudence. Fortunately, jurisprudence exclude the application of article 1129 in the context of price. In 1995, *assemblée plénière* of *cour de cassation*, in four judgements

¹⁰¹ Under French law, it is not generally prohibited to apply the legal regime of one situation by analogy to another situation. However, French judges tend to restrict the scope of application of article 1591 for its rigidity. (V. N. MOLFESSIS, *Les exigences relatives au prix en droit des contrats*, LPA, 5 mai 2000, n° 7, p. 42.)

concerning *contrat-carte* explicitly held that: “*lorsqu’une convention prévoit la conclusion de contrats ultérieurs, l’indétermination du prix de ces contrats dans la convention initiale n’affecte pas, sauf dispositions légales particulières, la validité de celle-ci*”¹⁰² This stance of excluding article 1129 from price was latter extended to contracts “*en tous matière*”.¹⁰³ This limit of scope of application of article 1129 is based upon a restrictive interpretation of the meaning of the word *chose*, whereby a price is not qualified as a *chose*.

We believe it is necessary to mention that in fact the issue in all these judgments are not directly about absence of precise price: an enforceable price does exist in all these cases. By contrast, the issue in all these cases is about the acceptability of a precise price fixed unilaterally by one party, i.e. the requirement of objectivity of price (a requirement not really based upon article 1129 or article 1591), which we would discuss immediately. Yet since the judges have explicitly regarded the exclusion of article 1129 as the justification of their decision, it is generally believed that the reasoning can also be used to justify the exclusion of requirement of precision, the literal aspect of article 1129 in price. Therefore, contracts other than sales are not subject to requirements of precision as applied to contracts of sales.

189. - Exclusion of former article 1129 in price interpreted as an acceptance of supplementary mechanisms of fixing price. Literally speaking, not applying article 1129 only means that a contract would not be invalid because of lack of a precise price. It does not exclude the possibility that a valid contract without precise price would nonetheless suffer a post-formation annulation for impossibility of execution.¹⁰⁴ However, French authors seem to have ignored the difference between an invalid contract and a valid yet non-enforceable contract, contending that validity of a contract without a precise price is impossible if there are no supplementary mechanisms to fulfil the gap.¹⁰⁵ And we believe it is relatively safe to say that the jurisprudence derived in cases in 1995, should be interpreted as having established supplementary mechanisms for contracts lacking a precise price.

¹⁰² Cass. AP., 1er décembre 1995, n° 91-15.578, n° 91-19.653 et n° 91-15.999.

¹⁰³ V. Cass. Civ. 1re, 12 mai 2004, n° 03-13.847, RDC 2004, 925, obs. D. MAZEAUD.

¹⁰⁴ Under French law, there are several terms designating the post-annulation of a contract. Among them, we believe *résolution*, which means termination of a contract because of non-performance (new article 1224s of *code civil*). The annulation here is not a *caducité* (new article 1186s of *code civil*) which is the sanction of disappearance of an indispensable element for formation of the contract, and here the price is not one. In addition, it is neither a *Rescision*, which presumes defects in consents or *lésion*, nor a *résiliation*, which is conventional in nature.

¹⁰⁵ E.g. V. T. REVET, *La détermination unilatérale de l’objet du contrat*, in *L’unilatéralisme et le droit des obligations*, Dir. C. JAMIN et D. MAZEAUD, *Economica*, 1999, n° 7, p. 36.

190. - Reform of October 2016 reinforcing the stance supporting supplementary mechanisms. The reform in 2016 has changed the numeration of article 1129 to article 1163, and changed the text a little bit.¹⁰⁶ However, its essence remains essentially the same as far as its scope of application is concerned. This means the jurisprudence still holds and payment of price is still excluded from the scope of “*presentation*” and the requirement of determinability still does not apply to price of contracts other than sales, which as we have interpreted, equals to the acceptance of supplementary measures for lack of precise price.¹⁰⁷

b. The identification of the supplementary mechanisms: judicial fixation of price as a defaulting rule

191. Although it has been clear that a defaulting supplementary mechanism does exist for contracts other than sales, it used to be unclear what the mechanism is. After the reform, we are now pretty sure that the defaulting mechanism is a judicial fixation of price.

192. - Before the reform of October 2016: unilateral or judicial fixation of price? In fact, the cases in 1995¹⁰⁸ from which the jurisprudence are derived and the 2004 case¹⁰⁹ which has extended the stance of 1995 cases to all contracts, are not about situations where a precise price is lacking. Rather, in all these cases the precision of price is not a problem. The issue here is actually the acceptability or legality of one kind of supplementary method of fixation of price: unilateral fixation of price by one party. Accordingly, *cour de cassation* was actually mute on what the defaulting mechanism to supplement a contract without price is.¹¹⁰

¹⁰⁶ Article 1163 of *code civil*: “*l’obligation a pour objet une prestation présente ou future. Celle-ci doit être possible et déterminée ou déterminable. La prestation est déterminable lorsqu’elle peut être déduite du contrat ou par référence aux usages ou aux relations antérieures des parties, sans qu’un nouvel accord des parties soit nécessaire.*”

¹⁰⁷ V. J. MOURY, *La détermination du prix dans le « nouveau » droit commun des contrats*, D. 2016, p.1013; J. MOURY, *Retour sur le prix : le champ de l’article 1163, alinéa 2, du Code civil*, D. 2017, p. 1209, n° 8

¹⁰⁸ V. Cass. AP., 1er décembre. 1995, n° 91-15.578, n° 91-19.653 et n° 91-15.999.

¹⁰⁹ V. Cass. Civ. Ire, 12 mai 2004, n° 03-13.847.

¹¹⁰ V. Cass. AP., 1er décembre. 1995, n° 91-15.578, n° 91-19.653 et n° 91-15.999, LPA, 27 décembre 1995, p.11, n° 40, note. N. MOLFESSIS. Some authors believe that because of the long-enduring hostility of French judges against judicial fixation of price, the defaulting supplementary mechanism can be only unilateral fixation of price (N. MOLFESSIS, *Les exigences relatives au prix en droit des contrats*, LPA, 5 mai 2000, n° 14, p. 46; T. REVET, *La détermination unilatérale de l’objet du contrat*, in *L’unilatéralisme et le droit des obligations*, Dir. C. JAMIN et D. MAZEAUD, *Economica*, 1999, n° 7, p. 31; Cass. AP., 1er décembre. 1995, n° 91-15.578, n° 91-19.653 et n° 91-15.999, JCP 1996, n° 45, p. 34, note J. GHESTIN; C. AUBERT DE VINCELLES, *Pour une généralisation, encadrée, de l’abus dans la fixation du prix*, D. 2006, chr., 2629.) Others, on the other hand, believe that since judicial fixation of price has not been explicitly denied in the cases, using it as the defaulting supplementary mechanism is not entirely impossible (V. D. FERRIER, *Les apports au droit commun des obligations*, RTD com. 1997.49., n°19, p.55; A. LAUDE, *L’exigence de détermination du prix*, JCP E 1997, n°5, p. 29).

193. - After the reform of October 2016: judicial fixation of price! Thanks to the reform of *code civil*, now we believe it is pretty clear that judicial fixation of price is the defaulting mechanism to supplement contracts without price because of two reasons. Firstly, the reform limits the scope of application of automatic unilateral fixation of price to only *contrats de presentation de service* as provided in article 1165, which makes it compulsory to allow judicial fixation of price in other situations in order for contracts without a precise price to be enforceable.¹¹¹ Secondly, a new article 1167 has been added in *code civil*, which provides that: “*lorsque le prix ou tout autre élément du contrat doit être déterminé par référence à un indice qui n'existe pas ou a cessé d'exister ou d'être accessible, celui-ci est remplacé par l'indice qui s'en rapproche le plus.*” Here, although not stated explicitly, we can infer that the legislators tend to grant judges the authority to find and apply an “*indice qui s'en rapproche le plus*”, which at least to some extent equals to a judicial fixation of price.

2. Requirement of objectivity of price

194. Another aspect of article 1591 of *code civil* is the requirement of objectivity, which means that price should be determined by the mutual willingness of both parties instead of only by the unilateral willingness of one party.¹¹² The meaning of this requirement is simple and clear and thus is not worth much discussion. Rather, what is worth discussion two issues: whether this requirement only applies to sales or it also applies to other contracts (i); and in the events where this requirement is not applied, a judicial control over “*abus*” would take up its role (ii).

i. The scope of application of the requirement

¹¹¹ V. J. MOURY, *La détermination du prix dans le « nouveau » droit commun des contrats*, D. 2016, 1013, n°8;

¹¹² In fact, this meaning of article 1591 cannot be literally drawn from the text itself. As an author put it: “*dans une lecture purement littérale, l'article 1591 du code civil pourrait s'accommoder d'un prix dont la détermination serait abandonnée contractuellement à l'une des parties.*” (J. GHESTIN, *La formation du contrat*, LGDJ, 3e éd., 1993, n° 711, p.694.) And many authors believe that the application of article 1591 to unilateral fixation of price is in fact a judicial invention to serve a purpose (contractual justice) other than that of the article (whose purpose is only to ensure that price is clear) (V. F. LEDUC, *La détermination du prix: une exigence exceptionnelle?*, JCP G 1992, p.3631, n°10; J. CARBONNIER, *Introduction*, in *L'évolution contemporaine du droit des contrats* : Journée René SAVATIER, PUF, 1986, p.29-39.)

195. Thanks to the jurisprudence derived from cases in 1995,¹¹³ which excludes the application of former article 1129 to price, for a long time it was certain that this requirement is only applicable to sales: contracts other than sales are well formed and effective.¹¹⁴

However, the reform of *code civil*, in our opinion, seems to have again reduced the scope of contracts not subject to the requirement of objectivity. This concern comes from two new articles 1164 and article 1165, both of which are about the unilateral fixation of price: article 1164 provides that in *contrat-carde*, price “peut être” unilaterally determined by one party whereas article 1165 provides that in “*contrats de prestation de service*”, unilateral fixation of price is the defaulting supplementary mechanisms of fixing price at the absence of a conventional price. Literally speaking, the two articles are to confirm the legality of unilateral fixation of price in two categories of contracts. Yet if we interpret them *a contrario*, we believe it means also that in contracts other than these two categories, unilateral fixation of price is not effective.¹¹⁵ A possible justification for the universal legality of unilateral fixation of price is the new provision about unilateral reduction of price in new article 1223. Yet we believe this would not be a very cogent argument: what article 1223 establishes is a right of unilateral reduction of price by the aggrieved party in the event of a breach instead of allowing the parties to initially agree to leave the task of determining the price to only one party. Article 1223, thus, seems not be able to justify that the reform has allow unilateral fixation of price in all contracts.¹¹⁶

It should be noted that what we have presented with respect to the scope of contracts where unilateral fixation of price is allowed, is only our humble conjecture. The real stance of French positive law should be latter clarified by new jurisprudence and doctrines.

¹¹³ The jurisprudence related to the requirement of determinability of price in contracts other than sales, actually concerns only facts involving unilateral fixation of price: the issue in these cases is not about the consequence of a contract whose price is not clear, but rather about the legality of a contract with a precise price, yet such price is determined only by one party.

¹¹⁴ V. N. MOLFESSIS, *Les exigences relatives au prix en droit des contrats*, LPA 5 mai 2000, p.48-49; There are some dissenting authors who believe that the jurisprudence only excludes the application of article 1129 in *contrat-carde* (V. F. TERRE et al., *Droit civil, Les obligations*, Dalloz, 9e éd., 2005, n° 291, p. 298).

¹¹⁵ Some authors believe that article 1164 and article 1165 do not restrict the scope of contracts which can use unilateral fixation of price (V. J. MOURY, *La détermination du prix dans le « nouveau » droit commun des contrats*, D. 2016, 1013, n°8.) But we believe the only plausible interpretation would be that such a practice is only allowed in the two situations, otherwise the legislators should either provide explicitly that unilateral fixation is allowed, or keep silent about it, if they believe such stance can be inferred from the limited scope of application of new article 1163. The fact that they only explicitly mention the legality of such a practice in two situations, to us, thus cannot be explained in ways other than that they limit the legality to only the two situations.

¹¹⁶ Another rebut against the justification of legality of unilateral fixation of price on the basis of article 1223, would be that article 1223 regulates only the execution of a contract whereas what here it is about formation of contract. Yet as we do not think it important to distinguish an invalidly formed contract and a valid yet non-enforceable contract, this justification would not be cogent and not worth mentioning.

ii. The judicial control replacing the requirement

196. Both in the jurisprudence¹¹⁷ and in the reform of *code civil*,¹¹⁸ a judicial control of *abus dans la fixation du prix* is established to replace the forbearance of unilateral fixation of price.¹¹⁹ The sanction of such judicial control would be discussed (a) before its criteria (b).

a. Judicial sanctions of *abus dans la fixation du prix*

197. Unlike the application of former article 1129 (new article 1163) or article 1591 of *code*, the sanctions of *abus dans la fixation du prix* is not the invalidity of the contract. Instead, the remedies the aggrieved party can receive are damages and termination of the contract.¹²⁰

b. Judicial criteria of *abus dans la fixation du prix*

198. As an author put it, “*L'article 1164 sanctionnant non point un prix excessif mais sa fixation abusive*”.¹²¹

199. - The *abus*: not *un prix excessif*. A consensus in France between both scholars and jurists, is that the judicial control of *abus* in unilateral fixation of price, does not occur in the event of a purely objective unbalance between the price and the *counterpart* provided by the other party: the mere fact that the party who pay the price feel, or that it is objective that the price unilaterally fixed by the other party is higher than a just price is insufficient to

¹¹⁷ “*L'abus dans la fixation du prix ne donnant lieu qu'à résiliation ou indemnisation*” in Cass. AP., 1er décembre 1995, n° 91-15.578.

¹¹⁸ “*En cas d'abus dans la fixation du prix, le juge peut être saisi d'une demande*” in article 1164 and article 1165 of *code civil*.

¹¹⁹ The judicial intervention may be based upon equality (former article 1135 (new article 1194) of *code civil*), or on a simply implicit authorization (*mandat*) of the party to the judge to fix the price for them. (V. M. CAFFIN-MOI, op. cit., n° 656)

¹²⁰ Article 1165 which governs service contracts does not provide termination as sanction of the *abus*. As for *contrat-carde*, article 1164 provides that the sanction is a *résolution*, which means the annulation is retrospective, which replaces the sanction provided by the jurisprudence – the *résiliation*, which means the annulation of contract is not retrospective (V. J. MOURY, *La détermination du prix dans le « nouveau » droit commun des contrats*, D. 2016, 1013, n°21).

¹²¹ J. MOURY, *La détermination du prix dans le « nouveau » droit commun des contrats*, D. 2016, 1013, n°29.

qualify the fixation of price as *abus*.¹²²

200. - The *abus: un fixation abusive*. Instead of focusing on an objective excessive price, the *abus* here refers to the abuse of powers in the procedure of fixing the price. For *contrat-carde*, an author has summarized that three conditions need to be met in order to qualify an *abus dans la fixation du prix*:¹²³ Firstly, “*une disproportion entre le prix arrêté et celui du marché*”: although an objective unbalance between the price and the *counterpart* provided by the other party alone is not sufficient to qualify an *abus*, it is necessary for this purpose. Secondly, “*une situation de contrainte de la partie qui en subit la fixation*”: here the *contrainte* means that the other party should have no possibility to trade with others and is forced to accept this price.¹²⁴ Thirdly, “*une détournement de pouvoir*”: the party fixing the price is actually granted with an authority of representation which should be exercised also to be benefit of the other party, which means that the party fixing the price should not fix such a high price that the other party would lose all interests in the trade.¹²⁵

3. Requirement of seriousness of price

201. The requirement of seriousness is another requirement related to price in French positive law, which mainly focuses on the objective difference between the price stipulated and a just price. This requirement is a direct transposition of the requirement of serious *counterpart* in general rules for contracts (i). However, the seriousness of *counterpart* does not guarantee the seriousness of price (ii).

i. A serious price: a special serious counterpart

¹²² V. J. MOURY, *La détermination du prix dans le « nouveau » droit commun des contrats*, D. 2016, 1013, n°27-28; Cass. civ., 1re, 30 juin 2004, RTD civ. 2005, 126, obs. J. MESTRE et B. FAGES; Cass. civ., 1re, 30 nov. 2004, D. 2005, 1828, note D MAZEAUD; Cass. AP., 1er décembre 1995, D. 1996, 13, note L. AYNES. Some authors used to of the opinion that a purely severe objective unbalance between *counterpart* constitutes also an *abus*, yet nowadays most of them have changed their stance (V. M. –A. FRISON-ROCHE, *Va-t-on vers une conception unitaire de l’abus dans la fixation du prix*, Rev. conc. cons., juillet-août 1996,13, p. 15).

¹²³ V. J. MOURY, *La détermination du prix dans le « nouveau » droit commun des contrats*, D. 2016, 1013, n°31.

¹²⁴ The *contrainte* can be either legal or factual. By legal it means that the other party is bound by the contract to trade exclusively with the party fixing the price; by factual it means that the other party, although not bound by any contract or law, is restricted in his ability to trade with others (V. J. MOURY, *La détermination du prix dans le « nouveau » droit commun des contrats*, D. 2016, 1013, n°26).

¹²⁵ V. J. MOURY, *La détermination du prix dans le « nouveau » droit commun des contrats*, D. 2016, 1013, n°25; J. MOURY, *La fixation unilatérale du prix dans le contrat cadre*, AJCA 2016, p.123.

202. An unserious price can be defined as one whose “*montant est tellement inférieur à la valeur de la chose qu'on ne peut le considérer comme une contrepartie de la chose.*”¹²⁶ Unlike the two requirements previously mentioned referred collectively as requirement of determinability of price, which takes article 1591 as its basis, the basis of the requirement of seriousness is not *expressis verbis* found in *code civil*, but rather a transposition of the common rules for contracts related to serious *counterpart* (*conterpartie*).¹²⁷ New article 1169 of *code civil* provides that: “*un contrat à titre onéreux est nul lorsque, au moment de sa formation, la contrepartie convenue au profit de celui qui s'engage est illusoire ou dérisoire.*” A price as the *conterpartie* provided by the “buyer”, is subject to this article and should not be *dérisoire*.¹²⁸ Thus, price is subject to a judicial control whereby judges may appreciate with their discretion to see whether a price is too low to be consider as a serious price.¹²⁹

Some authors believe that the particularity of French law is its requirement of *counterpart*¹³⁰ for the formation of a contract, in other words, it does not allow an abstract act.¹³¹ From our perspective as foreigners, however, we believe this is in fact not the particularity of French law. In fact, among the jurisdictions in the world, it is not abnormal to see *counterpart* as required for formation of contracts. The most typical example is the “consideration” in common law, whereby a valid contract requires both parties have given out something (consideration) in exchange for something given by the other parties.¹³²

What makes the requirement of *counterpart* under French law particular is that it grants judges the authority to judge the sufficiency of *counterpart* given by the parties. Although article 1168 explicitly provides that equivalence between *counterpart* is not

¹²⁶ F. COLLART-DUTILLEUL et P. DELEBECQUE, *Contrats civils et commerciaux*, Dalloz, 10e éd., 2015, n° 157, p. 153.

¹²⁷ However, we believe that the requirement of seriousness and requirement of precision actually serve similar purpose (consensus between the parties) whereas requirement of objectivity serves a different purpose (contractual justice). In fact, before the reform which explicitly provide that *counterpart* (*conterpartie*) should be serious (not *illusoire ou dérisoire*) as provided in article 1169, some judges used to base this requirement on article 1591 (V. Cass. com., 23 octobre 2007, n° 06-13.979), which means they believe that an unserious price is tantamount to an absence of price, which in turns reflect a lack of consents.

¹²⁸ Before the reform of *code civil* in 2016, this requirement of serious *counterpart* was reflected in provisions related to *objet* and *cause*, and thus the requirement of serious price is a transposition of such provisions (V. F. COLLART-DUTILLEUL et P. DELEBECQUE, *Contrats civils et commerciaux*, Dalloz, 10e éd., 2015, n° 153, p. 151; M. CAFFIN-MOI, *Cession de droits sociaux et droit des contrats*, *Economica*, 2009, n° 118, p.81).

¹²⁹ V. Cass. com., 27 octobre 2003, n° 06-13.979, *JCP E* 2008.1281, obs. H. LECUYER.

¹³⁰ Before the reform of 2016, *cause* was used instead of *counterparties* (counterpart). Yet all the reasoning about *cause*, in our opinion can be transposed to *counterparties*.

¹³¹ “*L'acte détaché de sa cause, et dont la validité serait indépendante du point de savoir si celle-ci existe et si elle est licite*” J.-L. FLOURAUBERT, E. SAVAUX, Y. FLOUR, *Droit civil, Les obligations T3 le rapport d'obligation*, Sirey, 9e éd., 2015, n° 275, p. 205.

¹³² See E. MCKENDRICK, *Contract Law*, Palgrave, 2017, p.70.

necessary for the validity of contract,¹³³ French judges retain the authority to judge whether the price is too low to be considered as non-existent. By contrast, in many other countries (as exemplified by common law countries), *counterpart* is not subject to any anti-derisoriness rule: here, a *counterpart* (consideration) is valid as long as the party provide it does have his freedom limited, as long as he does not have to do so.¹³⁴ The monetary amount of such consideration, no matter how trivial, has no bearing on the validity of the contract.

ii. A serious counterpart: not necessarily a serious price

203. Although the requirement of seriousness of price is just a transposition of the general rule of requirement of serious counterpart, a serious counterpart does not necessarily mean a serious price. The reason is simple: price is only a kind of *counterpart*, which has its own speciality: only a *counterpart* consisting of an amount of cash can be considered as price; whereas other *counterpart*, such as things or service do not qualify the criteria of price.¹³⁵ Therefore, where a party provide both an amount of money and another *counterpart*, which considered together as serious, if the amount of money alone is too low to be considered serious, it cannot be said that this contract is equipped with a serious price.

B. Implications of requirements of price

204. The requirements of price are important under French to the extent that they determine whether a contract is valid or not (1) and what legal regimes would apply (2).

1. Validity of a contract

205. The validity of a contract may be affected by both the requirement of seriousness (i) and the requirement of determinability¹³⁶ (ii).

¹³³ Article 1163 of *code civil*: “*Dans les contrats synallagmatiques, le défaut d'équivalence des prestations n'est pas une cause de nullité du contrat, à moins que la loi n'en dispose autrement.*”

¹³⁴ See the most classic case: *Thomas v Thomas*, 1842 2 QB 851, 114 ER 330.

¹³⁵ V. R. LIBCHABER, *Recherches sur la monnaie en droit privé*, LGDJ, 1992, n°146, p.115s. In the earlier years, price constituted of *counterpart* other than money, i.e. *prix en nature*, was supported by some author (V. R. –T. TROP LONG, *De la vente*, Ch. Hingray, 4e éd., 1844, p. 197, n°448. available at: <https://archive.org/stream/delaventeoucomme01trop#page/196>) However, such opinion has now been denied by most scholars and jurisprudence.

¹³⁶ Previously we treat the two aspects of requirement of determinability as two separate requirements. However, to the extent that their effects are the same as far as validity of a contract is concerned, we will here treat them together.

i. Validity in terms of requirement of seriousness

206. The requirement of serious *counterpart* provided in article 1169 as a general rule for contracts, apply to all kinds of contracts. As the text of this article is sufficiently clear, it seems there should be not much room for discussion. But there is an issue that may be particularly interesting in France: the validity of a contract with an unserious monetary *counterpart* and a serious non-monetary *counterpart*.

207. - Exceptional cases where a contract with a serious counterpart yet unserious price is invalid. Sometimes the validity a contract, if it is identified with a contract of sale, depends upon the seriousness of price, which means only a serious *counterpart* is insufficient for the validity. Here are two examples. The first example consists of a sale of a building in exchange for a symbolic price of one franc and the continuation of employment by the seller of the buyer. The seller later asked to annul the contract based upon *lésion*,¹³⁷ contending that the price of one franc is obviously insufficient as far as the rule of *lésion* is concerned and thus such contract should be annulled (*rescision*). The *cour de cassation* sustained the demand, pointing out that in the consideration of *rescision pour lésion*, only monetary price should be calculated, which means the continuation of employment, the other *counterpart*, is irrelevant in determining whether price is serious and whether a contract of sale is valid.¹³⁸ Another example is a case where the bankruptcy judge has authorized a sale of some assets of the insolvent company in exchange for the continuation of some previously signed contracts, the *cour de cassation* has annulled the sale on the basis that the bankruptcy judge has only authority to authorize “sales”, which means it should be supported by serious price instead of any other *counterpart*. The sale in this case is not supported by serious price, and should thus be annulled.¹³⁹

208. - In most cases, a contract with an unserious monetary counterpart and a serious counterpart is valid. We can see that the two previous contracts are held to be invalid because they are compulsorily qualified as “sales”. Except for some cases where such

¹³⁷ Technically speaking, here the basis of the demand of the seller is not unseriousness of price, but rather the *lésion*. But to the extent that they both concern sufficiency of price, we believe the stance and reasoning of this case can be transposable to seriousness of price. We will in this sense use interchangeably *lésion and invalidité*.

¹³⁸ V. Cass. civ. 3e, 8 janvier 1992, n°90-12.141, RTD civ. 1992.777, obs. R. Y. GAUTIER.

¹³⁹ V. Cass. com., 28 septembre 2004, n°02-11.210, D. 2005.302, note M.-A. RAKOTOVAHINY.

compulsory qualification is reasonable¹⁴⁰, there is no need to retain the “qualification of sale” of a contract: accordingly, the unserious price would disqualify a contract from being a sale, which in turn releases it from the requirement of seriousness of price. And the contract would thus be valid thanks to its other serious *counterpart*.¹⁴¹

ii. Validity in terms of requirement of determinability

209. As we have presented *supra*, validity of contracts of sales and that of contracts other than sales are subject to different requirement of determinability, the latter being much more lenient.¹⁴² Therefore, the qualification of the contract is often a crucial factor in determining its validity.

If the justification of the validity of a contract with serious *counterpart* and an unserious price, as mentioned above, is to apply also in determining the validity of a contract in terms of requirement of determinability, we believe it would no longer be any problem in most cases: a supposed “contract of sale”, if without a determinable price, would automatically be disqualified from being “a contract of sale”, and accordingly would be subject to the general rules, which in most cases allow non-determinable price.

Unfortunately, this reasoning is not adopted by French jurists or scholars, as proved exactly in the many cases of sales of shares where the contracts of sale have been declared invalid for a violation of the requirement of determinability of price.

2. Legal regimes applicable to a contract

210. Previously, we have discussed how the requirements related to price affect the validity of a contract. Under French law, because price is also a condition for qualification of contract of sales, and the qualification of a contract in turn determines the legal regime

¹⁴⁰ For example, in the second case involving an insolvent company (Cass. com., 28 septembre 2004, n° 02-11.210) where the selling company is limited in its capacity to trade: it can only “sell”. Thus, the successful qualification of sale is determinant for the validity of the contract because otherwise it would exceed the capacity of the seller.

¹⁴¹ V. T. LAMBERT, *L'exigence d'un prix sérieux dans les cessions de droits sociaux*, Rev. sociétés 1993.11, n° 7, p. 16; C. FREYRIA, *Le prix de vente symbolique*, D. 1997. 51, n° 9, p. 54; F. COLLART-DUTILLEUL et P. DELEBECQUE, *Contrats civils et commerciaux*, Dalloz, 10e éd., 2015, n° 157, p. 153.

¹⁴² As we have mentioned, we believe that the validity of contracts other than sales is subject to no requirement of precision at all. As for requirement of objectivity, it is not entirely clear whether only *contrat-carte* and service contracts are free from the requirement or all contracts other than sales are free from the requirement. But it is safe to say that contracts other than sales are subject to much less requirement than sales.

applicable to the contract, requirements related to price also determines the legal regimes applicable to the contract (ii) by determining the qualification of the contract (i).

i. Requirements related to price directly determines the qualification of contract

211. Article 1582 of *code civil* defines a sale (*vente*) as “*une convention par laquelle l'un s'oblige à livrer une chose, et l'autre à la payer*”). If the condition related to *chose* is satisfied, the qualification of a contract as a sale is dependent upon the existence of a price. To determine whether there is a price, naturally we should look at whether the requirements of price have been satisfied.

Between the two requirements related to price, it seems that only the requirement of seriousness plays a role in the qualification of sale: a contract without a serious monetary *counterpart* would be automatically disqualified from being a sale. By contrast, as is shown by the invalidity of contracts supposed to be qualified as sales for violation of the requirements of determinability, the requirement of determinability seem to have no bearing on the qualification: the fact that a price has failed the requirement of determinability, would not disqualify a contract from being a sale.

ii. Requirements related to price indirectly determines the legal regimes applicable to the contract

212. The reason why French jurists and scholars are so concerned about whether to qualify a contract as a sale or not, is because it determines the legal regimes applied to the contract. We have already mentioned *supra* that whether to qualify a contract as a sale or not greatly affect the conditions of validity of such contract. Except that, we believe for the purpose of this thesis, the most important legal regime whose application is determined by the qualification of sales, is the legal warranties – more specifically, the *garantie de vice caché* and the *garantie d'éviction*.¹⁴³ And because as we have mentioned, only the requirement of seriousness of price is relevant in the qualification of contracts of sales, we can say that as far as the applicable legal regime is concerned, only the requirement of seriousness of price is

¹⁴³ Other than that, it determines also the moment of transfer of ownership and the application of rules related to *lésion*, which we do not believe have much interests for the purpose of this thesis.

important, which determines only the applicability of legal warranties specially provided for sales.

II. Lack of requirements of price in China

213. Price is an important element for sales in every corner of the world. China is no exception. However, we can observe that in China, price is not a much-discussed topic, which indicates that not many disputes over it have occurred. This is because that firstly, the requirement of price is universal for all contracts under Chinese law (A). Secondly, Chinese judges are empowered with the authority to fill the gap in the absence of a clear and enforceable price (B). Thirdly, Chinese judges do not often intervene over the onerous characteristic of a contract (C). Lastly, price is not subject to special restrictions in terms of fairness other than the provision of “obvious unfairness” in common rules (D).

A. Universal provisions related to price in all contracts

214. Under French law, price determines the rules applicable to a contract because the legal regime of sales is different. However, under Chinese law, the legal regime applicable to sale is not much different from the general rules (1). A typical example is the three main articles (article 61, article 62 and article 63) concerning the method of determination of price are all provided in the chapter of general provisions. In the chapter of contract of sales, price only appears in the article 130 defining sales.¹⁴⁴

In addition, Chinese law explicitly makes it clear that legal regime applicable to contracts of sales is model law applicable to all other onerous contracts (2).

1. Legal regime of sale: not so different from other onerous contracts

215. Under Chinese law, there is a special chapter in the Chinese Contract concerning “*sales and purchase contracts*”. However, at least for the purpose of this dissertation, there is not much difference between the provisions for this chapter and that in

¹⁴⁴ Article 130 of Chinese Contract Law: “A ‘*purchase and sale contract*’ is a contract whereby the seller transfers its ownership over the targeted matter to the buyer and the buyer pays the price therefor.”

the general provisions¹⁴⁵ except for what is commonly referred as “*warranty of latent defects related to rights*”, which is cognate with *garantie d'éviction* under French law and specially provided for contracts of sales in article 150 of Chinese Contract Law. However, as the Chinese warranty does not bind the seller himself, it does not have the main usage in France: anti-competition of the seller in sales of business, and hence has no interests for the purpose of this thesis. Thus, it is safe to say that for the purpose of this thesis, rules for sales are no different than general rules for any other onerous contracts.

2. Legal regime of sales: a model law applicable to other onerous contracts

216. Even if the chapter of contracts of sales has some special provisions that do not exist in the general rules, such special provisions, however, apply to all other contracts because sales is considered to be model contracts for all onerous contracts.¹⁴⁶

217. -Article 174 of Chinese Contract Law provides that: “*any other non-gratuitous contract shall comply with laws containing relevant provisions and in the absence of such provisions, shall be handled with reference to the provisions governing purchase and sale contracts.*”

218. - Article 45 of “Interpretation of the Supreme People’s Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Purchases and Sales Contracts” provides that: “*Where there are provisions in laws or administrative regulations regarding contracts for the transfer of rights, such as the transfer of creditor’s rights or shares, such provisions shall prevail; where there are no such provisions, the people’s court may, according to the provisions of Articles 124 and 174 of the Contract Law, refer to and apply the relevant provisions of the sales contract. Where contracts for the transfer of rights or other non-gratuitous contracts refer to and apply the relevant provisions of a sales contract, the people’s court shall first cite the provisions of Article 174 of the Contract Law and then cite the relevant provisions of the sales contract.*”

¹⁴⁵ Under Chinese law, the general provisions consist of general provisions in Contract Law and general provisions for all “juristic acts” provided in The General Provisions of Civil Law (GPCL), because a contract is in fact a type of juristic act.

¹⁴⁶ For a detailed presentation of the role of model law of Contracts of sales, see J. YI, *On the application by analogy the legal regime for contract of sales to other onerous contracts*, Chinese Journal of Law, 1-2016. (参见 易军: “买卖合同之规定准用于其他有偿合同”, 《法学研究》2016年第1期).

B. Judicial fixation of price in the absence of a clear conventional price

219. -Price is by no means an indispensable element for the validity of a contract, whether such contract is a sale or not.¹⁴⁷ If the parties of a contract have failed to reach an agreement at the formation of the contract, price would be fixed in three ways:¹⁴⁸ Firstly, the parties may try to reach a new agreement on price. Secondly, if the parties failed to reach a new agreement, the price shall be determined “*in accordance with the related clauses of the contract or with trade practices*”. Lastly, if there is no such related clauses or trade practices, the price shall be fixed at “the market price in the place of contract performance at the time of the making of the contract” or at the “government-set price or government-guided price if it is so required by law”. Among the three ways to supplement a price, the latter two requires the intervention of a judge if the parties fail to agree on what is “the related clauses” “trade practices” “market price” or “government-set price”, who shall accordingly, by his discretion determines the price for the parties. For doing so, he may take any measures he sees fit, like resorting to a third-party expert, yet it is always the judge who has the final authority to fix the price.¹⁴⁹

220. -If should be noted that it is not 100 percent certain that all contract without a clear clause of price shall be valid and enforceable. “Considering the nature of a contract of sale, clauses of object, clauses of quantity and clauses of price are indispensable clauses. If the parties fail to agree upon the object, its quantity and the price, a contract of sale is impossible to form.”¹⁵⁰ A lack of agreement on price, thus may reflect a failure of consents of the parties and accordingly invalid. Chinese judges would usually try their best to find an

¹⁴⁷ See S. CHEN, *On the issues related to price in contract of sales in Chinese Contract Law*, Present day science 1-2012. 69, p. 69 (陈思: “论我国合同法中买卖合同的价格问题”, 《时代法学》2012年第1期).

¹⁴⁸ Article 61 of Chinese Contract Law: “*For a contract that has become valid, where the parties have not stipulated the contents regarding ... price or remuneration ..., or have stipulated them unclearly, the parties may supplement them by agreement; if they are unable to reach a supplementary agreement, the problem shall be determined in accordance with the related clauses of the contract or with trade practices.*”

Article 62 of Chinese Contract Law: “*Where the parties have unclearly stipulated related contents in a contract and fails to determine them in accordance with the provisions of Article 61 of this Law, the following provisions shall apply: ... (2) in case of unclear price or remuneration stipulation, the contract shall be performed in accordance with the market price in the place of contract performance at the time of the making of the contract, or according to the government-set price or government-guided price if it is so required by law...*”

¹⁴⁹ See S. CHEN, *On the issues related to price in contract of sales in Chinese Contract Law*, Present day science 1-2012. 69, p. 71 (陈思: “论我国合同法中买卖合同的价格问题”, 《时代法学》2012年第1期).

¹⁵⁰ C. ZHANG et X. WANG, *Contract Law*, Press of Tsinghua university, 2006, p.210 (张长青, 王霞, 《合同法》, 清华大学出版社 2006年版, 第210页).

appropriate price to fill the gap in the consents of the parties, but if he failed the task finally, the contract would be considered not formed.¹⁵¹

C. Judicial control over the onerous characteristic of a contract on the basis of a price

221. Under Chinese law, although there is not any requirement related to consideration or *counterpartie*, a distinction between onerous contract and gratuitous contract is clearly observed.¹⁵² In the event where it is absolutely unclear as to whether a contract is gratuitous or onerous, Chinese judges may intervene to annul the contract (1). By contrast, if the parties have explicitly stipulated that the contract is onerous, or even provided it with some *counterpart*, no matter how trivial it is, Chinese judges would generally respect this qualification of onerous contract (2).

1. Judicial activism when the parties' intention about the nature of the contract is unclear

222. When the text of a contract is ambiguous that it is unclear whether a contract is onerous or not, a Chinese judge would generally intervene to find that the consents of the parties are missing and the contract is invalid, unless he may find an *animus donandi* in the contract and accordingly qualify it as a donation (a gratuitous contract).¹⁵³

A typical example is when a contract is entitled “XX 转让(transfer)协议(contract)” (literally “contract of transfer of XX”). The Chinese word “转让”, which is equivalent to the English word “transfer”, does not have any connotation about its characteristic of onerousness: a “转让” can be either a sale or a donation.¹⁵⁴ If faced with a contract entitled “XX 转让

¹⁵¹ See S. CHEN, *On the issues related to price in contract of sales in Chinese Contract Law*, Present day science 1-2012. 69, p. 72 (陈思: “论我国合同法中买卖合同的价格问题”, 《时代法学》2012 年第 1 期); See H. NING, A reflection on the system of contracts of donation in Chinese law, Zhejiang social science 2-2007, p. 87 (宁红丽: “我国赠与合同制度若干问题的反思”, 《浙江社会科学》2007 年第 2 期).

¹⁵² The main interest of this distinction is that the debtor of a gratuitous contract has a right of repent before he has actually transferred the ownership of the thing whereas the debtor of an onerous contract does not. See W. WANG, *On the right of repent in contract of donation*, Legal forum 6-2010. 142, p. 142 (王文军: “论赠与合同的任意撤销权”, 《法学论坛》, 2010 年第 6 期).

¹⁵³ See H. YANG, “*Shopping without charge*”, a sale or a donation, Beijing daily, 20 July 2016, p. 14 (杨海超: “裸购”: 买卖还是赠与”, 《北京日报》2016 年 7 月 20 日, 第 14 版).

¹⁵⁴ In this sense, it is like the French word “*cession*”, which can be both gratuitous or onerous. V. S. LACROIX-DE SOUSA, *La cession de droits sociaux: à la lumière de la cession de contrat*, LGDJ, 2009, p. 9, n°2.

(transfer)协议(contract)” without equipped with any clause of price, a Chinese judge would probably firstly decide whether the transferor tend to transfer the object for free; if the answer is negative, he would probably hold the contract to be not-formed, for lack of consents.

2. Judicial restraint when the parties’ intention about the nature of the contract is clear

223. However, if the parties have explicitly expressed their intention on the qualification of a contract, usually by a clause of price or by the title of the contract (for example, if the contract is entitled “a sale of XX”), such qualification would generally be sustained by Chinese judges, no matter how ridiculously low is the counterpart given by a party to the contract, unless such a practice is to cover up a real donation so as to achieve some purpose anti-public order.¹⁵⁵

D. Judicial control over the fairness of a price

224. “Obvious unfairness” is one of the legally provided reason to revoke a contract under Chinese law, whose application requires both an objective condition— “an obvious unfairness” and a subjective condition that “one party exploits the other party’s distressed state and lack of judgment”.¹⁵⁶ The amount of *counterpart* is an important factor in determining an obvious unfairness, which usually is reflected in an obvious unbalance between the *counterpart* provided by the parties. However, the mere existence of an unbalance, no matter how obvious, is not sufficient to evoke the application of this rule. Instead, the more vital condition is the acts of exploitation of one party to the detriment of the other party.¹⁵⁷

Accordingly, we can make two observations related to unilateral fixation of price, about which we have failed to find any discussion, academic or juristic: Firstly, to hold a

¹⁵⁵ See Y. YU, *On the issues related to tax on accommodation in China, dissertation South-west China university of political science and law*, 2012, p. 23 (于洋: 《中国住房税收问题研究》, 西南政法大学硕士学位论文, 2012).

¹⁵⁶ Article 151 of Chinese General Provisions of Civil law (GPCL): “*The injured party has the right to request a people’s court or arbitration body revoke civil juristic acts where one party exploits the other party’s distressed state and lack of judgment, resulting in the establishment of a civil juristic act that is clearly unfair.*”

¹⁵⁷ See Y. ZHANG, *A remark on the “obvious unfairness” in the General Provisions of Civil Law*, *Journal of Shantou University (Humanities & Social Sciences Edition)* 8-2017. 66, p.71 (张燕璇: “<民法总则>显失公平制度评述”, 《汕头大学学报(人文社会科学版)》2017年第8期); C. ZHANG, *On the defects and reconstruction of “obvious unfairness” in Chinese law*, *Journal of Graduate School of Chinese Academy of Social Sciences* 2-2017. 115, p.119 (张初霞, “我国显失公平的立法瑕疵及重构”, 中国社会科学院研究生院学报, 2017年第2期) .

price or any other *counterpart* as obvious unfair, the mere existence of a unilateral fixation of price is not sufficient; it should be that the one who fixed the price has taken advantage of “the other party’s distressed state and lack of judgment”. Secondly, an obvious unfairness should be supported by an obvious unbalance between the *counterpart* provided by the parties, otherwise even if the one who have fixed the price is suspicious of having exploited the other party’s distressed state and lack of judgment, still the obvious unfairness is unable to be applied.

III. Comparison

225. Having presented the requirements of price in the positive law of both countries, we may find that the two countries differ principally in three aspects: the role of price in determining the qualification of a contract (A); the role of qualification of a contract in determining its conditions of validity in terms of requirement of determinability of price (B); and the role of judges in the fixation of price (C).

A. The role of price in determining the qualification of a contract

226. A particularity of French law that is not found in China, is that it allows the seriousness of price to determine whether to qualify a contract as a sale. As we have presented, the only mentionable effect of the qualification of sale is the applicability of legal warranties. This relation of determination is thus really beyond us, for we cannot imagine any justification to support it: why the scope of obligation of warranty of a party who provide a thing as *counterpart* would vary according to the different nature of the *counterpart* provided by other party?

But what is more beyond us is the concern that French jurists and scholars give to it. For example, French practitioners are very concerned about “negative price” even if the contract is supported by sufficient *counterpart* so as to make sure that the contract would not be annulled on the basis of unserious *counterpart*, and we can thus only believe that what they really concern is that the negative price would disqualify the contract from being a sale and therefore prevent the applicability of legal warranties. But as we have mentioned, in complicated transactions where lawyers are always available, the odds to resort to a legal warranty are really rare and should not constitute a major problem. Accordingly, if we are

right that the applicability of legal warranties is not important, it becomes really incomprehensible why French judges are so concerned about the existence of a serious price and the qualification of the contract as a *vente*.

If irrational things would somehow go extinct, we believe whether a contract should be qualified as a sale would cease to be an interesting topic in France, and the special concern about a “positive price” would also disappear accordingly.

B. The role of qualification of a contract in determining the conditions of validity

227. Another particularity of French law, is the different requirements of determinability of price it imposes on a contract, depending on whether it is a sale or not. By contrast, Chinese law imposes the same conditions of validity in terms of price to all contracts. We believe the different treatment in France would finally disappear for two reasons: firstly, there is no justification for such a different treatment (1). Secondly, such a different treatment is logically impossible (2).

1. Absence of justification

228. In fact, French authors have themselves found the absurdity of the different treatment. Since long time ago, the service contracts (*contrat d'entreprise*) has been released from the requirement of determinability of price, yet contracts of sales are still subject to it.¹⁵⁸ To this different treatment, an author explicitly mentioned that it is “*difficilement compréhensibles*”¹⁵⁹ And others pointed out that it is not based upon literal interpretation of the text of *code civil*.¹⁶⁰ We believe that this different treatment is a typical example of path dependence, whereby an arbitrary disposition would survive for a long while before being eliminated.

2. Contradiction with logic

¹⁵⁸ V. F. TERRE et al., *Droit civil, Les obligations*, Dalloz, 11e éd., 2013, n° 287, p. 292.

¹⁵⁹ C. AUBERT DE VINCELLES, *pour une généralisation, encadrée, de l'abus dans la fixation du prix*, D. 2006. 2629, n° 4, p. 2630; V. N. MOLFESSIS, *Les exigences relatives au prix en droit des contrats*, LPA 5 mai 2000. 41, n°15-16.

¹⁶⁰ V. F. TERRE et al., *Droit civil, Les obligations*, Dalloz, 11e éd., 2013, n° 287, p. 291.

229. This different treatment basically imposes a special condition for validity to a special category of contracts. Yet, if we believe in contractual liberty, such a different treatment is impossible unless it is to protect an interest of the nature of public order: in order to protect this interest, legislators should also provide for a condition for qualification that is different from the condition for validity. Otherwise the condition for validity would serve as both a condition for validity and a condition for qualification, and we would get a reasoning like this: a special condition X is applied only to a special category of contracts Y. For a random contract A, which fails the condition X, if it is qualified as a contract Y, it would be invalid. However, just for the very reason that A fails the condition X, it would automatically fail the qualification Y, which means its validity is not subject to condition X.

This is exactly the situation of the special requirement of determinability of article 1591 applied only to contracts of sales. Authors generally believe that this requirement is not to protect any public order.¹⁶¹ Therefore, there is no separate condition for the qualification of *contrat de vente*, and the very fact that a contract fails the requirement of determinability should automatically disqualify it from being a sale, and accordingly such contract is not subject to the special requirement of determinability of price.

C. The role of judges in the fixation of price

230. The most important difference between the two countries is the role of their judges in the fixation of price. Generally speaking, Chinese judges play a more important role in filling gaps in the absence of a determinable price; whereas French judges are traditionally discouraged from taking the place of the parties (1). However, when it comes to supervise the validity of a contract with a determined price, Chinese judges are usually more reluctant to intervene than their French counterparts (2).

1. The role of judges in filling gaps of price

231. After the reform of 2016 of *code civil*, we can see that there is trend of convergence of the two countries related to the judge's role in the fixation of price: now French judges like their Chinese counterparts, can intervene to fix the price for the parties if

¹⁶¹ V. P. -H. ANTONMATTEI et J. RAYNARD, *Droit civil, contrats spéciaux*, Lexisnexis, 7e éd., 2013, n° 129, p. 106; M. CAFFIN-MOI, *op. cit.*, n° 637.

they failed to fix it themselves. However, this authority of judges to fill the gap is limited only to contracts other than sales. We believe that the judicial fixation of price would eventually be also extended to contracts of sales for several reasons: firstly, allowing judges to fill the gap is not necessarily violate the intentions of the parties (i); secondly, the text of article 1591 can be so interpreted (ii).¹⁶²

i. Judicial fixation of price is not necessarily in violation of the intentions of the parties

232. Under both French and Chinese law, the obligatory force of a contract comes from the mutual intentions of the parties. It is from this premise that comes the reluctance in French jurisprudence of judicial intervention to fill gaps in price. This reluctance seems *a priori* reasonable because the price fixed by judges, after all, is impossible to 100 percent reflect the intentions of the parties, had they have fixed the price themselves. However, we believe this argument has simplified the situation, because declaring invalid a contract simply on the basis of lack of a precise price, does not necessarily reflect the intention of the parties either: sometimes what the parties are concerned more at the formation of the contract is the final execution of the contract, and comparatively they would care less about the amount of price. This is reflected in the fact that “*de nombreuses actions sont engagées par des parties qui n’invoquent l’indétermination du prix que comme un outil pour obtenir l’anéantissement d’un contrat dont elles ne tirent pas les bénéfices escomptés.*”¹⁶³ In other words, if the disappointed party can get what he expected, a price somewhat deviating from his intention is more than tolerable, which means that the requirement of determinability actually serves as a tool against the intentions *ab initial* of the parties.

To some extent, here it is a dilemma whereby legislators should choose the less evil one from two evils: is it more appropriate to impose upon the parties a price they are not 100 percent satisfied and make enforceable the rest of the contract which they have conventionally agreed; or is it more appropriate to release them from an imposed price, yet have the

¹⁶² It should be noted that objectively speaking, judicial fixation of price is not the only option. For example, in German law, it is the creditor who fix the price in the absence of a conventional price (V. M. PEDAMON, *Les apports du droit comparé : les solutions allemandes en matière de détermination du prix*, *RTD com.* 1997.67, p. 69). However, as French law and Chinese law now have no difference with respect to the defaulting supplementary method of fixing price, we would save our energy by not discussing the pros and cons of the two methods.

¹⁶³ M. STOCLET, *Le prix dans les cessions de droits sociaux*, Thèse Lille II, 2008, p.508, n° 759; V. M. CAFFIN-MOI, *op. cit.*, n° 648.

agreement on all other terms and elements annulled? We believe, judges are the right persons to make this choice: “*aussi le juge, saisi de la question de la conclusion d’une cession de droits sociaux sans accord complet sur le prix, devra-t-il déterminer si les parties se sont entendues sur le principe de la cession.*”¹⁶⁴ If a judge determine that at the formation the parties care more about the price than other terms of the contract, he should declare the contract as not validly formed because the parties have failed in agree on important elements. On the other hand, if the judge find that price is less important than other elements of the contract, he should stand in the shoes of the parties to fix a price for them, in order to make the contract enforceable.

As for the legal basis for the judicial fixation of price, it can be said that the parties to a contract whose price is not entirely agree upon, have “*implicitement donné mandat au juge de fixer le prix, au cas où elles ne parviendraient pas à un accord.*”¹⁶⁵ And in this way the judicial fixation of price does not contradict with the intention of parties: they should have had an expectation that judges would fix the price for them.

To sum it up, we believe in the future, the law of the two countries would converge to the extent that judicial fixation of price would be allowed in all kinds of contracts, including contracts of sales in France.

ii. The text of article 1591 does not exclude the possibility of judicial fixation of price

233. An obstacle to the recognition of judicial fixation of price in contracts of sales in France, is article 1591. In order to make it possible for judicial fixation of price, French authors usually try to alter the qualification of a contract otherwise considered as a sale. However, we believe it is entirely possible to keep the application of article 1591 and at the same time allow the judicial fixation of price. All we need to do is to reinterpret the meaning of the article.

234. -Firstly, the meaning of the word of determinability can be reinterpreted. The original text of article 1591 actually requires that price being determined at the formation

¹⁶⁴ M. STOCLET, *Le prix dans les cessions de droits sociaux*, Thèse Lille II, 2008, p.494, n° 737.

¹⁶⁵ M. CAFFIN-MOI, *op. cit.*, n° 648.

instead of being simply determinable. If it is possible to interpret the word determined as “determinable”, why cannot we interpret the word “determinable” as including situations where judges would fix the price for the parties? In fact, Italian law also requires that price of contracts of sales being determinable, yet Italian courts interpret it differently to include the situations where judges would fix the price for the parties (actually it is tantamount to hold all prices determinable, no matter how imprecise they are, which kind of destructs the inherent meaning of the word “determinable”).¹⁶⁶

235. -Secondly, this article can be reinterpreted as being only a condition for qualification. Another solution is to interpret article 1591 as just a condition for qualification of sales instead of as an article dealing with condition for validity. Interpreted in such a way, we can admit that the expression “determinable price” excludes those whose precision needs a separate agreement, yet being denied determinability, according to this article, only disqualify the contract from being a sale, it does not make it invalid.

2. The role of judges in supervising a precisely written price

236. Previously we have compared the role of judges in filling gaps in price when a precise conventional price is lacking. Here we would discuss the judicial review of prices that are although precisely written (which means it is logically possible to execute the contract under the instruction of its terms), are in fact suspicious to be unserious (i) or unfair (ii).

i. The role of judges to decide the seriousness of intention

237. On the basis of the article anti-illusory *counterpart* (article 1169), French judges have a power to annul a contract by finding that the *counterpart* is not serious. By contrast, Chinese judges do not have such a power to challenge the seriousness of the intention of the parties. Since the involvement of French judges in this case is backed by a newly-added article after the reform of *code civil* in 2016, we believe in a near future probably the difference would continue to exist for a while. However, this difference may be one that practitioners of the two countries shall not pay attention to.

¹⁶⁶ V. A. PRUM, *Les exigences de prix dans les contrats internationaux*, JCP E 1997, p. 32.

ii. The role of judges to decide the fairness of contract

238. In France, in terms of price, there are two methods to maintain the fairness (or justice): the first is the requirement of objectivity, the second is the judicial control of abuse of power in a unilateral fixation of price. The Chinese “obvious unfairness” is totally different from the former, yet somewhat similar to the later.

239. - Requirement of objectivity vs. “obvious unfairness”. The most important difference between the two is that the Chinese mechanism requires both an objective unbalance and an act of taking advantage of others in order to apply; whereas requirement of objectivity would render a contract invalid, as long as the price is fixed unilaterally: this means that it is very possible that a price, although unilaterally fixed, is not manifestly low or high, yet the contract is still annulled. It is obvious that the requirement of objectivity would eventually disappear, giving way to more lenient method like judicial control of abuse.

240. - Judicial control of abuse of power in a unilateral fixation of price vs. “obvious unfairness”. To start a judicial control of abuse in France, according to jurisprudence, both an objective unbalance of *counterpart* and two subjective conditions are to be met. Similarly, the Chinese “obvious unfairness” depends upon an objective unbalance and a subjective condition as well. Although the subjective conditions are not entirely the same, we can say that they serve roughly the same purpose and achieve same effects. The only difference is that the judicial control is limited to unilateral fixation of price, whereas the Chinese “obvious unfairness” is a universal rule applied to all situations involving unfairness. However, since in some sense, the Chinese “obvious unfairness” is just the counterparts of the new provision in French *code civil – violence économique*, we believe there is possibility that in the future, the special mechanism controlling only unilateral fixation of price would be replaced by *violence économique* as provided in article 1143. If this should happen, the laws of the two countries would converge on this point.

Conclusion of Section III

241. The most important difference between the laws of the two countries in terms of the requirements of price is that the requirements of price that are the source of so many issues in purchase of shares do not exist at all under Chinese law. For one thing, price does

not have to be determinable, as Chinese judges have the discretion to fill the gap. For another, price does not have to be serious, as the identification of a contract as a contract of sale plays no good under Chinese law. We believe the requirements of price, *de lege ferenda*, are not appropriate and should be eliminated. Fortunately, a convergence of Chinese law and French law in terms of requirements of price towards the eventual disappearance thereof, in our opinion, is quite predictable.

Conclusion of Chapter I

242. As for elements of a contract of purchase, the laws of the two countries has both similarities and differences. As for similarities, both countries hold as principle the contractual liberty and view the restrictions as exceptions and both countries require the consents of the parties to be free of defects. However, the two countries differ in the specific provisions as to the defects of consents and what is particularly important the two countries differ in the existence or not of the requirements of price.

Chapter II Effects

243. Once a contract has been validity concluded, it has certain binding forces, some of which are worth to be discussed for the purpose of this thesis: *garantie des vices cachés* (Section I) and *garantie d'éviction* (Section II).

Section I. *Garantie des vices cachés*

244. - Clarification of the notion of the expression “*garantie des vices cachés*”. To French readers, the expression “*garantie des vices cachés*” is a proper noun, which designates specifically a legal warranty as provided in article 1641 of *code civil* and the followings. However, if we interpret the expression “*garantie des vices cachés*” in a literal way, disregarding its meaning particular to French law, it actually designates all mechanisms against defects of things sold and purchased not disclosed by the seller in advance, both those stipulated conventionally and those provided *de plein droit*. If we are allowed to limit our discussion to only those *de plein droit*,¹⁶⁷ we can see that under French law, the expression “*garantie des vices cachés*”, encompasses both the “*garantie des vices cachés*” *strico sensu* and the *obligation de délivrance*, and similarly, we will see that the expression is used to refer to the corresponding Chinese counterparts of the two French notions as well.

245. - Scope of discussion: conditions instead of sanctions. *Prima facie*, the sanctions for the *garantie des vices cachés* as we have defined (both the *garantie des vices cachés strico sensu* and the *obligation de délivrance*) should fall within the scope of our discussion, especially given that the two countries somewhat differ therein¹⁶⁸ and given that recently (in 2016), the French *code civil* has reformed its provisions related to *l'inexécution du contrat*: for example, the introduction of *réduction de prix unilatérale* in the *code civil* by new article 1223, although eventually considered as “*n’avoir pas vocation à jouer à l’égard d’un contrat de cession de parts sociales ou d’actions*”,¹⁶⁹ is nonetheless discussed as an interesting topic by M. Couret and M. Reygrobellet. However, these seemingly interesting topics will not be discussed in this thesis for a simple reason: the sanctions under the positive laws of the two countries, no matter how different from each other, have one thing in common

¹⁶⁷ Here, we would like to emphasize that the expression “*de plein droit*”, in an abstract sense, can be interpreted in three ways: firstly, for a given mechanism, both its conditions and sanctions are provided *de plein droit* instead of being conventionally stipulated. For example, *garantie des vices cachés* under French law. Secondly, those where only the conditions are *de plein droit* whereas the sanctions are stipulated conventionally. This type of mechanism *de plein droit*, at least for the purpose of this thesis, does not exist. Lastly, those where the conditions are stipulated conventionally whereas the sanctions are provided *de plein droit*. For example, the *obligation de délivrance* under French law where the conditions should be stipulated conventionally and where the sanctions are provided in article 1217 and followings of the French *code civil*. In this thesis, by *de plein droit*, we mean all mechanisms either the conditions or the sanctions of whom or both are provided *de plein droit*.

¹⁶⁸ For example, the accumulation (*cumul*) of damages and termination (*résolution*) is explicitly recognized in article 1217 of French *code civil* whereas it is a disputable topic worth the scholarly discussion in China: see Q. LU, *the effects for the termination of contracts and the liability for breach of contracts*, Northern legal science, 6- 2012 (陆青, “合同解除效果与违约责任”, 《北方法学》, 2012年第6期).

¹⁶⁹ V. A. COURET et A. REYGROBELLET, op. cit, n° 45.

--- it is so obvious that they are inherently insufficient and can be well replaced by conventional ones, as opposed to the conditions which are also insufficient and replaceable yet in a not so obvious way. As the main purpose of our discussion of the various legal protections is for demonstrating their inherent unsatisfactoriness, as will be presented *infra*, the obviousness of the insufficiency and substitutability of the legal sanctions allows us to save ourselves from spending much effort in discussing them.

246. On that account, in this section, our comparison (III) will be limited to the conditions for applying the respective *garanties des vices cachés* in France (I) and in China (II).

I. *Garantie des vices cachés* in France

247. Under French law, there are two legal foundations that in our opinion can be roughly referred to as *garantie des vices cachés* (A). Reading them together, we can have a grasp of the conditions for applying the *garantie des vices cachés* in France (B).

A. Foundations for *garantie des vices cachés* under French law

248. Under French law, the two legal foundations that are subsumed under the category of *garantie des vices cachés lato sensu* are the *garantie des vices cachés stricto sensu* (1) and the *obligation de délivrance* (2).

1. *Garantie des vices cachés stricto sensu*

249. - Clarification of the meaning of *garantie des vices cachés stricto sensu*: *garantie des vices cachés* for *choses corporels* instead of *garantie de la cession de choses incorporels*. Technically speaking, under French law there are two kinds of *garantie des vices cachés stricto sensu*: the one provided in article 1641 of *code civil* and the followings for everything except for those provided in article 1693; and the one provided in article 1693 and followings of *code civil* specifically for *choses incorporeles*. As the two mechanisms has different scope of application, with the former much larger than the latter, the issue as to which one is supposed to be applied seems to be an important one, at least when it comes to

purchase of shares.¹⁷⁰ However, nowadays it is no longer an important issue as the French consensus is that when it comes to purchase of shares, it is article 1641 instead of article 1693 that is applicable.¹⁷¹ Therefore, in this thesis, when referring to *garantie des vices cachés stricto sensu*, we mean the one provided in the general provisions for *contrat de vente* in general (article 1641) instead of the one provided specifically for *cession de droits incorporels* (article 1693).

250. - Condition for application *de plein droit* of *garantie des vices cachés stricto sensu*. As we will limit our discussion to only the one provided in article 1641, we will present only the regimes of this mechanism. According to article 1641, “*le vendeur est tenu de la garantie à raison des défauts cachés de la chose vendue qui la rendent impropre à l’usage auquel on la destine, ou qui diminuent tellement cet usage que l’acheteur ne l’aurait pas acquise, ou n’en aurait donné qu’un moindre prix, s’il les avait connus.*”. The detailed conditions that we can interpret from the text will be discussed later. Here, we would like to emphasize only that the text of this mechanism has provided an enforceable condition *de plein droit* that can be automatically triggered without any conventional stipulations.

2. *Obligation de délivrance*

251. - Literal meaning of *obligation de délivrance*. According to article 1603, as for a *contrat de vente*, the seller is held to assume two legal (*de plein droit*) obligations: *celle de délivrer* and *celle de garantir la chose qu’il vend*. Literally speaking, as opposed to the latter, *obligation de délivrance* requires only “*le transport de la chose vendue en la puissance et possession de l’acheteur*” as provided in article 1604, mentioning nothing about the state or integrity of *la chose vendue*. In other words, literally speaking, as long as the seller has actually delivered something, he has fulfilled his *obligation de délivrance*, regardless of whether the thing delivered conforms to the expectation of the buyer or any other criteria.

252. - Expanded meaning of *obligation de délivrance*. Later, judges begin to interpret the *obligation de délivrance* not only as an *obligation de délivrance stricto sensu*, but also as an *obligation de délivrance* conforming to certain criteria. For example, a judge held

¹⁷⁰ V. P. MOUSSERON, *Les conventions de garantie dans les cessions de droits sociaux*, NEF, 1992, n° 108.

¹⁷¹ C. REMOND-BIED et C. VERCHEYRE-GRARD, *Cession de droits sociaux: la nouvelle jurisprudence favorable au cessionnaire déçu*, RJDA, octobre 1996. 831.

that: “l’obligation de délivrance ne consiste pas seulement à livrer ce qui a été convenu, mais à mettre à la disposition de l’acquéreur une chose qui corresponde en tous points au but par lui recherché.”¹⁷²

253. - Conditions for application not *de plein droit* of obligation de délivrance.

However, the judicial interpretation that has extended the scope of application of the *obligation de délivrance* does not make it widely used, at least not in situations discussed in this thesis: purchase of shares. For example, in a case that is obviously supposed to be regulated by the *obligation de délivrance*, the judge chose rather to find an implied conventional *garantie de passif*.¹⁷³ The reluctance of the recourse to the *obligation de délivrance* is because of a simple reason:¹⁷⁴ its application requires the pre-existence of some contractual stipulations, as it is the conventional stipulations that determine the criteria for conformity required for the application of the legal foundation.¹⁷⁵ Yet, if the parties bother to stipulate the criteria for the conformity that the seller needs to observe in delivering the thing sold, in our case it is the shares, why don’t they bother to stipulate further also the sanctions for their violation? From what has been just presented, we can see that although the *obligation de délivrance* serves a function similar to that of *garantie des vices cachés*, they differ in one point: the legal provisions for the former does not provide for condition for application *de plein droit* whereas that of the latter do.

B. Conditions for *garantie des vices cachés* under French law

254. - Scope of discussion: the conditions for *garantie des vices cachés stricto sensu*. As we have mentioned *supra*, there are two kinds of mechanisms able to be categorized as *garantie des vices cachés lato sensu*. However, as the condition for applying *obligation de délivrance* is supposed to be stipulated conventionally and thus not of the nature *de plein droit*, it is not worth our presentation and we will limit our discussion only to the conditions for applying *garantie des vices cachés stricto sensu*.

255. - Presentations of the conditions for *garantie des vices cachés*. According to

¹⁷² Cass. civ. 1re, 20 mars 1989, n° 87-18517; v. aussi Cass. civ. 1re, 14 février 1989, 86-14913.

¹⁷³ V. note A. BENABENT sous cass. civ. 1re, 16 juin 1993, n° 91-17519, D. 1994. 210.

¹⁷⁴ V. M. STOCLET, *Le prix dans la cession de droits sociaux*, thèse Lille-II, 2008, n° 245; M. CAFFIN-MOI, *Cession de droits sociaux et droit des contrats*, Economica, 2009, n° 605.

¹⁷⁵ V. Cass. com., 28 juin 2005, n° 04-11543; Cass. com., 8 juillet 2003, n° 01-02949; Cass. 3e civ., 15 mars 2000, n° 97-19959.

article 1641 of *code civil*, we can see that the conditions for applying the *garantie des vices cachés* *strico sensu* are two-fold. For the subjective condition, *vices* should be *cachés*, i.e. should be not known to the buyer in advance. For the objective condition, the *vices* should “*la rendent impropre à l'usage auquel on la destine*”, or “*diminuent tellement cet usage que l'acheteur ne l'aurait pas acquise, ou n'en aurait donné qu'un moindre prix, s'il les avait connus*”. What should be noted is that the objective condition for *garantie des vices cachés* focuses on the objective usage of the thing sold which is relatively certain.

II. Garantie des vices cachés in China

256. Under Chinese law, the provisions for *garantie des vices cachés* (A) lack conditions whose application is *de plein droit* (B).

A. Provisions for *garantie des vices cachés* under Chinese law

257. What are commonly referred to as “*garantie des vices cachés*” under Chinese law are provided in two articles: article 111 and article 155 of Chinese Contract Law.

258. - Article 111: *garantie des vices cachés* in general. Article 111 of Chinese Contract law provides that: “if the quality fails to meet the agreed requirements, liability for breach of contract shall be borne in accordance with the agreement between the parties. If the liability for breach of contract is not stipulated or is not clearly stipulated, nor can it be determined pursuant to the provisions of article 61 of this Law, the party suffering the loss may, with reference to the nature of the targeted matter and the degree of the loss, choose in a reasonable manner to demand that the other party bear the liability for breach of contract in such form as repair, replacement, redoing, return of the targeted matter, discount in payment or remuneration.”

259. - Article 155: *garantie des vices cachés* specifically for contracts of sales and purchase. What has been provided in article 111 as a mechanism applicable to all kinds of contracts is reiterated in article 155 specifically for a particular kind of contracts --- contract of purchase and sales: “if the targeted matter delivered by the seller fails to meet the quality requirements, the buyer may demand that the seller bear the liability for breach of contract pursuant to the provisions of article 111 of this Law.” Obviously, article 155 adds nothing new

to article 111, which is why we believe article 155 is nothing but a reiteration of a rule in the general provisions for contracts in the context of a specific kind of contracts: the contract of purchase and sales.

B. Conditions for *garantie des vices cachés* under Chinese law

260. - Key notion in determining the existence or not of *vices cachés*: quality. We can see that both article 111 and article 155 of Chinese Contract Law focus on the notion “quality”, which determines whether there is a *vice caché* or not. In other word, under Chinese law, a *vice caché* can be defined as a failure of delivering things whose quality conform to a given criterion for quality.

261. - Criteria for quality. Article 111 provides three kinds of methods to determine the criterion for quality needed to determine the existence or not of *vices cachés*. Firstly, the criterion shall be determined according to the contractual stipulations. In other words, the willingness of the parties is its principal source. Secondly, in the absence of conventional criterion for quality, it is by a set of supplement rule as provided in article 61 to fill this gap. Thirdly, if article 61 also fails to provide the necessary criterion for quality, it is by a “reasonable manner” to determine it.

Here, it is worth to mention the supplement criteria for quality as provided in article 61, which reads as: “for a contract that has become valid, where the parties have not stipulated the contents regarding quality, price or remuneration or the place of performance, or have stipulated them unclearly, the parties may supplement them by agreement; if they are unable to reach a supplementary agreement, the problem shall be determined in accordance with the related clauses of the contract or with trade practices.” This article, in turn points to article 62, which provides specifically the criteria for quality when it is not stipulated conventionally: “in case of unclear quality requirements, the contract shall be performed in accordance with state standards or trade standards, or in the absence of such standards, in accordance with common standards or special standards conforming to the aim of the contract.”

As the objects that we discuss in this thesis are shares, there are no “state standards or trade standards” as to their quality, which means that the only applicable part of article 62 is “common standards or special standards conforming to the aim of the contract”. This part

of article 62, along with the expression “reasonable manner” provided in article 111, indicates an important conclusion: under Chinese law, without contractual stipulations, an important element for determining the existence or not of *vices cachés* --- the required quality --- cannot be determined in a manner *de plein droit*. Rather, it is up to the judge to fill this gap: they will, on a case-by-case basis, relying on their own judgements and discretions, to determine whether the thing delivered fail or conform to the required quality.

III. Comparison

262. Comparing the *garanties des vices cachés* in the two countries, we can observe drastic differences. In particular, they differ in the foundations (A) and in the conditions (B).

A. Comparison of the foundations for *garantie des vices cachés*

263. - *Garantie des vices cachés* under China is similar to *obligation de délivrance* under French law. Under French law, there are two foundations serving the function of *garantie des vices cachés*: the *garantie des vices cachés stricto sensu* (article 1641 and the following of French *code civil*) and the *obligation de délivrance* (article 1604), with the former providing a condition *de plein droit* and the latter needing contractual stipulations to be applied. By contrast, under Chinese law, what is called “*garantie des vices cachés*” is actually more similar to *obligation de délivrance* under French law than its *garantie des vices cachés stricto sensu*, as in essence the Chinese mechanism is for protecting the contractual stipulated quality and for providing supplement to the contractual stipulations in its absence. In other words, actually under Chinese law there is no counterpart to the *garantie des vices cachés stricto sensu* under French law.

B. Comparison of the conditions for *garantie des vices cachés*

264. - Presentation of the difference as to the conditions in the two countries. The elements for determining the existence or not of *vices cachés* under the laws of the two countries differ greatly: whereas French law focuses on the notion “*usage auquel on la destine*” which is in essence a condition whose application is *de plein droit* and of relatively clear definition, Chinese law focuses on the notion “quality”, which, at least as far as shares are concerned, cannot be applied without further interpretation by judges and is in essence not

a condition *de plein droit*.

265. - Implications for the difference as to the conditions in the two countries. As the criterion “usage” under French law is much clearer than the criterion “quality”, in applying their respective *garanties des vices cachés*, French judges have much less discretion than their Chinese counterparts. However, it is also predictable that French judgements in this regard will have much more certainty than their Chinese counterparts.

Conclusion of Section I

266. In this section, by comparing the *garanties des vices cachés* in the two countries, we can see that the applying conditions are much more restrictive in France than in China, as French law provides a more clear and definite criterion for the notion *vices cachés* whereas the clarity and definiteness is lacking under Chinese law. This means that Chinese judges have more discretion than their French counterparts. Yet, it means also that Chinese judgements might be much more unpredictable than their French counterparts.

Section II. *Garantie d'éviction*

267. *Garantie d'évictions* is an ancient rule dated back to roman time. Both French law (I) and Chinese Law (II) has inherited it. However, a comparison would show that they differ greatly in one major aspect and such difference may have a great impact on the topic of this thesis (III).

I. *Garantie d'éviction* under French law

268. As a Chinese, what used to surprise us is that the *garantie d'éviction* under French law would remedy not only evictions by legal encumbrance by third parties but also sanction those factual hindrance performed by the seller (A). This means that on top of the effects of ownership, the buyer has another foundation to hold the seller liable (C). Latter, we realized that this particularity of French law (in the eyes of a Chinese) is actually attributed to the special contents of sellers originated from roman law (B).

A. Contents of *garantie d'éviction* under French law

269. Article 1626 provides that: “*quoique lors de la vente il n'ait été fait aucune stipulation sur la garantie, le vendeur est obligé de droit à garantir l'acquéreur de l'éviction qu'il souffre dans la totalité ou partie de l'objet vendu, ou des charges prétendues sur cet objet, et non déclarées lors de la vente.*” From this article, we can see that *garantie d'éviction* under French take its effect in two aspects: *Garantie du fait personnel* (1) and *Garantie du fait des tiers* (2).

1. *Garantie du fait personnel*

270. - Contents of the *garantie du fait personnel*. Article 1626 mentions that the seller should guarantee the buyer against “*évictions*” and “*charges prétendues*” on the things sold. French authors and jurists interpret this warranty to firstly impose an obligation of not disturbing upon the seller himself: “*Quem de evictione tenet actio, eumdem agentem repellit*

exceptio.”¹⁷⁶ *Prima pacia* to us, we thought that this means that the seller should not evoke any right that he holds in order to encumber the things sold. This is certainly one aspect of the French rule.¹⁷⁷ Yet it is more than that: what is the particularity of French law and what is more important for this thesis, is that the seller himself should refrain from any acts that may hinder the buyer.¹⁷⁸ The particularity of this provision will be discussed later.

271. - Nature of public order of the *garantie du fait personnel*. Article 1628 of *code civil* provides that: “*quoiqu'il soit dit que le vendeur ne sera soumis à aucune garantie, il demeure cependant tenu de celle qui résulte d'un fait qui lui est personnel: toute convention contraire est nulle.*” According to this article, *garantie du fait personnel* is of the nature of public order, which constitutes a restriction on the contractual liberty.

2. *Garantie du fait des tiers*

272. Another aspect of article 1626 concerns third parties: the seller thereby should guarantee the buyer that nobody may evoke any right to evince the things sold.¹⁷⁹ This is comprehensible and what we thought *garantie d'éviction* is supposed to mean. But when it comes to third parties, this article only protects a buyer against *évictions* coming from their judicial rights; it excludes any protections against an eviction resulted from acts of a third party.¹⁸⁰

B. Foundations for *garantie d'éviction* under French law

273. *Prima facia*, the existence of *garantie du fait personnel* is kind of incomprehensible to us because after the sale, the buyer would become the owner of the thing sold. And any evictions performed by anyone, including the seller, can be thus sanctioned by many remedies available to owners, and why bother to include the acts of seller in the scope of application of this rule? Later, we found that this question can be answered in two ways: The first is to regard *garantie du fait personnel* as an application of provisions related to good

¹⁷⁶ F. VIOLET, *Quels rapports entre obligation de garantie et obligation de non-concurrence dans la vente d'un fonds de commerce?*, Defrénois 2006. 467; V. F. C. DUTILLEUL et P. DELEBECQUE, *Contrats civils et commerciaux*, Dalloz, 10e éd., 2015, n° 249

¹⁷⁷ V. J. HUET et al., *Les principaux contrats spéciaux*, LGDJ, 3e éd., 2012, n° 11284

¹⁷⁸ V. C. HOCHART, *La garantie d'éviction dans la vente*, LGDJ, 1993, n° 87

¹⁷⁹ V. Cass. 3e civ., 3 décembre 2008, n° 07-14.545 et 07-17.516.

¹⁸⁰ V. Cass. 3e civ., 11 mai 2011, n° 10-13.679; F. LAURENT, *Principes de droit civil*. T.24, 3e éd. 1877, n° 219, p. 220, disponible sur <http://gallica.bnf.fr/ark:/12148/bpt6k5808776z/f217.item.r=220>.

faith (1). The second, on the other hand, is to explore the historic origins of *garantie d'éviction* (2).

1. General principle of good faith

274. The first explanation of this seemingly redundant provision is that it is actually a transposition of the principle in the common provisions of contracts--- the performance of contracts in good faith, in the specific law of sales: under this explanation, the special duty assumed by the seller of refraining from some acts that would disturb the peaceful enjoyment of the seller yet he is otherwise entitled to, is because allowing him to do so would constitute a bad faith performance of the contract. Because there is no direct rule applying in this situation (other remedies available to owners does not impose more duties to sellers than any other persons), judges began to interpret the meaning of *garantie d'éviction* in a broad manner so as to make it as the basis for such a necessary rule.¹⁸¹

If this explanation is to hold, we believe this article is just similar to the requirement of objectivity (requirement against potestative price) to the extent that both articles are used as vehicles to achieve other ends that are not their own (The requirement of objectivity of price is for the real purpose of maintaining certain level of justice, yet is based upon article 1591 which focuses on the determinability of price).

2. Historic relic from Roman law

275. Another explanation is to explore its historic origin. Under French law, nowadays in a contract of sale, the transfer of ownership is a necessary effect of a contract of sale, as provided in article 1583 of *code civil*. However, under roman law, a seller was only obliged to “*livrer la possession de la chose, garantie l'acheteur contre l'éviction, s'abstenir de tout dol*” and transfer of ownership was not a necessary effect of sale at that time.¹⁸² Lack of the protection usually provided for owners, it was thus necessary to provide another

¹⁸¹ V. D. HOUTCIEFF, *Le principe de cohérence en matière contractuelle*, PUAM, 2001, n° 334s; another author, in remarking the fact that article 41 of CISG lacks *garantie du fait personnel*, pointed out that this function is played by the good faith principle, which indirectly support the argument that the legal foundation of *garantie du fait personnel* is the principle of good faith (V. E. LAMAZEROLLES, *Les apports de la Convention de Vienne au droit interne de la vente*, LGDJ, 2003, n° 232).

¹⁸² V. G. FARNIE, *De la garantie pour éviction en matière de vente*, thèse Paris, 1893, p. 5, Disponible sur <http://gallica.bnf.fr/ark:/12148/bpt6k6461315m/f7.image>.

protection to the otherwise vulnerable buyer and such a protection should be even more powerful than that by ownership: for an owner haunted by an interference of his properties by a random person, at least he may sell it as the final recourse; yet for a buyer in roman time, it was possible that he did not have this option because of lack of ownership. Since a buyer without ownership was more vulnerable than an owner, the seller thus should answer for more evictions that a buyer would suffer: not only should he answer for legal evictions resulted from rights of others, but also acts that physically hinder his peaceful possession.¹⁸³ However, for some reasons not entirely known to us, jurists and scholars began to believe that for evictions resulted from acts by someone other than the seller, the involvement of the seller is useless to prevent them, and the legislators thus exclude the evictions resulted from acts by others from the scope of protections by *garantie d'évictions*.¹⁸⁴

However, this special protection against hindering acts should have disappeared given that in 1840, *code civil* has already made the transfer of ownership a necessary effect of sales of shares. Since a buyer now can avail of all the remedies available to him as the owner of the thing sold, he no longer needs the special protection against acts of anyone: all he now needs is a warranty that his ownership would not be jeopardized by any legal encumbrance (only legal encumbrance cannot be remedied by the effects of ownership *per se*). Nevertheless, the basic structure of obligations of sellers has been retained, which includes this *garantie d'éviction* offering a board protection against acts of the seller.¹⁸⁵

C. Implications of *garantie d'éviction* under French law

276. - *Ganraite du fait personnel* as the more important aspect of the *garantie d'éviction*. For the purpose of this thesis, the most important implication of *garantie d'éviction* under French law, is the aspect of *garantie du fait personnel* where sellers are refrained from many acts that a mere ownership is unable to forbid.¹⁸⁶ A typical example is

¹⁸³ V. J.-P. LEVY et A. CASTALDO, *Histoire du droit civil*, 2e éd., Dalloz, 2010, n° 494s.

¹⁸⁴ V. B. GROSS et P. BIHR, *Contrats. Ventes civiles et commerciales, baux d'habitation, baux commerciaux*, PUF, 2002, n° 329. We believe this exclusion is unreasonable because just like sellers may be attributable for the existence of an eviction resulted from rights of others, he may well be attributable for an eviction resulted from acts of others. The powerful protection of peaceful possession should only cease to exist after the ownership is actually transferred. However, whether it is reasonable to exclude evictions resulted from acts by others is not very important, as all we need here is the observation that the special coverage of evictions from acts by the seller is resulted from the lack of necessary transfer of ownership under roman law.

¹⁸⁵ V. B. GROSS et P. BIHR, *Contrats. Ventes civiles et commerciales, baux d'habitation, baux commerciaux*, PUF, 2002, n° 327; J. GHESTIN et B. DESCHE, *La vente*, in *Traité des contrats*, dir. J. GHESTIN, LGDJ, 1990, n° 785.

¹⁸⁶ V. P. MALAURIE, L. AYNES et P.-Y. GAUTIER, *Les contrats spéciaux*, Defrénois, 7e éd., 2014, n° 353.

that after the termination of a *contrat de franchise*, the fact that the *franchiseur* refused to buy back the inventories consisting of goods bought by the *franchisé* from him, would constitute an *éviction* for the purpose of *garantie d'évictions*.¹⁸⁷ This abstain from buying some goods owned by a buyer, in most cases, does not constitute an eviction that can be remedied by the effects of ownership; yet it can be remedied by the special protections coming from *garantie d'éviction*, or more precisely from *garantie du fait personnel*.

277. - Garantie du fait personnel as a perpetual obligation on the part of sellers.

An important point to note is that the *garantie du fait personnel* has no temporal limitation. This has a significant impact that the seller of something is always bound by a heavier obligation than any other random persons. The perpetual nature of the *garantie* constitutes a big problem in purchases of shares, as will be presented *infra*.

278. - Garantie du fait personnel as of the nature of public order. It is also important to note that the *garantie du fait personnel* is of the nature of public order, which makes it difficult to even conventionally derogate from it. This nature poses another big problem in purchases of shares, as will be presented *infra*.

II. Garnatie d'éviciton under Chinese law

279. Under Chinese law, *garantie d'éviction* is usually referred to as “warranties of defects of right”, as it only governs the legal encumbrance without mentioning anything about physical hindrance by acts of somebody (A). This lack of regulation of physical hindrance can be explained by the Chinese rule of transfer of ownership (B). For the purpose of this thesis, what is most important that we should obtain from this rule under Chinese law is that with respect to physical acts, sellers are subject to no more restrictions than any other persons (C).

A. Contents of *garantie d'éviction* under Chinese law

280. In a strict sense, Chinese law lacks legally prescribed *garantie du fait personnel* (1). In a larger sense, i.e if we deem all rules serving the same functions as *garantie du fait personnel lato sensu*, it does not exist either (2).

¹⁸⁷ V. D. MAINGUY, *La revente*, Litec 1996, n° 259.

1. Lack of *garantie du fait personnel stricto sensu*

281. Article 150 of Chinese Contract law provides that: “*the seller has the obligation to guarantee that no third party shall claim rights against the buyer over the thing delivered unless the law provides otherwise.*” The meaning of the text of this article is simple and does not need any further interpretation to the extent that it does not regulate any physical acts committed by the seller that would hinder the enjoyment of the thing sold.¹⁸⁸ And if we roughly identify *garantie du fait personnelle* with *garantie du fait personnel* caused by *trouble du fait*, the latter being the most important aspect of the former, it is safe to say that Chinese law does not have any *garantie du fait personnel*.

2. Lack of *garantie du fait personnel lato sensu*

282. If we do not stick to only rules bearing the same name with *garantie du fait personnelle*, we could consider all rules serving the same purpose as *garantie du fait personnel lato sensu*. So, is it possible to find other foundation for a *de facto garantie du fait personnel* in Chinese law? Since one of the justification of *garantie du fait personnel* given by French authors is that it is actually a disposition of the performance in good faith in the special domain of contracts of sales, we should look at the similar articles in Chinese law to find our answer. Article 6 of Chinese Contract Law, which is about the principle of good faith in general, provides that: “*the parties shall abide by the principle of good faith in exercising their rights and performing their obligations.*” And article 92 of Chinese Contract Law, which is about post-contractual obligations, provides that: “*upon discharge of the rights and obligations under a contract, the parties shall abide by the principle of good faith and perform obligations such as notification, assistance and confidentiality, etc. in accordance with the relevant usage.*”

¹⁸⁸ However, a literal interpretation of this text would lead to an absurd observation that the seller is not within the scope of persons whose “rights against the buyer over the thing delivered” are to be guaranteed by the seller. We have not found any Chinese literatures rebutting this ridiculous observation, yet we believe it is a pretty straight-forward conclusion that if rights of third-parties that jeopardizes the buyer’s ownership is within the application of this legal warranty, those of the seller would *a fortiori* belong to the same category.

However, we have failed to find any article supporting the idea that from this principle a general obligation, binding only seller, of not doing anything harming the enjoyment of the thing bought by the buyer, is to be drawn.¹⁸⁹

B. Rationale of *garantie d'éviction* under Chinese law

283. For the purpose of this thesis, the most noticeable particularity in Chinese law concerning *garantie d'éviction*, is the lack of *garantie du fait personnel*. Here, we would tentatively explore the reasons for the lack thereof both as a statute rule (1) or as a corollary of the principle of good faith (2).

1. Rationale for the lack of *garantie du fait personnel* as a statute rule

284. It is a consensus that the “warranty of defects of rights” in Chinese law is a decedent of the *garantie d'éviction* in French law and roman law.¹⁹⁰ Accordingly, it is a natural corollary that it is Chinese law (or the law of the countries who sit in between China and French law in “the road of transplantation”, such as Taiwanese law, Japanese law and German law) that has abandoned one aspect of *garantie d'éviction* – *garantie du fait personnel*. The reason of this abandon can be explained by the change of the content of obligations of sellers.

Under Chinese law, “a ‘purchase and sale contract’ is a contract whereby the seller transfers its ownership over the things sold to the buyer and the buyer pays the price therefor”, as provided in article 130 of Chinese Contract Law. Here, we can see that the obligation of “transfer its ownership” has replaced the delivery of the things sold as the major

¹⁸⁹ See P. JIANG, *On the principle of contractual liberty and on the principle of good faith in the new Contract Law*, Tribune of political science and law, 1-1999.2 (江平等: “论新合同法中的合同自由原则与诚实信用原则”, 《政法论坛》1999年第1期); F.JIAO, *The reconstruction of the principle of good faith and the modern contract laws in China*, Hebei law science, 4-2002. 35 (焦富民, “诚实信用原则与我国现代合同法的重构”, 《河北法学》2002年第4期). N. CHEN, *On the principle of good faith in Contract Law – from a normative perspective*, Legal science, 6-2003. 59 (陈年冰, “试论合同法中的诚实信用原则——从规范的角度进行分析”, 《法律科学》2003年第6期). H. LIANG, *Principle of good faith and loophole closing*, China journal of law, 2-1994.22 (梁慧星, “诚实信用原则与漏洞补充”, 《法学研究》1994年第2期).

¹⁹⁰ See K. JIN et X. HE, *A study on warranty of defects in rights under Chinese law*, Journal of Jiangsu Administration Institute, 6-2016.118, p.118 (金可可, 贺馨宇: “我国买卖合同权利瑕疵担保制度研究”, 《江苏行政学院学报》2016年第6期).

obligation of the seller.¹⁹¹ Since the buyer now has the ownership on the things sold, he may evoke against any evictions on the things and there is thus no need to have a special provision to protect his peaceful possession. What cannot be protected by the ownership is only those legal encumbrances that prevails the ownership, which is why the other aspect of *garantie d'éviction* – “*garantie du fait des tiers*” has been retained and provided in Chinese Contract Law as “warranty of defects of rights”, which focuses on the defects on the ownership of the things sold instead of on the evictions on their peaceful possession.

2. Rationale for the lack of *garantie du fait personnel* as a corollary of the principle of good faith.

285. If the French practice of using performance in good faith as the basis for *garantie du fait personnel* indicates that there is an abstract possibility that *garantie du fait personnel* can be constructed by a mere reinterpretation of principle of good faith, such possibility does exist in Chinese law as there are provisions on good faith. The reason why this abstract possibility has not been turned into a concrete rule in positive law can be explained by a statement by a famous and authoritative author: “*the principle of good faith is a blanket provision... It is through this blanket provision that legislator accord discretion to judges, so as to make them capable of dealing with new situations and new problems.*”¹⁹² This statement can be understood from two aspects:

Firstly, as a blanket provision, it seems that to the eyes of Chinese authors and jurists, disputes concerning good-faith performance or post-contractual obligations of a contract should be decided on a case-by case basis and accordingly the good faith principle *per se* cannot be identified with a *garantie du fait personnel* when it comes to contracts of sales, because the latter actually provides a general restriction to sellers in all circumstances.

¹⁹¹ In the case of sales of movable things, delivery is the defaulting condition for transfer of ownership. Yet an actual delivery (the actual transfer of possession) can be replaced by a contractual one (*constitutum possessorum*) (See F. MA, On *constitutum possessorum*, Shandong University Law Review, 2003.253) whereby the parties agree that an actual delivery can take place later. In the case of sales of immovable things, delivery has nothing to do with transfer of ownership (registration takes its place). Therefore, to some extent the delivery is not much governed by the contract law (though it does govern the time and location of delivery). It is in fact the consequence of the exercise of the faculties of ownership (*action d'revendication*).

¹⁹² H. LIANG, *Principle of good faith and loophole closing*, China journal of law, 2-1994.22, p. 25 (梁慧星, “诚实信用原则与漏洞补充”, 《法学研究》1994年第2期).

Secondly, with this blanket provision, judges are able to create new laws to deal with new situations and new problems. If Chinese judges have by this article created a jurisprudence that imposes in general a more severe obligation on sellers, it can be said that a *garantie du fait personnel* has been created on the basis of the good faith principle. However, this is not what has happened as far as we know for we have failed to find any cases so decided. And we have to conclude that *garantie du fait personnel* does not exist in Chinese law, either as statute rule or as a corollary of the principle of good faith.

C. Implications of *garantie d'éviction* under Chinese law

286. For the purpose of this thesis, the most important implication of *garantie d'éviction* under Chinese law, or more precisely the lack of *garantie du fait des tiers*, is that after the transfer of ownership which is the most important obligation of a seller, the seller is subject to no more obligations or restrictions than any other random persons. If the seller committed acts troubling the peaceful possession of the buyer that can be remedied by the effects of ownership, the seller would be sanctioned the same way as all other transgressors. By contrast, if such acts should be tolerated by the buyer when the “malefactor” is a random third-parties, it should also be tolerated when it is the seller who has committed it.

III. Comparison

287. As far as *garantie d'éviction* is concerned, the main difference is the existence of the *garantie du fait personnel* under French law and the absence thereof in China, and we believe both countries are reasonable in their respective contexts (A). Although it is reasonable to have the *garantie du fait personnel* in France, we believe some of its (B).

A. Appropriateness of the existence or absence of the *garantie du fait personnel*

288. - Reiteration of the major difference. As far as *garantie d'éviction* is concerned, the presentations above reveal that the two countries differ noticeably in the scope of obligations of sellers: under China, after a complete sale the seller would in most cases assume the same passive obligation towards the seller as the new owner of the things sold; whereas under French law, only taking the precaution that any persons should with respect to

the thing sold is insufficient, he should cater to the need of the buyer so as to forgo many activities that he should have been entitled to do.

289. - Justification for the different rules. Although the two countries vary in the scope of obligations assumed by sellers, we believe both of them are reasonable from a neutral perspective. We would present our justifications from two aspects as follows.

Firstly, the incongruity with its historic function is not a sound reason to hold a rule unreasonable. In both China and France, transfer of ownership is a necessary effect of a sale of shares.¹⁹³ Therefore, logically speaking, evictions of the thing sold resulted from physical acts of sellers should be regulated by provisions related to effects of ownership; and to still retain *garantie du fait personnel* thus seems to incompatible with the historic logic. However, whether a rule serves the original purpose as it was invented is never a sound reason to rebut its reasonableness. A metaphor given by biologist Kenneth Miller would come to help us in understanding this: in refuting an attack on evolution (the irreducible complexity), Miller contended that a mousetrap now serving the purpose of trapping mouse, may be well originated from a tie-clip, which served a completely different purpose when it was made. And as long as the mousetrap fulfils well its role of mousetrap, the mere fact that it deviates from the function of its tie-clip ancestor is not relevant for the purpose of refuting its *raison d'être*.¹⁹⁴ Similarly, the mere fact *per se* that *garantie du fait personnel* is no longer needed to fulfil its function of protecting a buyer without ownership, is insufficient to hold that the rule has lost its reason for existence. The reasonableness of *garantie du fait personnel* or the lack thereof, shall be judged from their respective functions in their respective situations.

Secondly, the rules in both countries, although completely different, are both adapted to the environments of their countries. For any act committed by a seller that objectively reduces the utility of the things sold, under France it would be usually automatically remedied by a compulsory application of article 1626. By contrast, such an act would be judged on a case-by-case basis by Chinese judges to see whether it contravenes the principle of good faith. Therefore, in the event of an act in obvious bad-faith, in both countries the buyer would be remedied. The only difference would be in the grey area where it satisfies the condition of an *éviction du fait personnel* yet fails that of a bad-faith conduct. Here, the difference indicates

¹⁹³ Though the two countries differ as to whether such effect is a direct or indirect one of a contract of sale.

¹⁹⁴ K. R. Miller, *Only A Theory*, Viking Penguin, 2008, p. 54s.

the different preference of judges and legislators in terms of personal liberties or mutual benefits. And it is difficult to say whose preference is more correct than that of the other.

B. Inappropriateness of some features of the *garantie du fait personnel*

290. It should bear in mind that the *garantie du fait personnel* imposes an obligation upon sellers heavier than the obligation that a random person owes to an owner. In our opinion, the heavier obligation *de plein droit* under French law is reasonable as the seller of a thing has a larger potential to inflict harm upon the peaceful enjoyment of the thing by the buyer than a random person. However, the reasonableness only holds within certain limits.

291. - Inappropriateness of the nature of perpetuity. In the period immediately following a sale, it is reasonable to require the seller to take more precautions so as to make it easier for the buyer to enjoy the thing sold. However, with time goes by, after a certain period, the attachment of the seller and the thing sold is to be eventually severed and the seller will become nothing more than a random person under the effect *erga omnes* of the ownership of the buyer on the thing sold. If he should interfere with the peaceful possession of the thing by the seller, the buyer should act in the status of the owner instead of the buyer, and the legal recourses available to owners are sufficient to protect the interests of the buyer. Thus, there is no need to impose an extra heavier obligation on the part of sellers.

292. - Inappropriateness of the nature of public order. It may seem contrary to the consciousness of our readers that the law should allow the seller to get away with a voluntary interference with the peaceful possession of the buyer. However, this concern fails to notice that even without the *garantie de plein droit*, the legal recourses available to owners are also available to the buyer, which means the elimination of the nature of public order of the *garantie de plein droit* will only affect “the acts permitted to other persons yet not to sellers because of the *garantie du fait personnel*”. We really fail to see why this bonus to buyers cannot be derogated and thus fail to see the reasonableness of the nature of public order of the *garantie du fait personnel*.

Conclusion of Section II

293. From the comparison, we can see that *garantie d'éviction* in the two countries differ in the contents: the French law has a *garantie du fait personnel* as an aspect of the *garantie d'éviction* whereas this aspect is missing in Chinese law. We believe the existence or absence of the *garantie du fait personnel* are reasonable in both countries as they adapt to the special needs of the two countries. However, we believe two features of the *garantie du fait personnel* in French law are unreasonable: its perpetuity and its nature of public order.

Conclusion of Chapter II

294. As far as this thesis is concerned, the most important effects of a contract of purchase is two legal warranties. A comparison of the two legal warranties in the two countries shows that they differ greatly in the laws of the two countries: for *garanties des vices cachés*, the two countries differ in the conditions for applying them; for *garanties d'évictions*, the countries differ even in the existence or not of an important aspect of it.

Conclusion of Title I

295. Regimes for contracts of purchase in the two countries are similar in some respects yet differ in others. The similarity and difference, as we will see, are the causes for the different legal interventions to be presented *infra* that buyers and their attorneys will encounter.

Title II. Shares

296. In this title, we would discuss the features of shares that make purchases of shares distinct from purchases of other objects. The typical French way in broaching this topic is by identifying shares with a pre-existing category of objects (**Chapter I**). However, we believe this approach is insufficient, if not useless, as we believe it is not the identification of shares with what category that makes shares different. Rather, it is their own inherent originalities that do so (**Chapter II**).

Chapter I. Identification of shares

297. The practice of identifying shares with an existing legal category has only interests to French authors whereas not so much to Chinese ones (**Section I**). However, this differences in interests of the topic does not prevent us from discussing it (**Section II**).

Section I. Interests of the identification

298. A comparison of the French law (I) and Chinese law (II) would show that the interests of the topic of the identification of shares is only of practical interests in French law (III).

I. Interests in France

299. In France, when it comes to purchase of shares, the discussion of the identification of shares is usually a preliminary step. This is because by making the legal term “shares” the hyponym of another legal term (the hypernym), the legal regime for the hypernym would be able to apply to legal issues related to purchase of shares (A); and, in order to determine or justify the legal rule applicable to a given legal issue related to purchase of shares, French authors would thus usually seek to identify shares as a certain hypernym (B).

A. Legal issues to be solved by the identification of shares

300. When it comes to purchase of shares, the reasons why French authors would seek to discuss the identification of shares is for the purpose of solving the problem of finding the applicable rules regulating certain issues. However, among the issues, we find that some of them are actually governed by specific rules for shares, which to our understanding would exclude the interests of further discussing the identification of shares as far as those issues are concerned (1). In fact, we believe the identification of shares would be interesting only if the own legal regime for shares does not by itself deal with an issue (2).

1. Legal issues solved by specific rules for shares

301. The procedure of *agrément* and the opposability of transfer of ownership of shares are two issues that French authors would broch when it comes to discuss the legal nature of shares (i). However, we found it *a priori* useless to discuss them because since they are regulated by their own legal regime of shares: the identification of shares would be indifferent to the purpose it is to solve. After some reflections, we believe that it is for some

epistemological purposes that French authors would get down to discuss the seemingly useless topic of the identification of shares (ii).

i. Enumeration of the issues

302. - Procedure of *agrément*. If there is no specific rule in place, the issue of whether a purchase of shares is subject to a preliminary authorisation by the target company (or other shareholders) is possible to be regulated by new article 1216 of *code civil* whereby a *cession de contrat* is subject to an *accord* of *céde*. Ergo, under this hypothesis, whether to identify shares as *contrats*, i.e. whether to identify sales of shares as *cession de contrats* plays a vital role in determining the rule regulating this issue. Authors have also dedicated their contribution in identifying shares as contracts so as to borrowing this article of *code civil* to solve this issue in a context of sales of shares.¹⁹⁵

However, this issue is well regulated by rules in the own regime of shares. Under certain circumstances, for a sale of shares, the eventual transfer of ownership of shares and the status of shareholders is subject to a preliminary procedure of *agrément* whereby the other shareholders of the target company have an authority as to whether to allow this trade: for closed companies (*sociétés fermées*), or more specifically, *sociétés civiles*, *sociétés en nom collectif* and *sociétés à responsabilité limitée*, article 1861 of *code civil*, article L.221-13 and article L.223.13 respectively provide the detailed formalities and effects of such a procedure. For open companies (*sociétés ouvertes*), although there is no legally prescribed procedure of *agrément*, article L.228-23 and the following of *code de commerce* allows the companies to insert a *clause d'agrément* into the articles of association (*les statuts*) so as to impose such a procedure as imposed in closed companies. If there is no such a clause in the article of associations, an interpretation *a contrario* would naturally leads to the conclusion that shareholders are free to trade their shares. That being the case, the otherwise useful discussion of whether to identify shares as contracts or not would lose its interests because no matter whether to so identify shares, and whether to apply article 1216 of *code civil*, the same rules provided specifically for shares would apply.

303. - Opposability of transfer of ownership of shares. As for the issue of

¹⁹⁵ V. S. LACROIX-DE SOUSA, op.cit., p. 331s, n° 405s.

opposability of a transfer of ownership, in *code civil* there are two modes: one is for *choses incorporelles* other than *créance*, whereby opposability against third parties occurs only after a cumbersome procedure aiming at notifying the *cédé*, as provided in article 1690 of *code civil*; another is for *créance* and *choses corporelles*, whereby opposability occurs the moment a contract is concluded, as provided in article 1198 (for *choses corporelles*) and article 1323 (for *créance*) of *code civil*. Accordingly, it seems that whether to identify shares as *choses incorporelles* other than *créance* determines whether to subject this cumbersome formality to purchases of shares. And authors would consider this issue as a reason to discuss the topic of the identification of shares.¹⁹⁶

However, the identification of shares has little effect as far as the choice of applicable rules related to opposability is concerned, because this issue in sales of shares is well regulated by specific rules for shares. For *parts sociales*, French law, by article L221-14 of *code de commerce* and article 1865 of *code civil*, provides a specific provision related to the opposability of their sales against the companies, whereby the mode of article 1690 of *code civil* only produces the opposability against the company whereas the opposability against any third parties are achieved through both the article 1690 formality and “*publication des statuts modifiés au registre du commerce et des sociétés*”. There can be a debate as to whether the application is a confirmation of the nature of *choses incorporelles* of *parts sociales* and a simple reiteration of the legal rules for *choses incorporelles* in the context of *parts sociales*; or an application by analogy or by reference, i.e. by legal fictions of the legal regime for another legal category, to which *parts sociales* do not belong, to the context of *parts sociales*. Yet, either way it is pretty clear that a discussion of the identification of *parts sociales* is of little use for determining which rule to apply in this situation. For *actions*, marked by their feature of negotiability¹⁹⁷, article 1690 of *code civil* is explicitly excluded from applying. *Actions* used to be divided into those *au porteur* and *those nominatif*, with the former being traded by a simple delivery of the certificate and the latter being traded by a registration in a special register provided by the issuing companies. Either way, the mode of opposability has nothing to do with article 1690 and is subject to their own legal regimes. After a reform in 1981 aiming at *dematerialization* of securities, the division between *actions au porteur* and *actions nominatif* disappeared, giving way to a universal regime governing all *actions*: article L. 228-1 according to which the transfer of ownerships of all securities,

¹⁹⁶ V. S. LACROIX-DE SOUSA, op.cit., n° 103 et s.

¹⁹⁷ V. D.R. MARTIN, *Du titre et de la négociabilité, à propos des pseudo-titres de créance négociables*, D. 1993. 20.

including *actions*, are achieved by a registration in identified registers. Because under French the modes of opposability of transfer of ownership of shares are pretty clear, the otherwise useful identification of shares as *choses incorporelles* other than *créance* would lose its interests.

ii. Utility of the topics

304. The two issues previously presented are both regulated by the rules reserved for shares, which means that for the purpose of determining the applicable rules, there is no need to first discuss the identification of shares because no matter shares are identified with what category, the rules to be applied should be invariably the same ones. Hence, it must be for another purpose that authors would discuss the topic when it comes to these issues.

We believe this discussion is for the purpose of maintaining a certain coherence between the identification of shares and the corresponding rules regulating them. As for a given legal issue, the identification of shares as a legal notion, i.e. to treat shares as a hyponym of that legal notion, sometimes is not for the purpose of determining or justifying legal rules applicable to that very issue. Rather, such an identification may be to determine the rule applicable to another issue; or just for some doctrinal purposes not having any particular practical interests. But once shares are identified as a given legal notion, it may give authors an incentive to make sure that the legal regime for the hypernym is adaptable to all issues related to purchase of shares. For example, although the sincerest motivation, as we believe, of a French author to identify shares as *contrats*, i.e. to identify sales of shares as *cession de contrats*, is to get rid of the annoying requirements of price specifically for *vente*, he would also examine whether other rules for *cession de contrats* can be compatible with existing rules for sales of shares, for example those related to procedures of *agrément*: as long as the existing rules for sales of shares related to procedure of *agrément* can be assimilated to article 1216 of *code civil* concerning the power of accord of *cédé*, the soundness of the identification of shares as contracts would be reinforced, if not completely demonstrated.

2. Legal issues not solved by specific rules for shares

305. If there is no specific rule for an issue related to purchase of shares, the identification of shares would be a vital step to the extent that it determines what legal regime

is to be applied. In particular, the identification of shares is essential for three legal issues: price, legal warranties, and allocation of obligations between sellers and buyers.

306. - Price. As has been mentioned in title I, requirements of price are particularly restrictive for contracts categorized as *ventes*, i.e. contracts whereby one party is obliged to pay a certain amount of *prix* in exchange for delivery of *choses*. Ergo, to identify shares as *choses* (if the condition of price is met, which is usually the case) would subject the contract for purchasing shares under the special requirements of price, which as have been presented in title I, is undesirable; and to identify shares as anything other than *choses* (for example *contrats*) or *choses* not governed by provisions for *vente* (for example *créance*) would release the contract from the rigid requirements. That being so, the identification of shares as *choses*, *créances* or *contrats* is significant as far as the applicable rule related to price is concerned. To some extent, we believe price is the main cause for the passion among French authors for the topic of the identification of shares.

307. - Legal warranties. Under French law, *code civil* laid down two sets of legal warranties applying respectively to *choses corporelles* and *choses incorporelles*. The *garantie de vices cachés*, i.e. the legal warranty whereby sellers shall guarantee the normal usage of the thing sold, as provided in article 1641 and the following of *code civil* and as has been discussed in the first Title of this thesis, is supplanted by another legal warranty provided in article 1693: “*celui qui vend un droit incorporel doit en garantir l'existence au temps du transport, quoiqu'il soit fait sans garantie.*” Hence, whether to identify shares as *choses incorporelles* or *choses corporelles* plays an important role in determining whether the seller of that object shall guarantee the normal usage of it or merely the existence of the object at the sale. The recent reform of *code civil* has provided a specific legal regime for *cession de créances* separated from the legal provisions for *choses incorporelles* in *vente*; but with regard to legal warranties, the rule related to *créances* remains the same.

308. - Allocation of obligations between sellers and buyers. New article 1216-1 of *code civil*, which has made the joint liability of *cédant* of *contrats* the allocation by default of obligations, only applies to *cession de contrats*. If shares are identified as contracts, sellers of shares, i.e. the *cédant* of *contrats*, would by default assume a joint liability, with the buyers of shares, to the target company and its creditors, even after the sales of shares have been completed; By contrast, if shares are not so identified, new article 1216-1 would not apply,

which makes the existence of the joint liability at least doubtful. Therefore, the fact that article 1216-1 of *code civil* is only applies to *cession de contrat*, makes whether to identify shares as *contrat* or not a somewhat important question when it comes to sales and purchases of shares.

B. Legal notions to be examined for the identification of shares

309. Under French law, there are several legal notions that French authors would like to try to identify shares as: *choses*, *créance* and *contrats*. However, we believe the French authors may not entirely clear about the relations between these notions, which is necessary to be expounded in the first place (1). After that, we would get down to the most important task of this section: to find out the interests under French law of discussing whether to identify shares with each of these legal notions (2).

1. Relations between the legal notions to be examined

310. The candidate hypernyms for shares are *choses*, *créances* and *contrats*. About them, two points needed to be noted: firstly, the term *choses* should be divided into *choses corporelles* and *choses incorporelles* (i). Secondly, the relation between the term *créance* and *choses* should be explained (ii). After presenting the two points, four legal notions constituting four mutually exclusive legal categories whose interests are worth to be discussed, would appear in front of us (iii).

i. The relation between *choses corporelles* and *choses incorporelles*

311. - The division between *choses corporelles* and *choses incorporelles*. The term “*choses*” can be divided into two categories based upon their corporeality (the Gaian division): the *choses corporelles*, which signifies those by nature are corporeal, such as clothes, gold, silver, slaves etc. and the *choses incorporelles*, which means those that do not have a tangible existence, whose existence is a result of the creation by law (*quae consistunt in jure*).

A pure theoretical division in roman law,¹⁹⁸ it acquires a practical interest in French law: *code civil* dedicates the “*titre III de la vente*” of “*Livre III des différentes manières dont on acquiert la propriété*” to regulate sales (*ventes*), which have “*choses*” as their objects.¹⁹⁹ However, aside from 7 chapters under this chapter that govern all *choses* in general, a special chapter --- “*chapitre VIII du transport des créances et autres droits incorporels*” --- is dedicated to regulate only *choses incorporels*,²⁰⁰ which derogate *cession de choses incorporelles*, as for many issues, from the regulation of the other 7 chapters. This arrangement makes *vente* of *choses incorporelles* and *vente* of *choses corporelles* subject to different provisions when it comes to these issues.

Although technically the term “*choses*” comprises both *choses corporelles* and *choses incorporelles*, we find that in practice French authors often treat the term “*choses*” as synonym for “*choses corporelles*” while excluding *choses incorporelles* from the scope of *choses*. This interpretation of the word “*choses*”, as would be discussed *infra*, is the cause of some confusions.

ii. The relation between *choses* and *créance*

312. Before the recent reform, *créance* is just one type of the *choses incorporelles* (to some extent the archetype as the *chapitre* dedicated to *choses incorporelles* is entitled “*transport des créances et autres droits incorporels*”). However, after the reform, a new *chapitre* entitled “*cession de créance*” has been inserted into *code civil*, which is located in the general provisions for contract law instead of in the specific provisions for *vente*.

This reform has a significant implication: since then no matter whether to identify *créance* as *choses incorporelles*, *cession de créance* would be governed by a separate legal regime specifically for *cession de créance*²⁰¹. This separate chapter would release *cession de créance* from the entire legal regime for *vente* (both *vente* of *choses incorporelles* and *choses corporelles*) and accordingly makes *créance* an interesting legal notion worth to be discussed

¹⁹⁸ See Inst.2.2 and G.2.12-4.

¹⁹⁹ Article 1582 of *code civil* defines a *vente* as “*une convention par laquelle l'un s'oblige à livrer une chose, et l'autre à la payer*”.

²⁰⁰ *Code civil* uses the expression “*droits incorporels*” here.

²⁰¹ Thanks to the principle of “*specialia generalibus derogant*”, a hyponym can be regulated by a completely different legal regime from the general legal regime applied to its hypernym, therefore the fact that *cession de créance* is regulated by a legal regime different from *vente* does not denote that *créances* are not *choses*, the objects of *vente*: it can be also interpreted as if *créances* are subject to a special law that derogate from a general law.

when it comes to the identification of shares. In other words, after the reform the Gaiian division in *code civil* has actually been substituted by a division of the term *chose* among three concepts: *choses corporelles* (those regulated by general provisions of *vente*), *choses incorporelles* other than *créance* (those regulated by the special *chapitre* for *choses incorporelles*, renamed as “*du transport de certains droits incorporels, des droits successifs et des droits litigieux*” after the reform) and *créance* (those regulated by a separate *section* entitled “*la cession de créance*” in the general provisions of contract law).

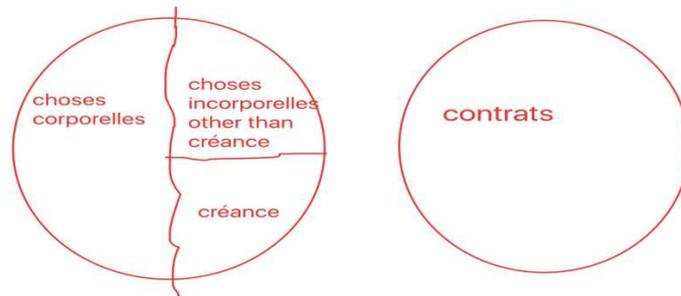
We have seen that after the reform, the special identification of shares as *créance* has acquired an interest separated from the identification as *choses incorporelles*. But before the reform, since the legal regime for *cession de créance* is the same as those regulating other *choses incorporelles*, there was no particular interest in further discussing whether shares were *créances* after it had been established that shares were *choses incorporelles* (which we believe is the legal nature by default of shares). However, we have found that at that time, French authors generally like discussing whether shares were *créance*, in order to determine whether sales and purchases of shares were subject to the so-called legal regime for *cession de créance*, which was actually the legal regime for all the *choses incorporelles*.²⁰² This redundant practice (in our eyes) at that time, nevertheless, has become useful after the reform, because since then, the previous legal regime supposed to be for “*cession de créance*” (which was in fact for both *cession de créance* and *choses incorporelles* other than *créances*) has been allocated to only *choses incorporelles* other than *créances*; with *cession de créance* being regulated by its own legal regime. Since then, it can be said that a distinction between *choses* and *créance* and a distinction between *vente* and *cession de créance* has been established. Briefly, only after the reform has the legal notion of “*créance*” become a legal category with separate interests; and only after the reform has there emerged a separate legal category of “*choses incorporelles* other than *créances*”, which has its own interests.

iii. The relations between the four mutually exclusive legal categories

313. After the previous development, four mutually exclusive legal categories can be established, whose legal regimes are supposed to be different from each other; and it is thus interesting to discuss whether to identify shares as them. The four legal categories are: *choses*

²⁰² V. S. LACROIX-DE SOUSA, op.cit., n° 127 et s; M CAFFIN-MOI, op. cit., n° 259 et s; M. STOCLET, Le prix dans les cession de droits sociaux, thèse Lille-II 2008, n° 235 et s.

corporelles; *choses incorporelles* other than *créances*, *créances* and *contrats*, as is illustrated in the following diagram:



2. Interests of the legal notions to be examined

314. With all the developments above, the interests of the four interesting legal notions which are the candidate hypernyms of shares, can be presented as the following. It should be noted that the interests presented here does not take into account the possible future special rules made specifically for sales and purchases of shares.

315. - Interests of identifying shares with *choses corporelles*. When shares are identified as *choses corporelles*, the legal warranties provided in the general provisions for *vente* would apply. The contracts of sales of shares would be subject to a set of special requirements of price only applicable to *vente*. As for allocation of obligations toward the target company between sellers and buyers, the rule provided for *cession de contrats* would not apply.

316. - Interests of identifying shares with *choses incorporelles* other than *créance*. When shares are identified as *choses incorporelles*, but not as *créances*, the legal warranties limited only to the existence of shares would apply, with the exclusion of the legal warranties provided in the general provisions for *vente*. The contracts of sales of shares would be subject to a set of special requirements of price only applicable to *vente*. As for allocation of obligations toward the target company between sellers and buyers, the rule provided for *cession de contrats* would not apply.

317. - Interests of identifying shares with *créance*. When shares are identified as *créances*, the legal warranties limited only to the existence of shares would apply, with the

exclusion of the legal warranties provided in the general provisions for *vente*. The contracts of sales of shares would not be subject to the set of special requirements of price only applicable to *vente*. As for allocation of obligations toward the target company between sellers and buyers, the rule provided for *cession de contrats* would not apply.

318. - Interests of identifying shares with *contrats*. When shares are identified as *contrats*, there would be no legal warranties applicable, whose effect is roughly equivalent to apply the one guaranteeing only the existence of shares.²⁰³ The contracts of sales of shares would not be subject to the set of special requirements of price only applicable to *vente*. As for allocation of obligations toward the target company between sellers and buyers, the rule provided for *cession de contrats* would not apply.

A table can be used to summarize the presentation above:

| | Garantie de vices cachés | The special requirements of price | Allocation of obligations provided for cession de contrats |
|-------------------------------------|--------------------------|-----------------------------------|--|
| choses corporelles | Applicable | Applicable | Non-applicable |
| choses incorporelles (non créances) | Non-applicable | Applicable | Non-applicable |
| créances | Non-applicable | Non-applicable | Non-applicable |
| contrats | Non-applicable | Non-applicable | Applicable |

II. Lack of interests in China

319. Under Chinese law, the identification of shares, as far as for the purpose of purchases and sales of shares, have seldom, if not never, been an interesting topic. This lack of interests of the topic is understandable as for nearly all the issues related to purchases and sales of shares, the rules applicable to them are either specific to shares (A), or belong to a homogenous legal regime for all kinds of objects (B), which eliminates any necessity of discussing this topic.

A. Issues solved by specific rules for shares

320. As in France, for some legal issues related to purchases of shares, i.e. opposability of transfer of ownership of shares (1); and procedures of *agrément* (2), there are specific rules in place, which eliminates any necessity of discussing the topic of the

²⁰³ V. S. LACROIX-DE SOUSA, op.cit., p. 294s, n° 352s.

identification of shares for the purpose of determining which rules to apply.

1. The opposability of the transfer of ownership of shares

321. Under Chinese law, the transfer of ownerships of both *parts sociales* and *actions* is subject to special requirements specifically for shares, which eliminates any necessity of discussing the identification of shares for the purpose of determining the rules applicable to the opposability of the transfer of ownership of shares.

For *parts sociales* of limited liabilities companies (the equivalence of *SARL* in French law), article 32 of Chinese Company Law provides that: “*the shareholders on the register of shareholders may claim and exercise shareholder’s rights on the basis of the register of shareholders. The company shall register the names of its shareholders with the company registration authority. If there is a change in the registered items, change registration shall be carried out. Anyone that fails to complete registration or change registration may not resist the claims of a third person.*” The text indicates clearly that the opposability of a transfer of shares against the target company is dependent upon the registration on the register of shareholders retained by the company and that against any third party is subject to the modification made in the registration retained by the “company registration authority”. The rule applicable is clear and sufficient to deal with all affaires might arise and there is no necessity to get down with the task of the identification of shares in order to find the applicable rule.

For *actions* of joint-stock companies (the equivalence of *SA* in French law), there are three situations and all of them are clearly regulated by specific rules. For *actions* accepted to be traded on regulated open markets, as article 138 of the Chinese Company Law provides, opposability is not a problem since the regulated market where the *actions* are traded would provide specific regulations on the conditions for transferring ownerships. For *actions* not accepted to be traded on regulated markets, yet are in bearer form, as provided in article 140 of the Chinese Company Law, there is no doubt that they are things (*choses corporelles*) as subject to the Chinese Law of Real Rights and the mode of opposability is clear as well. For actions not accepted to be traded in regulated open markets and in registered form, article 139 provides that the company has a duty to modify the name on its shareholder’s register, which

is commonly interpreted as the key to achieve opposability of a transfer of ownerships.²⁰⁴ Since in all of the three situations the rule related to opposability is clear to deal with the disputes should they arise, there is no good to discuss the identification of shares for the purpose of determining the applicable rules.

2. The procedure of *agrément*

322. For limited liabilities companies, article 71 of Chinese Company Law has provided a particular rule for the procedure of *agrément*, which has been complemented by a recent judicial interpretation issued by the supreme court (which takes the form of a statute and is considered as quasi-legislative): The Judicial Interpretations IV for Company Law. For joint-stock companies, company law has provided no specific provisions, yet such an absence of provision is generally interpreted as that legislators give the discretion to companies and their shareholders to regulate by themselves this issue in the article of association, according to the principle of contractual liberties.

B. Issues solved by universal rules for everything

323. The three issues in purchases of shares in France not regulated by specific provisions for shares, i.e. price (1), legal warranties (2) and allocation of obligations between sellers and buyers (3), are not so under Chinese law either. However, a noticeable phenomenon prevents the issues from being factors that make the topic of the identification of shares important: there is no diverse candidate rules possible to be applied to the issues.

1. Price

324. As discussed in the first title, price is not a condition for validity for any kinds of onerous contracts under Chinese law. Therefore, there is no necessity to identify shares with anything for the purpose of price and the identification of shares has no particular interests as far as the conditions for price is concerned.

²⁰⁴ See X. FU, A study on the publicity of the change of ownerships of shares of Joint-Stock companies – focusing on the registration in the shareholder’s register, Law Press China, 2010. (傅曦林: 《股份有限公司股权变动公示制度研究: 以股东名册登记为中心》, 法律出版社 2010 年).

2. Legal warranties.

325. As discussed in the first title, legal warranties are universal in almost all the onerous contracts for two reasons: firstly, the legal provisions for “purchases and sales contracts” (equivalence of *vente* under French law) are explicitly designated by law as the model contracts for all onerous contracts, i.e. the special provisions for sales and purchases contracts, including those related to legal provisions, are applicable to all kinds of onerous contracts; secondly, the legal warranties under Chinese Law are basically a reiteration of the contractual liabilities in general provisions for contracts in the special context of purchases and sales contracts. The two reasons make it useless to try to identify purchases of shares as sales and purchases of contracts for the purpose of applying some legal warranties.

3. Allocation of obligations between sellers and buyers.

326. Under Chinese law, there is no universal rules specific to shares dealing with the allocation of obligations between sellers and buyers of shares. If under Chinese law, there is such a rule in transfer of contracts, it would be also interesting in the Chinese context to discuss whether to identify shares as contracts or to identify sales of shares as transfer of contracts just as it is in France. However, there is no clear provisions for contracts either under Chinese law. Therefore, unlike in France, it would be useless to discuss whether to identify shares as contracts as far as to apply rules regulating this issue is concerned.

In short, because under Chinese law, all issues in purchases of shares are either regulated by a specific legal regime for shares; or regulated by a universal legal regime applicable to all objects (the absence of any rule is also a universal rule in this sense). Therefore, it seems that there is not much necessity under Chinese law to discuss the legal identification of shares.

III. Comparison

327. We have thus far presented the different effects that identifying shares as different legal notions would bring about under French law and why identifying shares as these legal notions is indifferent from a perspective of practical interests under Chinese law. In this division dedicated to the work of comparison, we would try to explore the underlying

reasons for such a difference, which can be reduced to two ones. The first one is the different prevalence of the problems of choices of rules (A). The second one is the different answers to a question --- is the identification of shares the only solution to the problems that this practice tends to solve? (B).

A. Difference as to the prevalence of the problem of choice of rules

328. - The reason for the different usefulness. The most apparent reason for the different interests of the topic of the identification of shares in the two countries is that this topic useful in France is almost useless in China. The purpose of discussing this topic in France, as has been presented, is to determine what legal rule is to be applied to a given legal issue. In an abstract sense this discussion would be interesting only if two conditions have been met:

For one thing, there is no specific rule in place, otherwise the principle of “*specialia generalibus derogant*” would eliminate any necessity of discussing the identification of shares.

For another (if there is no specific rule in place), there are not multiple candidate rules with diverse contents to be applied.

The two countries differ little as to the first conditions as in both countries two issues in purchases of shares are governed by specific rules (the opposability of the purchase and the procedure of *agrément*). Rather, it is the difference as to the second condition that has caused the different interests of the same topic: under French law, rules regulating three issues concerning purchases of shares are governed by different rules in different objects whereas under Chinese law, the three issues in different objects are all governed by a homogeneous legal regime (or not regulated in any way, as the allocation of the obligations between sellers and buyers). Hence, what is supposed to further discuss here is why under Chinese law there are less situations whereby diverse rules would apply to solve the same issue for different objects.

329. - The cause for the “reason of the different usefulness”. We believe the most important cause for this difference lies in the different development stage of the legal systems of the two countries (another reason being the different methodology as we would present

infra). A country with a legal system having a longer history (like France) would tend to have more intricate legal regimes because it would have more possibility to have laid down different legal regimes according to different context for the same issue.

Sometimes this multiple regulation is caused by a deliberate nuance made by legislators (or firstly by judges and later codified by legislators), like the new rule for the allocation of obligations between sellers and buyers is only useful when a sale concerns three parties with one being a passive subject of an obligation and other two parties being the sellers and buyers; therefore, in the recent reform of *code civil*, such a rule is inserted in the provisions for *cession de contrat*, the typical three-parties transactions instead of in the provisions of *vente*.

Sometimes it is a result of some random events in the legal history: for example, the reason why the requirements of price for *vente* and for other onerous contracts are different is for the mere reason of a different interpretation of article 1591 and former article 1129 (new article 1163 of *code civil*)²⁰⁵; and the reason why some legal warranties are only applicable to *vente de choses corporelles* is a mere heritage of the special treatment of the *contrat de vente* in roman law in the *code civil*.²⁰⁶

By contrast, a country with a shorter legal history, like China, would tend to apply the same rule for all, without much nuances made between different contexts.

Sometimes, this is because that legislators fail to provide sufficient legal provisions: in the case, the rule applied to all objects is homogenous --- “an absence of rule”.

Sometimes this is because that compared to countries with longer legal history, countries with shorter legal history have less random facts in their history that would have make unnecessary distinction in dealing with the same issue for different objects. No matter what are the exact reason for the non-usefulness of the topic of the identification of shares in China, one thing is certain: it reflects a primitive development of Chinese law.

330. - A remark on the cause for the “reason of the different usefulness”.

²⁰⁵ V. Cass. AP, 1 décembre 1995, n° 93-13688.

²⁰⁶ V. T. CANFIN, *Conformité et vices cachés dans le droit de la vente*, Publibook 2010, p.250.

Although we believe Chinese law is much simpler than French law when it comes to purchases of shares, we do not believe it is so much a disadvantage.

As a French author has put it: “*certain contentieux sont naturels, résultant de la complexité du réel. D'autres sont artificiels, liés aux imperfections de la règle légale*”.²⁰⁷ When it comes to purchases of shares, the sophisticated legal provisions under French law is exactly the “*imperfections de la règle légale*”: as contract law is a typical optional law, rights and obligations between parties should be in general stipulated by themselves, which makes the detailed legal provision for a given specific contract somewhat useless.²⁰⁸ This uselessness is especially apparent in purchases of shares, as we would explain in the next title, purchase of share is a transaction inherently risky and complex that are supposed to be free of judicial intervention except when enforcement of a conventional clause or its interpretation is needed. The fact that Chinese law is simple in this case is compatible to the special needs of purchase of shares to the extent that Chinese law provides little compulsory judicial intervention and leaves the maximum liberties to the parties: Chinese judges are not supposed to declare an otherwise valid purchase of shares invalid just because there is no price or the price agreed contradicts with some requirements; neither are Chinese judges obliged to provide legally prescribed protections to disappointed buyers not protected by conventional clauses. Chinese buyers of shares are thus presumed to be unprotected, yet once they have chosen to resort to conventional clauses, they would probably face little problems regarding the validity of their clauses; and there is thus little need to identify shares with a given existent legal notion to receive legal protections or to bypass legal restrictions. Therefore, the fact that the identification of shares is not a necessary topic in China, actually indicates the superiority of the simple Chinese law in the context of purchases of shares.

B. Difference as to the indispensability of the identification of shares

331. Even for the purpose of applying a legal regime for a legal notion to another legal notion, the method of identification seems to be more indispensable in France than in China. In other words, for French authors, it seems that only by identifying shares as a certain legal notion can the legal regime for that notion be properly implemented to shares; whereas

²⁰⁷ V. M. A. FRISON-ROCHE, *L'indétermination du prix*, RTD civ. 1992, p.269, n° 7.

²⁰⁸ V. J. HONG, *The typical contracts and the improvement of legal provisions for specific contracts*, first appeared in <http://www.iolaw.org.cn/showNews.aspx?id=58892>. (周江洪, 典型合同与合同法分则的完善, 首发于: <http://www.iolaw.org.cn/showNews.aspx?id=58892>.) Here we would like to cite again the phrase of a French author: “

such an identification is not at all necessary in China (1) This difference actually is about methodologies: i.e. the difference between identification vs legal fictions (2).

1. Legal fiction as a method alternative to identification:

332. - To identify shares with a given legal notion as a necessary step to apply the legal regime for that notion in France. In France, we have observed a phenomenon somewhat surprising to us: when it comes to apply a rule to solve an issue related to purchase of shares, authors and jurists have a tendency of identifying shares with the legally prescribed objects of that rule. This happens not only in a judicial level whereby authors would seek to justify judicial interpretations of a given law (an article of statutes or a generally accepted jurisprudence), as in the case of applying legal warranties for *choses corporelles* to shares. It happens also in a legislative level whereby authors would even seek to justify the very existence of a given law, as in the case whereby French authors tried to adapt the legal identification of shares as contracts with the specific rules related to opposability and procedures of *agrément*.

333. - To identify shares as a given legal notion not as a necessary step to apply the legal regime for that notion in China. In China, By contrast, the identification of shares with a given legal notion is never a preliminary condition for applying legal regime for that notion to shares. This happens also in both judicial and legislative levels. The practice in China of deeming contracts of sales and purchases as the model contracts for all onerous contracts is just one of the examples. In the judicial level, “the judicial interpretation on contracts of sales and purchases” provides that all legal provisions for contracts of sales and purchases in the Chinese Contract Law is applicable to all onerous contracts, which is actually founded in a principle in legislative level: article 124 of article 174 of Chinese Contract Law.

334. - Identification vs. Legal fictions. When it comes to a situation where there is a rule for one legal notion yet literally speaking not for another one, in order to apply the rule for the former to the latter, we can either try to identify the latter as the former (identification), or to directly apply the rule to the latter by a method called “legal fiction”, which is described by an Herr Larenz as: “deliberately identification of one notion with another one obviously different.” And the purpose of this method is “to apply the legal provisions for one notion (T1) to another one (T2)”, in other words “to equalize the legal effects of T1 and T2”, as opposed

to “demonstrating that T2 is actually the same with T1, or is one of its subset.”²⁰⁹ By the method “legal fiction”, the one who seeks to apply a legal rule for another notion (T1) to shares (T2) is by no means obliged to demonstrate that shares are a hyponym of the other notion. The different preference to the two methods thus gives rise to the different interests of the identification of shares: the importance of the topic of the identification of shares in France is caused by the preference to the method of identification whereas the unimportance in China by the preference to the method of legal fiction. If we would like to examine the appropriateness of the methodologies of the two countries with regard to this issue, we should compare that of identification and that of legal fiction.

2. Legal fiction as a method better than identification

335. We believe it should be admitted that identification is useful for the purpose of determining or justifying the rule applicable to a given issue: being identified as a legal notion would at least allow the applicability of a legal regime in a *prima facie* way, which would be opted out only if there is a special rule applicable in place of the more general rule on the basis of the principle “*specialia generalibus derogant*”. However, we believe the method of legal fiction is a better one for two reasons: for one thing, it makes the identification neither sufficient nor necessary for the purpose applying rules for a given legal notion to shares (i); for another, the method of identification would entail many tasks not inherently relevant to the purpose of choosing the appropriate legal rule to apply, which would be all saved by resorting to legal fiction (ii).

i. Legal fiction renders identification neither sufficient nor necessary

336. To identify shares as a given legal notion would by default allows an issue concerning purchase of shares to be regulated by the legal regime for that legal notion. However, only with the method of legal notion, it is neither guaranteed that to identify shares as a legal notion would necessarily make the legal regime for that notion apply, nor certain that if the legal regime for a legal notion is to be applied to purchase of shares, shares would

²⁰⁹ K. LARENZ, *Methodenlehre der Rechtswissenschaft*, (translated into Chinese by A. CHEN), Commercial Press China 2005, p. 142 (卡尔·拉伦茨著, 《法学方法论》, 陈爱娥译, 商务印书馆 2005 年, 第 142 页). Also, A French author described legal fiction as “*un procedee technique qui consiste à placer par la pensée un fait, une chose ou une personne dans une catégorie juridique sciemment impropre, pour la faire bénéficier, par voie de consequence, de telle solution pratique, proper à cette catégorie.*” (V. SIMONART, *La personnalité morale en droit privé comparé*, Bruylant, 1995, p. 24, n° 22.)

be necessarily identified as that legal notion.

337. - The insufficiency of the method of identification. Because of the principle of “*specialia generalibus derogant*”, to identify shares as a given legal notion (hypernym) does not necessarily lead to the application of the legal regime for that hypernym to shares.

We can have a better understanding of this by referring to the legal notion of *créance*, the typical *choses incorporelles* as has been reflected in the name of the *chapitre* dealing with *cession de choses incorporelles* before the recent reform of *code civil*. *Prima facie*, since *créance* is *chose incorporelle* and in turn *choses*, *cession de créance* should be considered as a hyponym or subset of *vente* which has *chose* as its object, at least when it comes to issues regulated by the common provisions for *vente*, like requirements of price. We believe the recent reform has not changed this fact. However, the recent reform has nonetheless provided a special legal regime for *créance* separated from that for *vente* (more particular that for *cession de choses incorporelles* in general). Thus, after the reform, the mere fact that *créances* are *choses* does not make it less true that *cessions des créances* are not subject to the general legal regimes for *vente de choses*.

338. - The unnecessary of the method of identification. Similarly, the mere fact that it is generally accepted to apply a rule specific for a legal notion does not necessarily indicate that shares are identified as such a legal notion. This position is even accepted in France²¹⁰ and we have observed such phenomenon that demonstrates it.

As *choses incorporelles*, *garantie de vices cachés* as provided in the general provisions for *vente* is not supposed to be applied to purchases of shares; however, it seems that French jurists, without discussing the identification of shares, generally have no problem of the applicability of this legal warranty.²¹¹ And we believe that among French judges, at least there is no consensus that shares should be identified as *choses corporelles*.

Another example is *garantie d'évictions*, which is provided in provisions for *vente* and technically only applicable in such a context. However, we have found nearly no

²¹⁰ V. J. -L. BERGEL, *différence de nature différence de régime*, RTD civ. 1984, 255, n° 10, p. 263.

²¹¹ V. M CAFFIN-MOI, *op. cit.*, n° 332s.

opposition to extending it to other onerous contracts,²¹² and we believe it is pretty clear that NOT all contracts subject to *garantie d'évictions* are *vente*, which means the identifying of a contract with *vente* is not a necessary condition for applying rules for *vente*.

ii. Legal fiction renders identification redundant

339. The fact alone, that between the identification of shares and the legal rule applicable to purchases of shares there is no deductive relation, would not render the method of identification too unsatisfactory: after all, being identified as a legal notion would at least provide for a legal regime by default. However, another disadvantage of the method of identification does make it somewhat unsatisfactory. The method of identification more often than not involves the discussion of some unnecessary sub-topics: sometimes they concern the effects of the identification; other times it concerns the conditions for the identification.

340. - Redundant discussion of effects of the identification of shares. If identification is the only method to apply a rule for another notion to shares, it would produce “an artificial problem of coherence” as we have presented *supra*: by this method, not only the adaptability of the rule sought to be applied should be examined; the compatibility of rules for this legal notion regulating other issues should be examined as well.

For example, the main interest under French law to identify shares as contracts is actually to bypass the annoying requirements for price applied to all *choses*. However, as long as the identification of shares as contracts is to be taken, and if there is no legal fiction, other rules specific to purchase of shares should be examined in terms of their compatibility with the more general rules for *cession de contrats*, like that related to opposability of the transfer of ownerships of shares and that related to procedure of *agrément*.

By contrast, if it is the method of legal fiction that has been employed, for the purpose of bypassing the annoying requirements of price, we can directly apply the rule related to price in *cession de contrats* (because there is no specific rule, the more generic rule for all onerous contracts --- new article 1163 of *code civil* would apply). All we have to do for this purpose is to demonstrate whether there is a compelling reason satisfying the conditions

²¹² Except for one author (V. S. LACROIX-DE SOUSA, *op.cit.*, p. 295, n° 354.)

for such an application by legal fiction.

341. - Redundant discussion of conditions for the identification of shares. By the method of identification, in order to apply a rule for a legal notion to purchases of shares, it is necessary to firstly discuss whether all the distinguishing features to identify an object as that legal notion exist also in shares, any absence of which would fail the task of identifying shares as that legal notion. However, among all the distinguishing features, or in other words all the conditions for identification, are they all inherent reasons that make the application of that rule appropriate in the context of purchases of shares? The answer is probably no.

For example, in order to discuss whether to apply the legal warranty for *créances* or to apply whether to apply *garantie de vices cachés*, one method is to try to identify shares as *créances*. As we would see in next section, one of the opposing argument against such an identification is that shares (or rights of shareholders) encompass not only pecuniary rights, but also political rights; and it is controversy to identify the political rights as faculties of *créances*. However, the *raison d'être* of the special legal warranties for *créances* is its risky nature (*caractère aléatoire*)²¹³ and what should be taken into consideration for the purpose determining whether to apply the legal warranties for *créances* to purchases of shares, should be the similarity or difference between shares and *créances* in terms of their risky nature: in other words, if the legal warranty for *créance* is to be applied, it should be because sales of shares are subject to the same inherent risk as *cession de créance*. The issue as to whether to identify political rights as *créance* is actually irrelevant to the reason *de lege ferenda* for applying either legal warranty for *créances* or *garantie de vices cachés*.

By contrast, if it is the method of legal fiction that has been taken, to apply a rule to an issue related to purchase of shares, what needs to be discussed would be limited to only the factors concerning the *ratione legis* of that rule. In the aforementioned case, what would be discussed in order to decide between *garantie de vices cachés* and legal warranty for *créances* would be only whether shares are inherently risky to the same extent as *créances* that the obligation of warranty of their sellers should be mitigated.

Conclusion of Section I

²¹³ V. S. LACROIX-DE SOUSA, *op.cit.*, p. 112, n° 119.

342. In this section, we have presented the fact that the topic of the identification of shares is of only interests in France whereas it is of little interest in China. The reasons for such a difference are two-fold.

For one thing, there are less issues under Chinese law whereby it is possible to apply different rules, which in turns implies less necessity of assimilating shares as a pre-existing category which law provides special provisions. This fact actually demonstrates the simplicity of Chinese law, which is, however, exactly what is needed in a legal system suitable to purchases of shares because in this case there is a special necessity that the allocation of risks and benefits between the parties of a purchase of shares should be mainly arranged by the parties to the exclusion of judicial interventions. The simplicity of Chinese law in this regard, necessarily reflects a *laissez-faire* policy which leaves most of the powers to the parties and requires less judicial interventions.

For another, Chinese jurists adopt often the method of legal fiction, which in our opinions has more advantageous than the method of identification of shares as often employed by French jurists, since by legal fictions, to apply a rule for a particular legal category in the context of shares, there is no need to satisfy completely all the identifying conditions, which in our opinions are not necessarily relevant in a sense *de lege ferenda* to the applicability of such a rule.

The two differences aforementioned demonstrate that to discuss the identification of shares is not an indispensable preliminary step to defend our thesis in an abstract sense. However, this is not to say that we would limit our presentations only to the revelation of the different importance and interests of the topic. Rather, in the next section we would also discuss this topic *per se* because it nonetheless an interesting topic for our French readers.

Section II. Presentation of the identification

343. To compare the French research on the identification of shares (I) with that of Chinese, which even though is for other purposes (II), is beneficial in a comparative sense (III).

I. Identification of shares in France

344. In the previous section, the four candidate legal categories to which shares can be identified with have been enumerated. Among them, we believe “*choses incorporelles* other than *créances*” should be the default identification of shares, or in other words the starting point of all our following presentations: if without any re-identification, *prima ficia*, shares should be identified as “*choses incorporelles*”²¹⁴. In fact, it is because the legal regime for *choses incorporelles* is not satisfactory to deal with issues in purchases of shares that have emerged the demands to identify shares with either *choses corporelles* (A), or *créances* (B) or *contrats* (C).

A. The proposition to identify shares with *choses corporelles*

345. In order to identify shares with *choses corporelles*, two kinds of methods have been come up with in France: the first kind of simply demonstrating the corporeality of shares (1) and the more complicated second kind of changing the criterion of *choses corporelles* (2).

1. Direct demonstration of the corporeality of shares

346. *Prima ficia*, shares are incorporeal in nature. However, by identifying them as ownerships, their corporeality can be based upon that of their objects (i). In addition, physical certificates that represent shares can also be used to provide some corporeality to the shares (ii).

i. By identifying shares with ownerships

²¹⁴ V. S. LACROIX-DE SOUSA, *La cession de droits sociaux à la lumière de la cession de contrat*, LGDJ, 2010, p.63 n° 55.

347. If shares are considered as ownerships on assets of a company it means that a sale and purchase of shares is tantamount to a sale and purchase of assets of that company. If most of the assets sold and purchased are corporeal in nature, it is safe to say that it is *choses corporelles* that are sold and purchased.

However, this opinion is now of only historic value as “*la question de savoir si les droits sociaux sont droits réels peut trouver une réponse rapide tant les controverses qui la sous-tendent sont aujourd’hui dépassées.*”²¹⁵ Because identifying shares as ownerships would confuse “*patrimoine social*” and “*patrimoine des associés*”,²¹⁶ as it is the target company that own their assets instead of its shareholders --- the buyer or the seller, who has only a direct bunch of rights against the company and an indirect influence on the patrimony of the company.

ii. By identifying shares with certificates

348. Another way to identify shares with *choses corporelles* is by the “*théorie de l’incorporation*”, whereby “*la créance*²¹⁷ *se matérialise dans le titre qui la constate, lequel, étant une chose corporelle, est susceptible de propriété*”²¹⁸. Here, the word *titre* means certificate, or in other words, “*instrumentum*”; whereas the shares it represents is the *negotium*. By this theory, the ownership on *negotium* would transpose to the *instrumentum*.²¹⁹ This opinion has long been the object of criticisms, which are mainly founded on the ground that *negotium* is independent of *instrumentum* (“*le titre au porteur, morceau de papier remis à l’actionnaire, n’a jamais été autre chose qu’un morceau du papier*”),²²⁰ as is well demonstrated in the fact that an *instrumentum* lost would lose its effects by a simple stop

²¹⁵ V. M. CAFFIN-MOI, *op. cit.*, n° 392: the author here used the expression “*des droits réels*” to refer to ownerships (*propriétés*), we believe it is worth to point out again that being identified as *droits réels* or real rights in English is not what prevents shares from being identified as *choses corporelles*, since *droits réels* comprises both ownerships and *jus in re alien*, the latter are all *choses incorporelles*. The distinction between *droits réels* and *droits personnelles* under French law, for the purpose of purchase of shares, is of little use, if not useless.

²¹⁶ V. M. CAFFIN-MOI, *op. cit.*, n° 392.

²¹⁷ Transposable to shares as both of them are *choses incorporelles*.

²¹⁸ F. CHABAS et al. *Leçons de droit civil*, t.II, vol II, *Bien, droit de propriété et ses démembrement*, Montchrestien, 8^e éd., 1994, n° 1301, p. 133.

²¹⁹ V. D. R MARTIN, *De la nature corporelle des valeurs mobilières (et autres droits scripturaux)*, D. 1996, chron., p.47; Ph. GOUTAY, *Titres au porteur et incorporation : réfutation d’une théorie*, *Bull. Joly. sociétés* 2001, p.475-479.

²²⁰ F. -X. LUCAS, *Les transferts temporaires de valeurs mobilières*, LGDJ, 1997, n° 408, p.209; v. E. THALLER, *Traité élémentaire de droit commercial*, Rousseau, 3^e éd., 1904, n° 892, p. 450 (disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k5463941k/f458.image>).

order (*opposition*)²²¹ ; and in the existence of registered securities (*titre nominatif*) where the certificates serve only a probative function of the *negotium* without being identified with them.²²²

349. The reform of 1981 of dematerialization of securities has further attenuated the “*théorie d’incorporation*” by eliminating entirely the category of bearer securities (*titres au porteur*) and requiring the registrations of all securities issued in France. Some authors defended the theory by pointing out that it concerns here only a change of the form of *instrumentum*: from certificates to registers.²²³ This defence is subject to both the aforementioned critics to the *théorie d’incorporation* before the reform; and criticisms aiming at the defence *per se*, according to which to consider the account in registers as *choses corporelles* is just an illusion.²²⁴

2. Surreptitious change of the criterion of *choses corporelles*

350. Another method used by French authors to achieve the same end of identifying shares with *choses corporelles* (nominally authors did not mention explicitly the term *choses corporelles*, but this is what they in fact have tried to do) is to change the criterion of *choses corporelles*: to change the question to be answered from “whether shares are *choses corporelles*” to “whether shares can be objects of ownerships (*propriétés*)”. To achieve this end, an identification of *choses corporelles* with the more generic term *choses* has been conducted (i). And then the term “*choses*” has been identified with *choses appropriables* (ii). By the two identifications, *choses corporelles* has been identified with *choses appropriables* and all that need to be done is to further identify shares with *choses appropriable* (iii).

i. The identification of *choses corporelles* with *choses*.

351. A non-ignorable issue discussed in France is whether to identify shares with *choses* or *créances*. This discussion, in the first place, seemed surprising to us because

²²¹ V. P. GOUTAY, *La dématérialisation des valeurs mobilières*, Bull. Joly. sociétés 1999. 417.

²²² V. M. CAFFIN-MOI, *op. cit.*, n° 433.

²²³ V. D. R. MARTIN, *De la nature corporelle des valeurs mobilières (et autres droits scripturaux)*, D. 1996, chron., p.47; *Du corporel*, D. 2004, p.2285-2287; F. NIZARD, *Les titre négociables*, Economica, 2003, n° 669s et p. 305s.

²²⁴ V. H. Le NABASQUE, *Les actions sont des droits de créances négociables*, in *Aspects actuels du droit des affaires*, Mél. Yves Guyon, Dalloz, 2003, p.673; F. -X. LUCAS, *Retour sur la notion de valeur mobilière*, Bull. joly. société 2000, n° 19, p. 775.

créances are the archetype of *choses incorporelles* and to identify shares with *créances* should be naturally considered as to identify them with *choses* according to the Gaian schema adopted in *code civil* (a). Latter we began to realize that what was discussed is actually whether shares are *choses corporelles* because the word “*choses*” is interpreted as synonym of “*choses corporelles*” by scholars (b).

a. *Choses corporelles* as a hyponym of *choses* as understood by legislators

352. According to “Gaius’s schema”, the term *choses* is the hypernym (generic term) whereas *choses corporelles* and *choses incorporelles* are hyponyms (specific terms). The interests of Gaian schema are reflected in the provisions for *vente* in *code civil*, whereby *choses* are understood as the objects of *ventes* (article 1582) and all provisions here are supposed to apply to all kinds of *vente*, both *vente de choses corporelles* and *vente de choses incorporelles*. In addition to the general provisions for all *choses*, there is a special *chapitre* dedicated to *vente de choses incorporelles*, commonly referred to as *cession de choses incorporelles*, whereby some rules in the general provisions are replaced by specific rules only applied to *choses incorporelles*, the most mentionable of which is the special legal warranties (commonly referred as *garantie de créance*, as *créance* is the typical *choses incorporelles*). In other words, *vente de choses corporelles* are governed by only the general provisions for *vente*; whereas *cession de choses incorporelles* are governed in principle by the general provisions for *vente* and as exceptions by specific rules only for *choses incorporelles*. Accordingly, under the Gaian *shcema*, the discussion of whether shares are *créances* or *choses* is meaningless because *créances*, as the typical *choses incorporelles*, is just a type of *choses* and in the case where shares have been managed to be identified as *créances*, it is thus naturally also identified as *choses*.²²⁵

b. *Choses corporelles* as a synonym of *choses* as understood by authors

353. However, in spite of our surprise, the prevalence of the topic of whether to identify shares with *choses* or *créances* is widely observed in France. One of the purpose of the discussion --- to determine whether to apply the legal warranties in the general provisions

²²⁵ V. P. LE TOURNEAU, *Quelques remarques terminologiques autour de la vente*, In *Le droit privé français à la fin du XXe siècle --- Mél. Pierre Catala*, Litec, 2001, n°5, p. 471.

for *vente* or to apply the legal warranties for *créances*²²⁶ --- reveals why French authors would discuss this topic. If the Gaian schema is adhered to, whether to apply the legal warranties for *créances* or the legal warranties in the general provisions for *vente* is actually determined by whether to identify shares with *choses corporelles* or *choses incorporelles*. With *choses incorporelles* generally be (falsely) referred to as *créances* (as would be discussed *infra*), the fact that French authors would discuss whether to identify shares with *choses* or *créances* for this purpose actually reflects an opinion that *choses* are limited to only *choses corporelles*: according to this opinion, “those governed by the special *chaptire* regulating *cession de choses incorporelles*” are not *choses*, which denotes that the scope of *choses* is confined to only “those not governed by the special *chaptire* regulating *cession de choses incorporelles*”, i.e. *choses corporelles*. Briefly, what French authors are discussing in the disguise of the topic of whether shares are *choses* is actually whether shares are *choses corporelles*, which implies their opinion that *choses* are a synonym of *choses corporelles*, to the exclusion of *choses incorporelles*.

ii. The identification of *choses* with *choses appropriables*

354. The identification of *choses* with *choses corporelles* as we have just presented is justified by Professor Lucas according to whom it is true that by the structure of *code civil*, *créance*²²⁷ is a special category of *choses*. However, since the *titre* “*de la vente*” is located under the *livre* entitled “*des différentes manières don’t on acquiert la propriété*” and since article 1583 provides that: “ ... *la propriété est acquise de droit à l’acheteur à l’égard du vendeur, dès qu’on est convenu de la chose et du prix...*”, *choses incorporelles*, for lacking *propriétés* (ownerships), are in reality not real *choses* and the general provisions for *vente* should not be applied to them, which instead should be only regulated by the special *chapitre* regulating *choses incorporelles*.²²⁸ This definition of *vente* and *choses* focusing on the existence of *propriétés* (ownerships) is also supported by other authors. For example, another author defined *vente* as as “*contrat par lequel une personne, qui est appelée vendeur, s’oblige à transférer à une autre la propriété d’une chose, tandis que l’autre, qui est l’acheteur,*

²²⁶ V. M. CAFFIN-MOI, *op. cit.*, n° 465.

²²⁷ We believe when French authors refer to the term *créances* in the context of purchases of shares, often actually they are referring to *choses incorporelles*, the hypernym of *créances*. Thus, depending on the context, it is sometimes possible to treat the term *créances* as *choses incorporelles*.

²²⁸ V. F. –X. LUCAS, *Les transferts temporaires de valeurs mobilières --- pour une fiducie des valeurs mobilières*, LGDJ, 1997, n° 454s.

s'oblige à lui en payer la valeur en argent.”²²⁹ Under this definition, a *chose*, for the purpose of being the object of a *vente*, should have a *propriété* (the French word for ownership) on it; and the term *chose* is accordingly identified with *chose appropriable*. Therefore, the question as to whether to identify shares with *choses*, which actually means whether to identify shares with *choses corporelles*, is transformed to the question as to whether to identify shares with *choses appropriables*, or whether there are ownerships on shares.

iii. The identification of shares with *choses appropriables*

355. Now that we have mentioned how the question of whether shares are *choses* have been transformed into that of whether shares have ownerships on them, what needs to be done to fulfil the task of the identification is thus to prove that there are ownerships on shares. To do that, one can either prove that shares *per se* are ownerships on the assets of the company, or that shares are identified with the certificates representing them, as we have mentioned *supra*. However, both methods are to directly establish the corporeality of shares, which makes it useless to replace surreptitiously the criterion of corporeality with that of appropriability as have been done by French authors. Instead, what French authors would try to prove is that shares, irrelevant to whether they are corporeal or not, have ownerships on them; in other words, to prove in a more general sense the existence of ownerships on *choses incorporelles*.²³⁰

Many authors oppose the idea of ownerships on *choses incorporelles* and thus oppose the idea that shares can be identified as *choses* without being firstly identified as corporeal.²³¹ The mandatory link between the *choses corporelles* and the existence of ownership actually finds its origin in a flaw in the Gaian division: Ownership is generally considered to be the archetype of real rights.²³² However, in Gaian division, there is no place of such an important notion because to accept such a notion would lead to a double existence of the same *chose*: one can have at the same time a *chose* and its ownership.²³³ To solve this

²²⁹ M. PLANIOL, *Traité élémentaire de droit civil*, 9e ed., t.2, LGDJ, 1928, n° 1353, p. 462. (Disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k6516822w/f482.image>).

²³⁰ V. V. ALLEGARET, *De la propriété des valeurs mobilières*, *Bull. Joly sociétés* 2005, n° 28; F. -G. TREBULLE, *L'émission de valeurs mobilières*, *Economica*, 2002, n° 653s.

²³¹ V. D. R MARTIN, *De la nature corporelle des valeurs mobilières (et autres droits scripturaux)*, *D.* 1996, chron., p.47; V. F. -X. LUCAS, *Les transferts temporaires de valeurs mobilières --- pour une fiducie des valeurs mobilières*, LGDJ, 1997, n° 454s.

²³² V. Ph. MALAURIE et L. AYNES, *Les biens*, Defrénois, 3^e éd., 2007, n° 352.

²³³ See G. GRETTON, *Ownership and its objects*, *Rabel J. Com. Int. Pr. L.*, October 2007, p. 806.

problem, there developed what is called “merger interpretations”, according to which a *choses corporelles* is identical to, or merged with the ownership of that *choses corporelles*. Other rights are not merged with their objects, and should be considered as *choses incorporelles*.²³⁴ If such an interpretation is adopted, the possibility of being objects of ownerships are reserved to *choses corporelles*.²³⁵

By contrast, the flaw in the Gaian division can also be solved by what is called “titularity interpretation” developed by Professor Ginossar, according to which the concept ownership is neither a *chose* (thing) nor a *droit* (right); but a holding relation between subject of a patrimony and its elements (*choses*). As Professor Zenati put it: “*ce qui rend techniquement propriétaire, ce n’est rien d’autre aujourd’hui que les procédés par lesquels l’ordre juridique permet à une personne d’imposer à autrui une relation privative aux choses et de protéger cette relation.*”²³⁶ Thus, to prove that shares, or more generally to prove that *choses incorporelles* are *choses appropriables*, all one needs to do is to support the opinion of Professor Ginossar.

B. The proposition to identify shares with *créances*

356. If to identify shares with *choses corporelles* is obviously incompatible to the presumed nature of shares as *choses incorporelles*, to identify shares with *créances* is not *prima facie* unacceptable since the term *créance* is only a hyponym of the term *choses incorporelles* and all one needs to do is to compare shares with the conditions of *créances* that make them distinct from other *choses incorporelles* (2). On top of this method, we have also found another method employed by some French authors consisting of eliminating “candidate” identifications of shares, which we find not all appropriate (1).

1. By elimination

357. Some authors believed that the combination of *droits réels* and *droits de créances* covered all *droits pécuniaires* and thus shares (*droits de l’associé*) necessarily

²³⁴ See G. GRETTON, *Ownership and its objects*, Rabel J. Com. Int. Pr. L., October 2007, p. 807.

²³⁵ Another reason is that historically, only *choses corporelles* can be objects of possession; and only objects of possession can be objects of ownerships. V. F. ZENATI, *Pour une rénovation de la théorie de la propriété*, RTD civ. 1993, p. 307.

²³⁶ F. ZENATI, *Pour une rénovation de la théorie de la propriété*, RTD civ. 1993, p. 316; For another explanation achieving the same conclusion with that of Ginossar yet with some tiny difference, v. M. FABRE-MAGNAN, *Propriété, patrimoine et lien social*, RTD civ. 1997, p.583-612.

belonged to one of the two categories.²³⁷ Thus, by eliminating the identification of shares with *droits réels*, shares are supposed to fall into the category of *créances*.²³⁸ However, this method is flawed in two ways: for one thing, it presumes falsely that ownership is the only *droits réels* (i) and for another, it supposes incorrectly that the division of *droits réels* and *droits de créances* is exhaustive (ii).

i. Ownership, the only *droit réel*?

358. We have observed a misconception among French authors that ownership is the only entity in the category of *droit réel* and that to dis-identify share from being ownerships is tantamount to dis-identify them from being *droits réels*: As early as in 19th century, an author rephrased the opinions of others -- that shares were “*ni un droit de propriété ou de copropriété, ni un droit de créance*”—as to mean that shares were “*ni un droit réel ni un droit de créance*”.²³⁹ Recently, Mme Caffin-moi in challenging the idea that shares are *droits réels*, simply demonstrated that shares are not ownerships.²⁴⁰

However, as we have mentioned *supra*, ownership is by no means the synonym of *droits réels*. If ownership is understood as the principal *droits réels*, it is obvious that there are other *droits réels* and the fact that shares are not ownerships does not necessarily exclude the possibility that shares are other *droits réels*. If by contrast “ownership” is understood as only a holding relation as M. Ginossar has suggested, the fact that shares are not ownerships does not demonstrate anything other than that shares are *choses*, without specifying which kind of *choses*, (*choses corporelles* and *choses incorporelles*, or *choses stricto sensu* and *droits*). Neither way is the demonstration of the fact that shares are not ownerships directly useful for the purpose of identifying shares as *créances*.

ii. *Droits réels* and *droits de créances*, the only *droits*?

²³⁷ V. Ch. LYON-CAEN et L. RENAULT, *Traité de droit commercial*, T.II, Librairie Cotillon, 2^e éd., 1892, n° 143, p. 104 (Disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k504274n/f108.vertical>).

²³⁸ V. H. Le NABASQUE, *Les actions sont des droits de créances négociables*, in *Aspects actuels du droit des affaires*, Mél. Yves Guyon, Dalloz, 2003, n° 17, p.677.

²³⁹ V. Ch. LYON-CAEN et L. RENAULT, *Traité de droit commercial*, T.II, Librairie Cotillon, 2^e éd., 1892, n° 143, p. 104 (Disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k504274n/f108.vertical>).

²⁴⁰ V. M. CAFFIN-MOI, *op. cit.*, n° 392.

359. Even if we accept that shares are not *droits réels*, the mere fact that shares are not *droits réels* is not sufficient to establish that shares are *créances*, as *droits réels* and *droits de créances* are not exhaustive: there are also other types of *droits pécuniaires*. As we would expound immediately, the originalities of shares are not necessarily adaptable to typical *créances*.²⁴¹ With the identification of *droits réels* being excluded, a possible conclusion is that shares are neither *créances* nor *droits réels* since for one thing there is no evidence *a priori* that *droits réels* and *droits de créances* are the only two categories of *droits pécuniaires* and for another it is possible that shares are not at all *droits pécuniaires* at all (for example if shares are identified as *positions contactuelles*).

2. By comparison

360. If to identify shares with *créances* cannot be realized by the method of elimination, what needs to be done is thus to find out the definition and identifying conditions for *créances* and compare them to shares in order to justify that shares meet all the conditions. As we would present immediately, there are some incongruities in the identification of shares as *créances* (i). Because in classifying something into a given category, what matters is the distinguishing of principal features, what needs to be done here is to determine whether the said incongruities are essential enough to change the principal features of shares and to make the otherwise adaptable identification inadaptable (ii).

i. Presentation of the incongruities

361. The identification of *créance*, as defined as “*un droit...en vertu duquel une personne nommée créancier peut exiger d’une autre nommée débiteur l’accomplissement d’une prestation (donner, faire ou ne pas faire quelque chose)*”²⁴², can be reduced to two conditions: *droit* (a); *droit d’exiger* (b). In addition, *créances* are in their nature *droits patrimoniaux*, which is another condition to be met (c).

a. Incongruity in terms of the condition of “*droits*”

²⁴¹ V. V. ALLEGARET, *De la propriété des valeurs mobilières*, *Bull. Joly sociétés* 2005, n° 7; F. –X. LUCAS, *Retour sur la notion de valeur mobilière*, *Bull. Joly* 2000, 765, n° 13, p. 722; Ch. LYON-CAEN et L. RENAULT, *Traité de droit commercial*, T.II, Librairie Cotillon, 2^e éd., 1892, n° 143, p. 104 (Disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k504274n/f108.vertical>).

²⁴² V. “*créance*” in G. CORNU, *Vocabulaire juridique*, PUF, 11^e éd., 2016.

362. *Créances* are *droits* (rights). However, shares, although called *droits de l'associé* or *droits sociaux* in French, are not in fact purely rights, as shareholders also assume a series of duties, which makes shares to some extent a “hybrid” of *créances* and *dettes*.²⁴³

b. Incongruity in terms of the condition of “*droits d'exiger*”

363. *Créances* are *droits d'exiger*. Accordingly, in order for shares to be identified with *créances*, they should allow their holders to demand (*exiger*) the target companies to fulfil some obligations. *A priori*, this condition is well satisfied as “*l'actionnaire est uni par un lien de droit, un vinculum juris, à la société qui oblige celle-ci à donner, à faire ou à ne pas faire quelque chose au profit de l'actionnaire.*”²⁴⁴ For example the target companies are obliged to pay their shareholders dividends during the operation of the company and to make liquidating distribution (*boni de liquidation*) at their closing.²⁴⁵ Ergo shares can be roughly assimilated as *créances* in many aspects.

However, further analysis would reveal that it is not entirely appropriate to identify shares with *droits d'exiger* and thus not entirely appropriate to identify shares *créances*. Shareholders have a special *droit de vote* against the companies and may to some extent participate in the decision-making process of the companies. Although the *droit de vote* is possible to be analysed as a *créance* against the target companies,²⁴⁶ it is sure to have some characteristic of, or at least is similar to, “*un droit d'intervention, c'est-à-dire une vocation à la vie sociale, dans la personnalité interne de la société.*”²⁴⁷ In other words, shareholders can influence the contents of obligations that the target companies are to assume by exercise their *droits de vote*. This becomes more apparent “*quand l'actionnaire a un rôle majeur dans la société, la identification de créancier est moins pertinente car il y a une certaine identité entre l'actionnaire et la société, ce qui ne correspond pas au rapport qui existe habituellement entre un créancier et un débiteur*”²⁴⁸ Because sometimes the rights of

²⁴³ V. S. LACROIX-DE SOUSA, *La cession de droits sociaux à la lumière de la cession de contrat*, LGDJ, 2010, n° 141, p. 123.

²⁴⁴ F. NIZARD, *Les titre négociables*, *Economica*, 2003, n° 35.

²⁴⁵ V. H. Le NABASQUE, *Les actions sont des droits de créances négociables*, in *Aspects actuels du droit des affaires*, *Mél. Yves Guyon*, Dalloz, 2003, n° 17, p.677; F. -X. LUCAS, *Retour sur la notion de valeur mobilière*, *Bull. joly. société* 2000, n° 13.

²⁴⁶ V. F. NIZARD, *Les titre négociables*, *Economica*, 2003, n° 32, p. 18.

²⁴⁷ V. R. MORTIER, *Le rachat par la société de ses droits sociaux*, Dalloz, 2003, n° 302.

²⁴⁸ F. NIZARD, *Les titre négociables*, *Economica*, 2003, n° 40, p. 20.

shareholders are to some extent exercised directly onto the target company instead of as a demand against the companies, it may thus not entirely appropriate to identify shares with *droits d'exiger*, thus not entirely appropriate to identify shares with *créances*.

c. Incongruity in terms of the condition of “*droits patrimoniaux*”

364. The last incongruity of identifying shares with *créances* is the fact that while supposedly, *créances* are *droits patrimoniaux*, many prerogatives of shares, especially those of a politic nature, can be only identified as *droits extra-patrimoniaux*. This is because usually they are not, at least not directly, for the purpose of bring pecuniary benefits to their holders and are rather for the benefits of the target company as a whole.²⁴⁹

ii. Seriousness of the incongruity

365. The incongruities as we have presented *supra* does not exist in all aspects of shares. This co-existence of *créances*-like prerogatives with non-*créances* ones makes a share a “*bouquet de droits*”²⁵⁰ or “*carrefour de droits*”²⁵¹ instead of a monolithic right. Thus, to discuss whether shares are *créances* is equivalent to discuss whether the non-*créances* prerogatives of shares or the *créances*-like ones should be given more “weigh” or influence on the identification of the entirety of the “bunch of rights”.

The non-*créances* elements in the “bunch of rights” are mainly *droits politiques*. M. Lucas claims that: “*ces prerogatives politiques ne permettent pas d'écarter le rattachement à la catégorie des droits de créances; tout au plus conduisent-elles à souligner l'originalité de la nature du droit conféré par l'actionnaire à l'actionnaire.*”²⁵² This opinion has been reinforced by the concept of “*baillieur de fonds*” who basically has only a right and incentive to get economically reimbursed, usually without rights and incentives to exercise the powers usually attached to *droits politiques*, and thus is in many ways similar to a typical *créancier*. *L'ordonnance du 24 juin 2004* which introduced into French law a new article L.228-1 of *code de commerce* and a special category of shares --- “*actions de preference*” which may

²⁴⁹ V. M. FABRE-MAGNAN, *Propriété, partimonine et lien social*, RTD civ. 1997, n° 37.

²⁵⁰ M. CAFFIN-MOI, *op. cit.*, n° 410.

²⁵¹ P. Le CANNU, *Qu'est-ce qu'un actionnaire*, Rev. sociétés 1999, p. 519.

²⁵² F. -X. LUCAS, *Retour sur la notion de valeur mobilière*, Bull. joly. société 2000, n° 13.

consist of no *droits de vote*²⁵³, also gives some credits to the argument of M. Lucas according to whom the incongruous prerogatives of shares are only secondary in nature. This argument is opposed by other authors, a predominant basis of which is that some of the *droits politiques* are inherent to shares (for example, *droits à l'information* and *droit de participer aux décisions collectives*).²⁵⁴ To sum it up, if the incongruities of the identification of shares as *créances* is well established, whether to identify shares with *créances* depends upon whether such incongruities are regarded as important or not.

C. Proposition to identify shares with *positions contractuelles*

366. On top of identifying shares as *choses corporelles* and *créances*, some authors also advocate to identify shares with *positions contractuelles*, or in other words to identify purchases and sales of shares with *cessions de contrats*.²⁵⁵ The reason why authors would bother to identify shares with *positions contractuelles* is because such a category has more advantages than other candidate categories (1). However, although to identify shares with *positions contractuelles* is advantageous, such an identification is faced with some theoretical obstacles (2).

1. Advantages of the identification of shares as *positions contractuelles*

367. Because the category of *positions contractuelles* is unique enough (i), to identify shares with *positions contractuelles* is more desirable than to identify shares with other categories (ii).

i. Premises of the advantages

368. - Before the recent reform of *code civil*, there were doubts as to the usefulness of identifying shares with *positions contractuelles*. The interests of trying to identify shares with *positions contractuelles* would be in peril if there are no specific rules for *cession de contrat*; in other words, if *cession de contrat* is subject to the legal regime for a

²⁵³ V. M. GERMAIN, *L'ordonnance n° 2004-604 du 24 juin 2004, portant réforme du régime des valeurs mobilières émises par les sociétés commerciales*, JCP G 2004, 440.

²⁵⁴ V. M. CAFFIN-MOI, *op. cit.*, n° 407.

²⁵⁵ V. R. LIBCHABER, *Pour un renouvellement de l'analyse des droits sociaux*, in *Aspects actuels du droit des affaires*, Mél. Yves Guyon, Dalloz, 2003, n° 3, p. 717; P. BERLIOZ, *La notion de biens*, LGDJ, 2007, n° 1081.

more generic category. Unfortunately, this was exactly the case before the recent reform of *code civil*.

For one thing, there was no specific rules, at least no specific rules in a legislative level, related to *cession de contracts* at that time. As Mme Sousa put it: “*le régime de la cession conventionnelle de contrat découlant de la jurisprudence et de la doctrine, il peut constituer un facteur de risque pour les parties contractantes.*”²⁵⁶

For another, at that time authors liked to discuss whether *cession de contrat* was itself a *vente* (i.e. whether *positions contractuelles* are *choses*).²⁵⁷ If that was the case, even if shares were regarded as *positions contractuelles*, a further discussion of whether such *positions de sociétés* were *choses* would still be necessary²⁵⁸ which made the discussion of whether shares were *positions contractuelles* in the first place pleonastic.

369. - After the recent reform of *code civil*, there is no longer doubts as to the usefulness of *positions contractuelles*. After the recent reform of *code civil*, it becomes apparent that identifying shares with *positions contractuelles* is meaningful, exactly because of the insertion of a new *chapitre* dedicated to *cession de contrat*. Since then, no matter whether *positions contractuelles* are identified as what category, one thing is certain: it is the specific legal regime for *cession de contrat* that is applied to *cession de contrat* instead of the legal regime for that of a more generic category. Therefore, now, no matter whether *positions contractuelles* are *choses* or not, the legal regime to be applied remains the same and there is little interest of discussing whether *positions contractuelles* are *choses*.

ii. Presentations of the advantages

370. The principal advantage of identifying shares as *positions contractuelles*, as we believe, is to release purchases and sales of shares from “*le risque essential de l’operation...*”

²⁵⁶ S. LACROIX-DE SOUSA, La cession de droits sociaux à la lumière de la cession de contrat, LGDJ, 2010, p.63 n°55. n° 398, p. 322; Another author in pointing out that the discussion of the nature of *société*, an essential sub-topic for the topic of whether to identify shares with *positions contractuelles*, was of not of much practical interest, indicated indirectly that the identification of shares as *positions contractuelles* was not very interesting. (V. J. –P. BERTREL, *Liberté contractuelle et société, Essai d’une théorie du juste milieu en droit des sociétés*, RTD com., 1996, p. 611).

²⁵⁷ V. T. REVET, *Rapport français sur les nouveaux biens, in la propriété*, Travaux de l’association H. Capitant, Journées vietnamiennes 2003, t.58, Société de législation comparée, 2006, p.281; A. CHABALLIER, *La patrimonialité de la position contractuelle*, thèse Montpellier I, 2000, n° 378.

²⁵⁸ V. P. BERLIOZ, *La notion de biens*, LGDJ, 2007, n° 1100.

lié au prix de parts sociales ou des actions”.²⁵⁹ To achieve this end, it seems *a priori* more appropriate to just identify shares with *créances*, as the term *créance* is a hyponym of *choses incorporelles* and shares are presumed to be *choses incorporelles*, and what is needed to identify shares with *créances* is only to find out whether the features distinguishing *créances* from other *choses incorporelles* exist or not in shares. By contrast, to identify shares with *positions contractuelles* is to some extent counter-intuitive and would not be much different from to identify shares with *créances* except for the rule related to allocations of duties between sellers and buyers, which in our opinion is trivial and non-essential to the inherent problems of purchases of shares.

The reasons why authors would bother to identify shares with *positions contractuelles* is because to do so would avoid the incongruities of the identification of shares as *créances* as we have mentioned *supra*.²⁶⁰ For one thing, the *positions contractuelles* involves necessarily *créances* and *dettes*, which is adaptable to the fact that shareholders assumes also duties to the target company; for another, the contracts whose *positions contractuelles* are transferred can be interpreted to be a *contrat-organisation*, which means that the rights conferred to shareholders are not necessarily *droits d'exiger* in nature; lastly, *positions contractuelles* are not always *patrimoniaux* in nature, which suits the nature of *droits politiques* constituting elements of shares.

2. Obstacles to the identification of shares as *positions contractuelles*

371. To identify shares with *positions contractuelles* is *prima facie* sound because of the existence of a legal foundation in *code civil* (i). However, the mere existence of the legal foundation does not guarantee the success of this identification because of criticisms put forward by some authors (ii).

i. Foundation for the identification of shares as *positions contractuelles*

372. To identify shares with *positions contractuelles* is justified *a priori* by a traditional definition of the term “*société*”. In roman law, *société* was regarded as a set of

²⁵⁹ S. LACROIX-DE SOUSA, La cession de droits sociaux à la lumière de la cession de contrat, LGDJ, 2010, p.320 n° 395.

²⁶⁰ V. R. LIBCHABER, *Pour un renouvellement de l'analyse des droits sociaux*, in *Aspects actuels du droit des affaires*, Mél. Yves Guyon, Dalloz, 2003, n° 3, p. 717; M. CAFFIN-MOI, *op. cit.*, n° 451.

contractual relations among individuals²⁶¹, and in the era of codification this opinion was accepted by French jurists²⁶² and eventually accepted by *code civil*. Before 1985, article 1832 of *code civil* defines *société* as “*un contrat par lequel deux ou plusieurs personnes conviennent de mettre en commun des biens ou leur industrie, en vue de partager le bénéfice ou de profiter de l'économie qui pourra en résulter.*” If this definition is to hold, shares as rights against (or in) a *société* (company) is nothing more than a *position* of *contractant* of a *contrat* and sales and purchases of shares are nothing more than a *cession de contrat*.

ii. Criticisms to the identification of shares as *positions contractuelles*

373. However, the identification of a company as a contract, the most essential foundation of identifying shares as *positions contractuelles*, has long been criticized by French authors, whose focuses are whether a company should be identified as a contract, or whether *contrat de société* (the contract by which a company is formed) continue to take effect after the formation of a company (a). However, we believe actually there has already been a consensus on these questions and what is actually is the issue here is whether the term *contrat* in the expression “*cession de contrat*” should be interpreted as comprising the entities represented by the legal term “*société*” or “*contrat de société*” (b).

a. Focus of discussion, as it is

374. Under the traditional definition of *société* in *code civil*, there is little problem of identifying shares as *positions contractuelles*. However, in 1985 a *loi n° 85-697 du 11 juillet 1985* modified the content of article 1832 of *code civil* whereby the expression “*la société est un contrat par lequel deux ou plusieurs personnes conviennent de mettre en commun des biens ou leur industrie...*” has been replaced by that of “*la société est instituée par deux ou plusieurs personnes qui conviennent par un contrat d'affecter à une entreprise commune des biens ou leur industrie ...*”, which means technically *société* is no longer deemed as a *contrat* but rather as an *institution* created by a *contrat* (*contrat de sociétés*). This change makes the identification of shares as *positions contractuelles* no longer self-evident but rather dependent

²⁶¹ C. CHAMPAUD, *Les fondements sociétaux de la doctrine de l'entreprise*, in *Aspects organisationnels du droit des affaires*, Mél. Jean Paillusseau, Dalloz, 2003, p.119.

²⁶² V. R. J. POTHIER, *Traité du contrat de société*, p. xxi, disponible à <https://play.google.com/books/reader?id=3qZEAAAACAAJ&printsec=frontcover&pg=GBS.PA3>.

upon two conditions: for one thing, whether a company is still identified as a contract; for another, whether a *contrat de société* is successive.

375. - Whether a company is still a contract. Although literally speaking, after 1985 a company (*société*) *per se* is no longer a contract, the majority of French authors still believe that companies are to some extent contract, only that they are also institutions.²⁶³ A noticeable interpretation is that since then the legal notion companies (*sociétés*) would fall into a category of *contrat-organisation*, which is opposed to and distinct from *contrat d'échange* to the extent that in a *contrat d'échange* the interests of the parties are opposed to each other whereas in a *contrat-organisation* the interests of the parties are in the same direction and such a contract is to form an independent organisation having its own interests.²⁶⁴ Under this interpretation, even after the 1985 reform, companies as provided in *code civil* are still *contrat*, yet it is a special one called *contrat-organisation* as opposed to *contrat-échange*.

376. - Whether a *contrat de société* is successive. The previous discussion focuses on the nature of companies *per se*. By comparison, there is also another legal foundation upon which the opinion that shares are *positions contractuelles* can be formed: in identifying shares as *positions contractuelles*, it does not mean that companies are contracts and shares as *positions sociétaires*. Rather, it concerns whether shares are *positions contractuelles* of the contract creating companies (*contrat de société*) and when shares are sold and purchased, it is *contrats de société* that is sold and purchased instead of positions in the companies *per se*.

This interpretation seems to be more adaptable to the text of *code civil* since no matter whether companies are still contracts or not, they are nonetheless explicitly specified as being created by contracts (*contrats de sociétés*). However, this interpretation has been mainly criticized for its ignorance of the nature of instantaneousness of *contrats de sociétés*. M. Anyès contended that the principal obligation of shareholders is “*la création d’une organisation destinée à satisfaire l’intérêt patrimonial ou moral de ses membres, au moyen de*

²⁶³ V. J. –P. BERTREL, *Liberté contractuelle et société, Essai d’une théorie du juste milieu en droit des sociétés*, RTD com., 1996, p. 611; C. CHAMPAUD, *Le contrat de société existe-t-il encore?*, in *Le droit contemporain des contrats : bilan et perspectives*, Economica, 1987, p. 132. *Contra*. R. LIBCHABER, *La société, contrat special*, in *Prospectives du droit économique* in Mél. Michel Jeantin, Dalloz 1999, p. 281: this author believes that *société* is still a contract even after 1985.

²⁶⁴ V. P. DIDIER, *Brèves notes sur le contrat-organisation*, in *l’avenir du droit*, Mél. François Terré, Dalloz-PUF-Litec, 1999, p.635; P. HOANG, *La protection des tiers face aux associations: contribution à la notion de contrat-organisation*, LGDJ, 2000, introduction; J.-F. HAMELIN, *Le contrat-alliance*, Economica, 2012; S. LEQUETTE, *Le contrat coopération: contribution à la théorie générale du contrat*, Economica, 2012.

la poursuite d'un intérêt collectif, distinct de l'intérêt des associés”,²⁶⁵ which is instantly fulfilled after shareholders have payed (*réaliser*) or promised to pay their contributions to the capital (*apport*), ergo the *contrat de société*, whose *position contractuelle* is supposed to be transferred when it comes to purchases of shares, would have already ceased to exist, which makes it impossible to identify shares with *positions contractuelles*. Mme Lacroix-de Sousa, by comparison, opposes the opinion of M. Anyès in that she considers the object of a *contrat de société* is more than just the contributions of capitals and establishment of the institution of a company, which is surely instantaneous. Rather, she believes that the object of a *contrat de société* is identified with *objet social* of the company it has created, which makes it successive and adaptable to have a transferrable *position contractuelle*, which in turn makes it plausible to identify shares with *positions contractuelles*.²⁶⁶

b. Focus of discussion, as we believe it ought to be

377. The existent discussions in France focus on the issue of whether it is appropriate to continue to reduce companies to a contract or to regard *contrats de sociétés* as successive. We believe in fact there is not much substantial divergences among French authors in this regard. For the purpose of determining whether shares are *positions contractuelles*, in our opinion, the issue is rather whether the notion “*contrat*” as is figured in the title of the *section* of *code civil* “*la cession de contrat*” should be interpreted so as to encompass the entities (signified) represented by the terms aforementioned (signifiers).

378. - The fake divergence. At first glance, French authors differ greatly on the nature of companies and the nature of contracts creating them. However, a further analysis would reveal that in essence, they have a similar, if not identical understanding of the process of the establishment of a company: 1. a company is established by a “*contrat de société*” (either by being transformed directly from the *contrat de société*; or by being created by the contract, with the contract ceasing to exist) 2. nearly everyone agrees that both the “*contrat de société*” and the company are different from ordinary contracts (*contrats d'échange*) to the extent that the direction of consents of parties to the former is to the same direction whereas the directions of consents of the latter are opposite to each other; and to the extent that the

²⁶⁵ L. AYNES, *La cession de contrat et les opérations juridique à trois personne*, *Economica*, 1984, n°289.

²⁶⁶ V. S. LACROIX-DE SOUSA, *La cession de droits sociaux à la lumière de la cession de contrat*, *LGDJ*, 2010, n° 177, p. 159s.

former would create a group having a separate interest whereas the latter reflects only the interests of each party.

379. - The real divergence. The real divergence among the authors, as far as this thesis is concerned, is actually whether a company or the contract having created this company (*contrat de société*) should be assimilated or identified with the term “*contrat*” in the section “*la cession du contrat*” of *code civil*, which *prima facie* concerns only *contrat synallagmatique* and seems not applicable to either the company or the *contrat de société*. If the term *contrat* as is understood in the section of *code civil* is interpreted as referring to all bilateral or multi-lateral *actes juridiques*, shares can be identified as *positions contractuelles*; otherwise such an identification would not be plausible.

II. Identification of shares in China

380. Although the identification of shares is of little interest when it comes to purchases of shares in China, the discussions of this topic have been still conducted in several occasions: the earliest discussion occurred in 1994 for the purpose of “SOE reform” whereby former State-owned enterprises were transformed to companies by shares and thus it was necessary to discuss what it meant by shares: in particular, to achieve the goal of separating ownership and management of a company, and in turn to ensure the independent personality of SOEs.²⁶⁷

After that, the nature of shares has been seldom discussed as an independent topic to the extent that we have only found several articles in this regard written during the recent 20 years. In some other topics, the nature of shares may be discussed as a sub-topic: for example, in discussing whether creditors of a company can sue a director of the company on the ground *ut singuli*, an author mentioned that it is necessary to discuss whether shares are credits (*créances*) or not.²⁶⁸ Another example is that in discussing whether it is appropriate to apply the rule related to *bona fide acquisitions* (roughly equivalent to article 2276 of French *code*

²⁶⁷ See P. JIANG et X. KONG, *On shares*, Chinese legal science, Jan. 1994, p. 72 (参见江平孔祥俊, “论股权”, 《中国法学》1994年第1期, 第72页); D. KANG, *A discussion on the nature of shares*, Tribune of Political Science and Law, Jan. 1994, p.67 (康德琯, “股权性质论辩”, 《政法论坛》1994年第1期, 第67页). X. CHENG, *A legal thought on the nature of shares*, Shandong Legal Science, Jun. 1998, p. 7 (程晓峰, “关于股权性质的法律思考”, 《山东法学》1998年第6期, 第7页).

²⁶⁸ See J. CHEN, *On the liabilities of directors of a company towards third parties*, Journal of Comparative Law, May 2013, p. 93 (陈景善, “论董事对第三人责任的认定与适用中的问题点”, 《比较法研究》, 2013年第5期, 第93页).

civil) of shares, an author discussed whether shares can be identified with things as regulated by the “Real Rights Law”.²⁶⁹

These discussions, although not interesting for the purpose of purchases of shares in China, are nonetheless interesting for French readers to better judging the identifications of shares they have made, which are interesting for the same purpose in France. In particular, Chinese discussions of this topic are useful to determine whether the identification of shares as *choses corporelles* (A); as *créances* (B) and as *positions contractuelles* (C) are reasonable or not.

A. Discussions related to the identification of shares as *choses corporelles*

381. We have mentioned *supra* that the discussions of whether shares are *choses* in France is actually for the purpose of determining whether purchases of shares are subject to the legal regime for *vente de choses corporelles* (the general legal regime for *vente* minus the special legal regime for *cession de choses incorporelles*), which in our opinion mostly concerns the contractual relation between parties.

In China, there are similar discussions, yet the purpose is different: it is to determine whether shares are subject to Chinese Real Rights Law, whose scope of regulation is similar to *livre II “des biens et des différentes modifications de la propriété”* plus the *sous-section “effet translatif”* (articles 1196 à 1198) and the *titre “de la possession et de la prescription acquisitive”* of *livre III “des différentes manières don’t on acquiert la propriété”*. In other words, in China, to discuss whether shares are *choses* is for the purpose of determining whether shares can be objects of real rights, and in turn whether shares are subject to some provisions regulating the relation between a right holder and a third party, for example, in case of a purchase of shares from non-eligible sellers (*achat de choses d’autrui*), whether the authentic owner or the innocent buyer should prevail.²⁷⁰ The identification of shares in China has nothing to do with provisions like price or legal warranties, or any other issues whose applicable rules are determined by the identification of shares as under French law. Because the purpose or interests of discussing the topic are actually different in the two countries, we

²⁶⁹ See S. ZHANG, *A challenge to the bona fide acquisitions of shares*, the Jurists, Jan. 2016, p. 131 (张双根, “股权善意取得之质疑”, 《法学家》, 2016年第1期, 第131页).

²⁷⁰ See S. ZHANG, *A challenge to the bona fide acquisitions of shares*, the Jurists, Jan. 2016, p. 131 (张双根, “股权善意取得之质疑”, 《法学家》, 2016年第1期, 第131页).

believe it is worth to note in the first place that a discussion in one country might not entirely transposable to another country.

However, although the purpose of the operations of identifying shares as *choses* are different, the Chinese reasoning and rationales may still be of some interests to French readers. Here, we will present Chinese discussions of whether shares (*droits de associés*) *per se* are in fact ownerships (1); that of whether shares are identified with the certificates representing them (2); and that of whether shares are objects of ownerships (3).

1. Shares as ownership *per se*?

382. Similar to in France, the proposition to identify shares with ownerships is largely obsolete nowadays. But back in the late 1980s, the dominant view was to identify shares with ownerships. This dominant view actually reflected the opinion that states should have a tight control over state-owned enterprises as state as shareholder of SOEs would have a direct control over both the managements and the assets of them if shares were considered as ownerships.²⁷¹

Yet, having realized the necessity of independent personalities of companies and the inevitable incongruity between identifying shares with ownerships and this necessity, Chinese authors have put forward many doctrines trying to fix the problem. Some argue that the companies had their own “rights of management” which guaranteed their independence (thesis of “rights of managements.”).²⁷² Others argue that on top of the ownerships of investors (shares), the companies had also their own ownerships on their assets (thesis of “double-layer ownerships”).²⁷³ However, as we have mentioned, the very existence of the proposition to identify shares with ownerships were caused by the remnant influence of Marxism whereby state-control and intervention in economy is advocated. With the

²⁷¹ See D. KANG, *A discussion on the nature of shares*, Tribune of Political Science and Law, Jan. 1994, p.67 (康德琯, “股权性质论辩”, 《政法论坛》1994年第1期, 第67页).

²⁷² See T. TAN, *A distinction between “rights of managements” and properties of enterprises having the statues of legal person*, Chinese legal science, Feb. 1992 (覃天云, “经营权与企业法人产权辨析”, 《中国法学》, 1991年第2期).

²⁷³ See L. WANG, “On the double-layer structure of enterprises by shares --- a debate with Comrade Guo Freng”, Chinese legal science, Jan. 1989 (王利明, “论股份制企业所有权的二重结构—与郭锋同志商榷”, 《中国法学》, 1989年第1期).

deepening of the reform, nowadays the opinion of identifying shares with ownerships has been largely abandoned.²⁷⁴

2. Shares as identified with their corporeal certificates?

383. We have found little literature in China discussing the thesis to identify the ownerships of certificates of shares with that of shares *per se*, except in one article where Mr. Wang, in advocating the installation of a legal regime for dematerialized securities, indirectly implied that securities in bearer form are presumed to be regulated by Chinese Real Rights Law, which roughly equals to acknowledging their corporeality.²⁷⁵ There are also other authors who might be deemed as implicitly opposing the idea of transposing the corporeality of certificates to shares they represent: for example, an author who advocates to identify shares with ownerships, implied that the existence of corporeal certificates of otherwise incorporeal properties does not change the fact that such properties are incorporeal.²⁷⁶ We believe that this method of identifying shares with *choses corporelles* is not plausible as dematerialization of securities is also the future of China²⁷⁷ which would make it useless at that time to even discuss whether certificates of shares can be identified with the shares they represent.

3. Shares as objects of ownerships?

384. We have also found little literatures discussing the thesis to regard shares as objects of ownerships. However, the essence of French discussion is about whether there can be ownerships on *choses incorporelles* and a similar topic has been widely discussed in

²⁷⁴ In fact, after 1994, rarely would any author advocate that shares are ownerships. This change maybe was marked by the famous article of Professor Jiang. See P. JIANG et X. KONG, *On shares*, Chinese legal science, Jan. 1994, p. 72 (参见江平孔祥俊, “论股权”, 《中国法学》1994年第1期, 第72页)

²⁷⁵ See L. WANG, *The Chinese Real Rights Law and dematerialization of securities*, Securities Law Review, vol. 4 2011, p. 22. (王利明, “<物权法>和证券无纸化”, 《证券法苑》2011年第四卷, 第22页).

²⁷⁶ See A. HUANG, *On the nature of shares --- a remark on paragraph 1 of article 68 of Chinese Real Rights Law*, Journal of Yinbin University, May 2009, p. 69 (黄奥, “论股权的性质---兼评<物权法>第68条第一款”, 《宜宾学院学报》2009年第5期, 第69页).

²⁷⁷ See L. WANG, *The Chinese Real Rights Law and dematerialization of securities*, Securities Law Review, vol. 4 2011, p. 22. (王利明, “<物权法>和证券无纸化”, 《证券法苑》2011年第四卷, 第22页).

China: whether *res incorporals* (*choses incorporelles*) in the Gaian division, i.e. rights²⁷⁸, can be objects of Real rights as defined in the Chinese Real Rights Law.

Because the modern Chinese law was a product of transplantation of various German-style laws,²⁷⁹ which all limit the concept “things”, or the objects of real rights, to “corporeal things”²⁸⁰, most of Chinese authors in the beginning tended to define the concept “thing” as referring to only corporeal things and to consider real rights (literally “rights of things”) able to be established upon only corporeal things (*choses corporelles*),²⁸¹ although there are some authors who advocated that the term “things” should include both corporeal things and incorporeal things.²⁸² Because at that time there was no legislative statutes regulating this issue, neither of the two opposing opinions were *a priori* unreasonable, and thus it was possible to identify shares with things, by firstly redefining the meaning of things as including both corporeal things and rights.

Things changed in 2007. When Chinese Real Rights Law (or literally translated as Law of Rights of Things) was passed in 2007, its article 2 provides that: “the term ‘things’ as defined in this law refer to both movable and immovable properties. If a law specifies that a given right is the object of a real right, such provision shall be respected.” This seems to have eliminated the possibility of a further discussion of this topic since here it contrasts the term “things” with “rights”, which means that in the eyes of legislators, rights are not things and it is only by exception can rights be deemed as objects of real rights and that it is no longer possible to identify shares with objects of real rights without special provisions. For example, *bona fide* acquisition of shares became impossible because shares were excluded from the scope of objects of real rights, which excluded in turn the applicability of article 106 of

²⁷⁸ Chinese authors generally agree that the Gaian concept of *res incorporals* has been replaced by the clearer concept “rights” (*droits*) in modern days. See X. FANG, *The construction and disintegration of gaius’ conception of things incorporeal*, Chinese Journal of Law, Avril 2006, p. 97 (方新军, “盖尤斯无体物概念的建构与分解”, 《法学研究》2006年第4期, 第97页).

²⁷⁹ H. LIANG, *Three ways of thinking on the compilation of civil code*, first appeared in <http://www.iolaw.org.cn/showArticle.aspx?id=223>

(梁慧星, “当前关于民法典编纂的三条思路”, 首发于 <http://www.iolaw.org.cn/showArticle.aspx?id=223>).

²⁸⁰ Article 90 of German *BGB*: “Only corporeal objects are things as defined by law.”; Article 85 of Japanese Civil Code: “The term “Things” as used in this Code shall mean tangible thing.”.

²⁸¹ H. CHEN, *Theory of real rights law*, National School of Administration Press, 1998, p. 49 (陈华彬, 《物权法原理》, 国家行政学院出版社, 1998年版, 第49页); H. LIANG, *Proposals for the compilation of Chinese civil code*, Law press China, 2003, p. 19 (梁慧星, 《中国民法典草案建议稿》, 法律出版社2003年版, 第19页); L. WANG, *Proposals of scholars for the compilation of Chinese civil code and their reasons --- General Provisions*, Law press China, 2005, p. 241 (王利明, 《中国民法典草案学者建议稿---总则编》, 法律出版社2005年版, 第241页).

²⁸² G. XU, *A proposal to a green civil code*, Social science academic press, 2004, p. 8 (徐国栋, 绿色民法典草案, 社会科学文献出版社2004年版, 第八页).

Chinese Real Rights Law (article 2276 of *code civil*), until positive law has recognized, by the technique of legal fiction, the applicability by fiction of article 106 in the context of purchases of shares.²⁸³

B. Discussions related to the identification of shares as *créances*

385. - The usefulness of the identification of shares as *créances*. In the earlier times, the purpose of Chinese authors to identify shares with credits were usually for the purpose of dis-identifying them from being ownerships,²⁸⁴ as at that time the dominant view was that the division between real rights (which usually were identified with ownerships) and rights of credits was exhaustive and in order to dis-identify something from being a real right, it was necessary to identify it as credit. This use has diminished in the recent 20 years as it is now generally acknowledged that real rights and rights of credits are not the only two categories of candidate rights that shares can be identified with.²⁸⁵ Aside from that, we do not believe there is any other use under Chinese law to identify shares with credits, as there is no specific provision specifically for credits.

386. - The method of identifying shares as *créances* that ignores the incongruities. The same incongruities that haunt French partisans of identifying shares as *créances* also exist in China. Mr Jiang has pointed out that the political rights of shares make it difficult to entirely consider shares as rights of demand (*Anspruch*) as it confers their holders a certain degrees of domination (*Herrschaftsrecht*) on the companies.²⁸⁶ The first method to rebut this opposition is to ignore the nature of domination of shares and to deem all political rights attached to shares, even the rights of vote as mere faculties of credit.²⁸⁷ This method is too far-fetched as it obviously deviates from the truth, and not worth our further presentation.

²⁸³ See S. ZHANG, *A challenge to the bona fide acquisitions of shares*, the Jurists, Jan. 2016, p. 131 (张双根, “股权善意取得之质疑”, 《法学家》, 2016年第1期, 第131页).

²⁸⁴ See F. GUO, *A discussion on the ownerships of enterprises by shares*, Chinese legal science, Mars 1988 (郭峰, “股份制企业所有权问题的探析”, 《中国法学》1988年第3期).

²⁸⁵ See P. JIANG et X. KONG, *On shares*, Chinese legal science, Jan. 1994, p. 72 (参见江平 孔祥俊, “论股权”, 《中国法学》1994年第1期, 第72页): the authors believe shares are rights *sui generis*. Z. CHENG, *On the nature of shares*, Journal of Anhui Electric Power College for Staff, June 2001(程宗章, “股权性质刍议”, 安徽电力职工大学学报 2001年第6期): the author believes that shares are *Mitgliedsrecht* (rights of membership).

²⁸⁶ See P. JIANG et X. KONG, *On shares*, Chinese legal science, Jan. 1994, p. 72 (参见江平 孔祥俊, “论股权”, 《中国法学》1994年第1期, 第72页).

²⁸⁷ See J. CHEN, *The nature of shares --- a new theory of identifying shares as credits*, Commercial Research, Jun. 2006, p. 24 (陈建松, “股权性质---新债权论”, 《商业研究》, 2006年第6期, 第24页).

387. - The method of identifying shares with *créances* that acknowledges the incongruities. Another method consisting of acknowledging the incongruities of some faculties of shares, yet claiming that these faculties are nowadays contingent and insignificant in nature, since with the development of the modern managerial capitalism consisting of a trend whereby the power of company governance has shifted from “owners” (shareholders) to managements, small and diverse shareholders have become more concerned in capital-return than the day-to-day operation of the company, which makes them similar to, if not equivalent to creditors.²⁸⁸ The drawback of this argument is apparent: even if the said trend is true, it indicates only that shares of small and diverse shareholders should be identified with credits; as for shares of majority shareholders, they do not lose any traits that identified them as something more than credits.

C. Discussions related to the identification of shares as *positions contractuelles*

388. - A Chinese topic helpful to the thesis of *positions contractuelles*: whether it is appropriate to identify companies with contracts. To identify shares with *positions contractuelles* has never been a popular opinion in China (in fact we believe Chinese authors would be flabbergasted by the very idea of considering purchases of shares as *cession de contrats*) because “transfer of contracts (*cession de contrat*)” is not a useful category to identify purchases of shares with, as this category is not regulated by any rules specific for this category. However, a theory popular in China, although not directly linked to the topic of purchases of shares, may be useful for the purpose of reinforcing the thesis of *positions contractuelles* in France: the contractarian theory of company law.

389. - The purpose of the contractarian theory of company law. The contractarian theory of company law was firstly advocated in 2004 by Mr Luo for more space of “autonomy of wills” in affairs of operation of companies and less legislative interventions. In particular, he pointed out that in a chapter of Chinese Company Law, entitled “the creation and structure of companies by stocks”, among 56 articles, the word “should” appears 43 times; “must” 11 times, “should not” 17 times, whereas the word “may” appears only 13 times, which indicates that: “the fact that the control of the state is so tight and the space left

²⁸⁸ See F. GUO, A discussion on the ownerships of enterprises by shares, Chinese legal science, Mar.1988 (郭峰, “股份制企业所有权问题的探析”, 《中国法学》1988年第3期).

to contractual arrangements is so narrow, is well reflected in Chinese Company Law.” For Mr. Luo, if a company was considered as a contract and company law as a mere special category of contract law, the theoretical foundation of a reform to achieve the aforementioned ends would be laid down.²⁸⁹ The Chinese purpose of identifying companies with contracts is drastically different from its French counterpart: the purpose of French partisans of the thesis of *positions contractuelles*, at least when it comes to purchases of shares, is to advocate that a contract of purchase of shares should be governed by rules of a specific category of legal regime (*cession de contrats*), which has nothing to do with the Chinese purposes. Therefore, the discussions in China might not entirely transposable into a French context. Yet we still believe that the contractarian theory discussed in China can to some extent reinforce the thesis of *positions contractuelles* in France and it is thus still interesting to present this theory for our French readers.

390. - The first key point of the contractarian theory of company law: company is a “nexus of contracts”.²⁹⁰ Back in 1930, Mr. Coase pointed out that firm was an alternative to market, both of which were just types of contracts: the most typical contracts were those concluded by parties in the market; yet this type of contracts would generate “transaction costs” and to save these costs, a series of stakeholders would form a firm, which was basically a series of long-time fixed contracts.²⁹¹ This theory has latter been refined by many American authors and eventually been reduced to what is called “corporate contracts”.²⁹² According to this definition, a company is nothing more than a “nexus of contracts” among a series of stakeholders, such as shareholders, managers, directors, employees or even providers and customers.

391. - The second key point of the contractarian theory of company law: company law is to supplement the manifestations of intentions of the parties. If company is no more than a “nexus of contracts”, why can’t contract law be directly applied to affairs

²⁸⁹ See P. LUO, *The Contractarian theory of corporate law and the justification of rules of company law*, Chinese journal of law, Feb. 2004, p. 71 (罗培新, “公司法的合同路径与公司法规则的正当性”, 《法学研究》2004年第2期, 第71页).

²⁹⁰ See P. LUO, *The Contractarian theory of corporate law and the justification of rules of company law*, Chinese journal of law, Feb. 2004, p. 71 (罗培新, “公司法的合同路径与公司法规则的正当性”, 《法学研究》2004年第2期, 第71页).

²⁹¹ See R. COASE, *Nature of the firm*, *Economica* (journal, not the French press), Nov. 1937, p. 386 (available at <https://www.colorado.edu/ibs/es/alston/econ4504/readings/The%20Nature%20of%20the%20Firm%20by%20Coase.pdf>)

²⁹² See P. LUO, *The Contractarian theory of corporate law and the justification of rules of company law*, Chinese journal of law, Feb. 2004, p. 71 (罗培新, “公司法的合同路径与公司法规则的正当性”, 《法学研究》2004年第2期, 第71页); N. CHEUNG, *The contractual nature of enterprises, in the institution of enterprises and organizations of market*, Shanghai people’s press, 1996, p. 240 (张五常, “企业的契约性质”, 载《企业制度与市场组织》, 上海人民出版社1996年版, 第240页).

concerning companies? In other words, what is the specific use for the existence of a separate company law? The ultimate reason is that the features of a “corporate contract” (or a series of contracts) --- i.e. its long-duration and the special bounding between stakeholders²⁹³ --- make it (or them) in essence an incomplete contract (or series of contracts),²⁹⁴ which needs legislators to lay down specific provisions to fill the gap of consents of parties.

392. - A criticism to the contractarian theory of company law and our criticisms to the criticism. The most noticeable criticism to the theory consists of denying the existence of contractual liberties in company law. Under the logic of this criticism, contract law is marked by contractual liberties and if contractual liberties are lacking in a domain, it cannot be said that this domain is governed by contract law. Partisans of this criticism believe that company law is marked by ubiquitous compulsory rules, and thus company law is not with the category of contract law and company is not contract.²⁹⁵ We believe that this criticism does not hold for two reasons: for one thing, the fact that a contract is subject to many compulsory rules does not automatically change the fact that it is a contract: some contracts are subject to more compulsory rules than others. For another, it is not an established fact that company law should be of the nature of compulsory law, especially when the very reason to advocate the contractarian theory in China is to eliminate the compulsory rules: to use the existence of compulsory rule to demonstrate that company law is compulsory law is thus an invalid circular reasoning.

III. Comparison

393. By comparing discussions of nature of shares in the two countries, we believe an important conclusion can be made: under French law, shares are always *positions contractuelles* (A); sometimes *créances* (B); and never *choses* if the term is interpreted as synonym of *choses corporelles* (C). As for the correct nature of shares under Chinese law, because it is useless for the purpose of this thesis, we believe it would not be too problematic without discussing it.

²⁹³ See P. LUO, *The Contractarian theory of corporate law and the justification of rules of company law*, Chinese journal of law, Feb. 2004, p. 71 (罗培新, “公司法的合同路径与公司法规则的正当性”, 《法学研究》2004年第2期, 第71页).

²⁹⁴ See O. Hart, *Firms Contracts and Financial Structure*, Clarendon press, 1995, p.23.

²⁹⁵ See D. JIANG, *The contractual space in company law: from the logic of contract law to institutional law*, Law science, April 2017 (蒋大兴, “公司法中的合同空间: 从契约法到组织法的逻辑”, 《法学》2017年第4期); See H. HUANG, *Rethinking the Contractarian Theory of Corporate Law*, Law science, April 2017 (黄辉, “对公司法合同路径的反思”, 《法学》2017年第4期).

A. Shares are always *positions contractuelles* under French law

394. The most noticeable obstacle in France that hinders the identification of shares with *positions contractuelles* is the nature of institution of *société*. French authors, in order to overcome this obstacle, tried to identify *société* with either semi-contract semi-institution or as *contrat-organisation*; or tried to demonstrate that the *contrat de société* survives after the creation of the *société*. The contractarian theory of company law as being widely discussed in China provides another way to tackle the problem: under this theory, to identify *société* with institution is not incongruous with the thesis of *positions contractuelles* as institution is nothing more than a “nexus of contracts” among diverse stakeholder. It should be noted that the contractarian theory of company law is different from the French thesis of *positions contractuelle* in one point: under the French thesis, parties to a *société* or a *contrat de société* are other shareholders whereas under the contractarian theory of company law, parties to a “corporate contract” are all the stakeholders, far more than just shareholders.

No matter whether based upon the French foundation that a *société* is a contract among shareholders or that *contrat de société* is successive or upon the theory widely discussed in China that a company is nothing more than a “nexus of contracts”, we believe it is reasonable to identify shares with *positions contractuelles* and accordingly sales and purchases of shares with *cessions de contrats*.

B. Shares are sometimes *créances* under French law

395. Both Chinese and French authors have used one fact as basis for identifying shares with *créances*: the diminishing interests of shareholders in political rights due to the trend of separation of ownerships and managements. However, this argument emphasizing the *caractère accessoire* of the incongruous features and faculties of shares would face a universal problem: the *caractère accessoire* of the incongruities only exist in shares of *bailleur de fonds*. Although nowadays it is true that most of shareholders are just *bailleur de fonds*, the other side of the story should not be ignored: for shareholders holding a certain quantity of shares of any types of companies; and for shareholders of closed companies (*SARL* for example), shares are definitely not only a right of demand for dividends or other

economic benefits. Therefore, to identify shares with *créances* holds only in part of the cases and should not be regarded as a universal conclusion.

C. Shares are never *choses stricto sensu* under French law

396. Comparing with Chinese discussions, we can see clearly that shares are never *choses* under French law, if the term *choses* are considered to be a synonym of *choses corporelles*. For one thing, it is not practicable to find corporeality in shares (1); for another, to reinterpret the meaning of the term “ownership” so as to make *choses incorporelles* as objects of ownerships is useless for the purpose of identify shares as *choses*, if the term is understood as *choses corporelles* (2).

1. Impracticability of finding corporeality in shares

397. French authors tried to find corporeality in shares by either identifying shares with certificates representing them; or by equalizing shares (*droits d'associé*) with ownerships (*droits de propriété*). Unfortunately, neither of them is plausible.

398. - The impracticability of identifying shares with certificates representing them. Even if this thesis is in an abstract sense reasonable, the doomed destiny of dematerialization of securities would deprives any interests of further discussion of it.

399. - The impracticability of identifying shares with ownerships. Authors of both countries believe that this thesis ignores the independent personality of a company has only historic values and we need thus no further discussion of it.

2. Uselessness of demonstrating *choses incorporelles* as objects of ownerships

400. The most seemingly plausible method come up with by French author for the purpose of identifying shares with *choses* consists of demonstrating that *choses incorporelles* is possible to be objects of ownerships. This is also how Chinese authors tried to demonstrate that rights can be objects of Chinese Real Rights Law. However, the very existence of the *chapitre “du transport de certains droits incorporels, des droits successifs et des droits litigieux”* makes it impossible to achieve the same end in the French context.

We have mentioned that after 2007 when Chinese Real Rights Law took effects, authors have generally ceased to discuss whether rights (*choses incorporelles*) can be objects of real rights, as the Law provides that only by specific legal provisions can rights be objects of real right, thus excludes rights from the scope of objects of real rights in general occasions. And the term “things” is generally understood as a synonym with “objects of real rights”, thus it is clear that shares are not things. However, we believe if an author does want to demonstrate that shares are objects of real rights, it would not be entirely impossible, since there is only one statute --- Chinese Real Rights Law that deals with the issues it regulates; if there is also another statute explicitly governing the same issues in “rights” (for example the mode of transfer of rights, the protections of rights, etc.) it would be useless, if not impossible to identify shares with objects of Real Rights.

However, under French law, there is a *chapitre* specifically provided for *choses incorporelles*. In France, by admitting the possibility of ownerships on “*choses incorporelles*”, it is possible to subsume shares (or any other *choses incorporelles*) under the category of “*choses*”, if the term “*choses*” is defined as objects with ownerships on them. Yet this operation is useless, since it demonstrates nothing more than what appears in the head of compilers of *code civil*: *choses* are divided into *choses corporelles* and *choses incorporelles* and accordingly *ventes* are divided into *ventes de choses corporelles* and *cession de choses incorporelles*; and accordingly it is true that shares are *choses* and purchases and sales of shares are *vente*, yet shares are *choses incorporelles* and purchases and sales of shares are *cession de choses incorporelles*. If the term “*choses*” is understood as a synonym of “*choses corporelles*”, obviously it is never possible to identify shares with “*choses*” in this sense.

Conclusion of Section II

401. Although the topic of identification of shares has no particular practical interests in China for the purpose of the main topic of this thesis, some doctrinal discussions in China are still helpful to French readers for the purpose of better understanding the identification of shares, which is interesting in the French context. In particular, by consulting relevant Chinese discussions and situations, it is safe to conclude that under French law, the category of *positions contractuelles* is the most appropriate one to identify shares with; sometimes, *créances* can also be a hypernym of shares, yet not always; and under no condition would it

correct to say that shares are *choses*, if the term “*choses*” is understood as referring to only *choses corporelles*.

Conclusion of Chapter I

402. This chapter has demonstrated that the identification of shares, i.e. to assimilate shares as what existing legal category, is not an inherently inevitable sub-topic for the purpose of discussing the main topic purchases of shares. In fact, the necessity of discussing this topic indicates for one thing the existence of an unnecessary judicial intervention and the lack of necessary contractual liberties in France, given that purchase is in essence a contractual operation and the features of shares requires especially contractual liberties. And for another, even if we are to admit the necessity of discussing the applicability of rules in some occasions, it indicates an insufficient use of the methodology of “legal fiction”, which would focus on the real issues about the applicability of a given rule into the context of a given legal category.

However, if we limit ourselves within the system of French positive law, we believe to identify shares with an existent category in order to realize some effects is a plausible approach. Although the identification of shares is not of much interests for purchases of shares in China, discussions of this topic do exist in China, and they are beneficial for French readers to better understand the identification of shares under French law. In particular, Chinese experience has helped us to reach a conclusion that under French law, shares are always *positions contractuelles*, sometimes *créances* and never *choses*, if the term “*choses*” is understood as *choses corporelles*.

Chapter II. Originalities of shares

403. Compared with other objects of purchases, shares have their originalities (Section I), which makes their purchases exposed to special problems and needs (Section II).

Section I. Presentations of the originalities

404. What makes shares different from other objects of purchases, as we believe, is their value. The value of shares is different from value of other objects in two aspects: for one thing, it is difficult, if not entirely impossible, to determine the value of shares (I). For another, even if we assume that what is the value of shares has been unambiguously agreed upon, the value of shares is particularly difficult to be maintained or reserved by their new owners after their transmissions (II).

I. Inherently undeterminable value

405. The first feature of the value of shares crucial for the purpose of this thesis, is its inherent difficulty to be determined. The difficulty comes from two problems. The first problem is that there is no reliable method to know in advance all the information necessary to determine the value (A). The second, on the other hand, concerns a more fundamental question: what it means by the expression “value of shares” (B).

A. Epistemological difficulties in determining the value

406. - Information and the determination of value of shares. As we would present *infra*, the value of shares is inherently subjective, meaning that shares have different values to different persons. Therefore, in order to determine the value of shares, a buyer need to know all the information necessary to make a reasonable judgement as to the value of shares, since according to the “efficient-market hypothesis”, the price of assets in a perfect market should reflect all available information.²⁹⁶ This hypothesis applies to only efficient market where there are plenty of buyers and sellers in the market and the law of the supply and demand is effective. Obviously, the shares as discussed in this thesis do not belong to the category having an efficient market. However, *a contrario*, we can also say that if all information about the shares of a company is available in the market, the value of shares (or its efficient price) can be determined by a rational buyer.

Unfortunately, two obstacles prevent the full acquisition of necessary information to determine the value of shares. For one thing, such information may be too complicated to be

²⁹⁶ See. E. FAMA, *Efficient capital markets: a review of theory and empirical work*, Journal of Finance, vol. 25, 1970, p. 383.

all acquired (1). For the other, even if in an abstract sense it is possible, the inherent asymmetry of information would inhibit it (2).

1. Complexity of information

407. Information necessary to make a sound judgement as to the value of shares may be too much to be all acquired (i). On top of that many essential information may not be objectively available yet when the shares are acquired (ii). Finally, the fact that the same information may change greatly and rapidly also contributes to the difficulties in determining the value of shares in advance (iii).

i. Quantities of information

408. The sheer volume to determine the value of shares is sometimes beyond the limit of human ability to acquire. In fact, not only the factors traditionally considered to be relevant to the value of shares like the figures in balance sheet or income statements, the pending litigations or the proportion of shares acquired²⁹⁷ are necessary to determine the value of shares. In our opinion, many other factors seemingly irrelevant to a target company may actually affect the value of its shares, sometimes even being the main factors. For example, the ban of scooter may seem to have nothing to do with the value of shares of a company running a restaurant in a small town. Yet in fact, the ban of scooters in many Chinese cities has severely jeopardized the ability of courier to deliver an article “in the last kilometre”,²⁹⁸ which would in turn affect negatively the profit-making capability of an e-commerce retail company located in a small town relying on express delivery to deliver commodities to its customers, which in turn reduce the spending capability of the boss and employees of the retail company and eventually reduce the profit-making capability of a restaurant relying on the retail company and the value of shares of the company operating the restaurant. In fact, the chain of butterfly effects can go endless that a seemingly random event may be crucial to determine the value of shares, which means that it is firstly even impossible to identify what information is necessary for the determination of value of shares.

²⁹⁷ Proportion of shares acquired determines the power of control, which may provide a certain control premium. V. J. PAILLUSSEAU, *La cession de contrôle et la situation financière de la société cédée (de la nature juridique du contrôle et de la cession de contrôle)*, JCP 1992, n°29, p.191; J. HONORAT, *La prime de contrôle ou quand deux et deux ne font plus quatre, Propos impertinents du droit des affaires*, in Mél. C. GAVALDA, Dalloz, 2001, p. 147.

²⁹⁸ The most severe ban on scooters in Shenzhen in history has severely jeopardized the industry of express delivery (“深圳启动‘史上最严’禁摩限电令 快递企业受重创”) at: <http://www.chinanews.com/business/2016/04-02/7821250.shtml>

ii. Unavailability of information

409. Even if a particular information necessary to determine the value of shares is identified, it is possible that the information is not able to be revealed, either because the relevant event involved has not yet occurred (a); or that even if the event has occurred, it is not known to anybody yet (b).

a. Unavailability due to incompleteness

410. Sometimes, it is known that a pending event would have a startling effect on the value of shares of a company, yet the exact effect is not yet known because the event has not yet occurred or has not yet finished. For example, a risky project that the company is being engaged in whose success or failure is not yet certain. In fact, the most typical example is a pending litigation: if the company loses it, the value of shares would certainly decrease whereas otherwise it will increase or remain the same. Yet because the outcome of the litigation is not yet known, it cannot be transformed into the information to evaluate the shares.

b. Unavailability due to unawareness

411. Other times, an event that would gravely affect the value of shares of a company has already occurred, yet this occurrence is not yet known to anybody.²⁹⁹ This unawareness is often caused by the fact that the accounting statement used to determine the value of shares is from the last financial year (*exercice comptable précédent*).³⁰⁰

iii. Volatility of information

412. Another problem is that even if all information necessary to determine the value of shares is well known, they are inherently instable due to the very nature of the operation of

²⁹⁹ V.J. PAILLUSSEAU, *La cession de contrôle et la situation financière de la société cédée (de la nature juridique du contrôle et de la cession de contrôle)*, JCP 1992, n°4, p.186.

³⁰⁰ V.J. PAILLUSSEAU, *La cession de contrôle et la situation financière de la société cédée (de la nature juridique du contrôle et de la cession de contrôle)*, JCP 1992, n°13, p.188.

companies: as long as a company is in business, the figures in its accounting statements is sure to change, which in turn makes its value change.

2. Asymmetry of information

413. If the lack of information that we have just mentioned disturbs everybody equally, there is a special kind of lack of information that disturbs only the buyer of shares of a company: being an outsider of the target company, the buyer does not have access to certain crucial information available to an insider of the company, such as the seller. In fact, a main subject of this thesis is to discuss how to enforce sellers to disclose such information that he has possessed to buyers of shares; in other words, whether such an obligation should be legal or whether it should be a purely conventional product.³⁰¹

B. Ontological difficulties in determining the value

414. - The persons affected by the ontological difficulties: judges or arbiters. The expression “ontological difficulties” as we employ here signifies the difficulties as to even nail down the exact definition of the word “value” in a linguistic sense, as it has multiple meanings. If the epistemological difficulties as have been already presented affect mainly the parties, the ontological difficulties to be discussed here concern mainly third-party evaluators. This is easy to understand: If we roughly understand the word “value” as meaning “the power of something to achieve a particular purpose”, the buyers of shares are often sophisticated merchants and are well aware of their purpose of buying shares. If the shares fail to achieve the supposed purpose, from the perspective of buyers, the shares do not have the presumed value. However, the mere fact that buyers are well aware of his expectation of value of shares is useless as far as the resolution to disputes is concerned. When a dispute arises as to whether the value of shares has fulfilled their buyer’s expectation, it is the one who has the jurisdiction over the dispute that should find out the initial expectation of the buyer. Unfortunately, this is not an easy task for the judge or arbiter.

³⁰¹ As we would expound *infra*, to disclose information to buyers is tantamount to assume obligations of *garantie de revision de prix*. And thus, a legally compulsory disclosure of information equals to inflict a heavier burden on sellers of shares. *Contra*. D. DANET, *Cessions de droits sociaux : information préalable ou garantie des vices?*, RTD com. 1992. p. 315.

In our opinion, this kind of difficulties are inherent in the task of retrospectively finding out the initial expectation of value of buyers (1). However, in ordinary things, the difficulties seem to have been well solved (2). Unfortunately, shares are not ordinary things and thus are still disturbed by such difficulties (3).

1. Inherent difficulties in the determination of value

415. The value of a thing can be determined by different approaches (i). The different approaches make the word “value” a polyseme and thus to determine the value of a thing, the first step is to verify in which sense the parties initially tended to use the word (ii). If it turns out to be a subjective approach that has been used, the subjectivity of the value would make it difficult to ascertain the exact amount of the value initially agreed upon by the parties (iii).

i. Different approaches of determining value

416. To an average Joe, the value of something is the benefit that a thing can produce for him. In particular, the benefit can either be a direct use of the thing (value in use), or the possibility to trade it for something else (value of exchange). No matter what the benefit is, for the purpose of this thesis, the benefits should be measurable in currency, in order for a buyer to know whether his payment is worth it. For a long time, to measure benefits faces two obstacles: for one thing, the use of the thing and the use of currency are not directly comparable; for another, the rate of exchange between a thing and the currency (exchange value or price), especially the mechanisms of its coming about, is always a myth.

To solve the obstacles, many theories have been come up with, which can be roughly divided into two categories: the ones advocating a subjective value (a) and the ones advocating an objective value (b).

a. Theories of subjective value

417. Theories of subjective value are numerous and sophisticated.³⁰² But for the purpose of this thesis, all we need to know is that all advocates of this kind of theories believe the concept “value” is a purely subjective feature of a thing instead of intrinsic to it, determined purely by “the importance that an acting individual places on a good for the achievement of his desired ends.”³⁰³ This kind of theories solve perfectly the two obstacles in measuring values.

418. - For one thing, the utility of a thing can be measured by the currency that a person is willing to sacrifice in order to acquire it. For example, if I am willing to give away 80 euros in exchange for the book “*les conventions sociétaires*” written by M. Mousseron, the value (or the value of use; utility) of this book is 80 euros to me. Similarly, if I would be willing to pay the same price to a cow and three sheep, it indicates that the utility of a cow and the utilities of three sheep, to me, are equivalent.

419. - For another, the value of exchange of a thing can be measured by the value of use plus a certain surplus. It should be noted that because the notion utility or value of use is a pure subjective one, the value of the book may be higher or lower than 80 euros for someone else. Let’s assume that the book, while worth 80 euros to me, is worth 100 euros to a student preparing an incoming examination. The difference of our utilities is thus 20 euros: I would be willing to give away this book in exchange for an amount of currency more than 80 euros whereas he is willing to give away less than 100 euros in exchange for this book. After a certain process of bargaining, we would reach a price somewhere between 80 euros and 100 euros. The exact location in the range is determined by our respective bargaining power, in turn determined by various factors such as rarity of the book.³⁰⁴ For me, the value of exchange of the monograph would be my subjective utility (value of use) plus a surplus fixed between 0 and the entire difference of 20 euros.

b. Theories of objective value

³⁰² See G. J. STIGLER, *The Development of Utility Theory. I*, vol.58 Journal of Political Economy 1950, p. 307-327.

³⁰³ See C. Merger, *Grundsätze der Volkswirtschaftslehre (Principles of Economics)*, trans. J. DINGWALL et B. F. HOSLITE, Ludwig von Mises Institute, 2007, p. 120.

³⁰⁴ M. J. Mousseron has pointed out that the two factors determining *valeur* is *utilité* and *rareté*. V. J. M. MOUSSERON, *Valeur biens droits*, in Mel. A. BRETON et F. DERRIDA, 1991, p. 278, n° 6.

420. In contrast to the theories of subjective value, various theories of objective value advance the idea that instead of pure subjective preferences, it is some features or factors inherent to a thing that determines the value of the thing, including both its value of use and value of exchange.

421. - The objective use-value.³⁰⁵ Contrary to the subjective theories of value, the Marxism theory, as the most famous theory of objective value, argues that it is impossible to measure the utility of a thing in currency. According to Karl Marx, utility of a thing, or in a Marxism term “use-value” (*Gebrauchswert*) is one of two distinct characteristics of a commodity, with the other one being the “value” (*Wert*). For him, the “value” of a thing reflects the embodied or materialized “human labours”, which can be represented in a “money-form”. On the other hand, “use-value”, i.e. the want-satisfying power of a thing, is intrinsic to it and cannot be represented by money or anything else. For example, even if in the market, both a cow and three sheep can be sold at the same price, it is wrong to say that the use-value of a cow equals to the use-value of three sheep; the use-value of a thing is not comparable to that of another.

Although the “use-value” of a thing and its “value” does not have a “causal relation”, the two do have a “correlation”, as both being intrinsic characteristics of a commodity: for a given commodity, it is certain to have a particular use-value and a particular value; therefore, for a given use-value, it corresponds to a given value measurable in a given amount. Thus, if we are able to identify a particular use-value, we are always able to also identify a fixed value, which can be represented by money. For example, the use-value of the book “*les conventions sociétaires*”, although not determining its “value”, is sure to be accompanied with a particular value (say, 80 euros, which according to Karl Marx reflects the labours dedicated by M. Mousseron to the book).

It should be noted that the “use-value” as mentioned here should be distinguished from the “utility” as mentioned in the subjective theories of value. The latter (subjective utility) refers to a subjective evaluation by a particular person over a thing about its power to satisfy one of his particular desire. This power varies according to different people as they have different appetites and needs. By contrast, the former (objective use-value) designates a

³⁰⁵ See K. MARX, *Das Kapital*, vol. I, People’s publishing house, 2004, p.47-101 (卡尔·马克思, 《资本论第一卷》, 人民出版社 2004 年, 第 47 至第 101 页).

“general utility” independent of the particular needs of a particular person. This “general utility”, as we believe, can be roughly understood as a synonym of the expression “*usage auquel on la destine*” as provided in article 1641 of French *code civil*.

422. - The objective value of exchange. Contrary to the subjective theories of value, under Marxism, the value of exchange (*Tauschwert*) of a particular thing, rather than being determined by the subjective utilities of two parties and their respective bargaining power, is determined by an intrinsic characteristic: the “value” of the thing. As has been mentioned, the “value” of a thing is defined as the materialized “socially necessary labour time” for producing such a thing and this definition provides the basis for the relation of exchange between different things: the rate of exchange between different things reflects actually their respective contents of “materialized socially necessary labour time”. If a cow can be traded for three sheep, it is because it takes the same amount of socially necessary labour time to raise a cow and to raise three sheep. Generally, the value of exchange is represented by a certain amount of money.

It should be noted that the value of exchange of a thing is not tantamount to its price. Price is the actual amount of money that a thing is able to be traded in the market whereas the value of exchange is a mere rate of exchange based upon the “value” of two things. However, generally speaking, the price of a thing would reflect its value of exchange and in turn its “value”; and the price would fluctuate around the value.³⁰⁶

If we do not quibble about the difference between “price” and “value”, the subjective theories of value would also dictate an objective value, or objective price. The subjective value of exchange of a seller, as we mentioned would be an amount between the quantified subjective utility of a seller and the quantified subjective utility of a buyer. If there is only one buyer and only one seller, the exact amount of the subjective value of exchange, or the price, would be somewhat arbitrary. However, often in the market there are multiple buyers and sellers of a series of things serving similar functions, and through the competition, quantities of supply and quantities of demand would balance at a fixed price.³⁰⁷ This “competitive price” or “market clearing price” is no longer arbitrary, but somewhat independent of the influence

³⁰⁶ See the entire book of *Das Kapital vol. 3* which focuses on the transformation of value into price. K. MARX, *Das Kapital*, vol. III, People’s publishing house, 2004 (卡尔·马克思,《资本论第一卷》, 人民出版社 2004 年).

³⁰⁷ See D. N. DWIVEDI, *Microeconomics: Theory and Applications*, 12 ed., Wiley, 2014, p. 50.

of a single person. To a random buyer, the price of a thing would thus seem to be a fixed one. Although the market clearing price under theories of subjective value and the value of exchange under Marxism is not entirely the same, to the extent that both of them are objective amount irrelevant of the influence of a particular person, for the purpose of this thesis, we believe we can roughly treat them as the same thing.

ii. Difficulties associated with the polysemy of the word “value”

423. - A reiteration of the different meanings of the word “value”. As we have just presented, the word “value” can be used to refer to (1) an objective use-value (the general utility of a thing); (2) an objective value of exchange (roughly equalling to an objective market price of a thing); (3) a subjective utility measurable in currency (the cost that a person is willing to suffer in order to acquire a thing); and (4) a subjective reselling price (the possible profits one can receive by trading a thing after he has acquired it).

424. - The reason why the multiple meanings of the word “value” poses problems to the determination of value. If without the help of any conventional stipulations, when a dispute arises, the judge or arbiter is objectively impotent to conjecture what the original manifest intent (*“manifestation de volonté”*) of the buyer was, simply because there are varieties of possibilities: buyer could have meant any of the four significations of the word “value”.

425. - The problem of ascertaining the choice between “use-value” or “value of exchange”. Particularly, the judge or arbiter would have a difficulty in ascertaining whether in the beginning buyers manifested to acquire the thing for the purpose of use it, or to resell it. If it is the former, the focus would be that the thing should be able to be used according to the standard chosen (the standard varies depending upon the subjective or objective approach) whereas if it is the latter, the focus would be on the whether the thing has defects that prevent the thing to be resold in the market at the price agreed (the price may varies depending on the subjective or objective approach).

426. - The problem of ascertaining the choice between objective value or subjective value. In addition, the judge or arbiter would face a problem of finding out whether the buyer meant objective value or subjective value in the beginning. If it has been

established that it is the objective values that the buyer meant in the beginning, things would be easy as objective values of a thing is always clear. By contrast, if it is demonstrated that what buyers meant are subjective values, things would be much more complicated.

iii. Difficulties associated with subjective values

427. - If the value is demonstrated to be a “subjective utility”. Because subjective utility is in essence the subjective satisfaction of a subjective purpose of a buyer, in order to ascertain whether a thing has lived up to its expected value, the judge or arbiter needs to know what is the subjective purpose. The problem is that the list of possible purposes of the same thing can go inexhaustible. For example, a cow can be used to get milk, killed for food or for its leather, put on a yoke of plough, etc. The endless possibilities make it nearly impossible for the judge or arbiter to really confirm what utility the buyer really expected in the beginning.

On top of that, under the theories of subjective value, the utility of a thing is measured in the currency that a person is willing to sacrifice in order to acquire the thing. However, the initial amount of money that a person is willing to pay for a thing, unless noted down in a conventional clause, is nearly impossible to be established, especially by a third party like judges or arbiters.

428. - If the value is demonstrated to be an “expected reselling price”. Things get even trickier when the purpose of a buyer is found to be for resell the thing. Here, under the theories of subjective value, the thing can only live up to its value if it can be resold at a higher price expected by the buyer. Obviously, this one is more difficult than the already impossible-to-find “subjective utility”.

429. - Subjective values inherently inadaptable to be ascertained by judges or arbiters. We can see that subjective values, due to their lack of an objective amount, is inherent inadaptable to be ascertained retrospectively by judges or arbiters. This is why legal protections in every country exclude them from the protections *de plein droit*.

2. Simplicity of the determination of value of ordinary objects

Although for a judge or arbiter to ascertain the initial expectation of value of the buyer of a thing is inherently difficult, in the ordinary trading of ordinary objects, the difficulties do not pose much problems.

430. - In ordinary trading of ordinary objects, the objects are acquired for use instead of reselling at a profit. In most of daily trading for objects, the buyers are for the purpose of acquire something to use. Retailers in every corner of the world make only a small portion of all buyers of things. Thus, in ordinary things, when it comes to define the word “value”, usually it means only the utility of a thing.

431. - In ordinary trading of ordinary objects, the value is presumed to be an objective value. Because of the large quantities of ordinary objects, there is usually a perfect market for them where the law of supply and demand applies, along with market prices. This means that no matter how much utility a thing can bring to a person, he can always acquire it in the market at a fixed price; and that subjective value is identified with objective value, and in turn identified with a fixed price. For example, no matter what is the utility of a cow to me, I can always buy a cow in the market at a certain price; thus, no matter whether under an objective theory or subjective theory, the value of a cow is the same to me.

3. Difficulties of the determination of value of shares

432. Unfortunately for buyers of shares, all factors that make the determination of value simple in ordinary things are lacking in shares, thus to determine a buyer’s initial expectation of the value of shares is a difficult task for judges and arbiters. In particular, compared to ordinary objects of purchases, shares do not have fixed objective values (i) and instead have only unverifiable subjective values (ii).

i. Absence of objective values

433. Shares have neither an objective use-value (a) nor an objective value of exchange (b).

a. Absence of objective use-value

434. By objective use-value, we mean the general utility that the society normally assign to a particular thing. However, shares do not have such a general utility, at least not a clear one. Because shares are used to control a company, we can roughly equalize the value of shares with value of companies. However, the problem is that the companies do not have clear general utility either, whether we regard them as a collection of assets or as undividable entities, or in other words, no matter what the motives of the buyers to buy the shares are.

435. - **Lack of clear objective use-value of companies in an atomistic sense.** If we treat companies as collections of different items, material or immaterial, plus liabilities, to have a company or shares of a company is tantamount to have a series of items along with a bunch of debts. This seems that we can identify the value of a company and its shares by identifying firstly each and every item in the patrimony of the company; and if the value of each and every constituent (assets and liabilities) can be easily identified, the value of the company can also be identified.

This view is to some degree reasonable as many constituents of the patrimonies of companies do have objective use-value. However, this view has also oversimplified the situation, as many assets in the patrimony of the companies do not have use-value that corresponds to a fixed value of exchange: the most typical example is immaterial assets like clientele or reputations. As M. Danet has pointed out: “*S'agissant de l'évaluation des éléments incorporels, celle-ci se caractérise à l'évidence par la luxuriance des techniques proposées dont certaines font un large appel au « coefficient multiplicateur », formule cabalistique d'allure raffinée mais dont la parenté avec le rustique pifomètre n'est pas douteuse.*”³⁰⁸ Because many constituents of companies do not have objective use-value, the companies in their unities do not have objective use-value either.

Some authors believe that the only reason why shares do not have objective value is because of the individual personalities of companies.³⁰⁹ Here we can see that this is not the only reason as even if we allow the obstacle of individual personalities to be removed, the use-value of companies are still not clear enough to be evoked in a legal sense. We agree what has said by M. Danet: “*Le problème est de nature économique et il est indifférent qu'il*

³⁰⁸ D. DANET, *Cessions de droits sociaux: information préalable ou garantie des vices?*, RTD com. 1992. 315.

³⁰⁹ V. M. CAFFIN-MOI, *op. cit.*, n° 483.

s'agisse de cession de parts ou de cession de fonds.”³¹⁰

436. - Lack of clear objective use-value of companies in a holistic sense. If we treat companies as undividable entities, they lack *a fortiori* objective use-value. Companies can be regarded as a chain in a process of production; and also as a cash-flow provider. Yet the vague description of use-value, as we believe, is of little use, if not none: to say the objective use-value of a company is to operate and to generate cash-flow, is the same as to say the value of a box is that it contains some items and once in a while it can produce new items, without specifying what items are inside and how many new items can be produced. In an extreme sense, in spite of the fact that every company has different main business and generate different cash-flow, as long as a company is legally registered, its shares are worth its objective use-value.

b. Absence of objective value of exchange

437. Except for shares of companies listed in securities exchange, neither shares with negotiability (*actions*) nor shares without such a characteristic (*parts sociales*) have a concrete value of exchange: for one thing, shares do not necessarily contain any “socially necessary labour force” and thus do not have “value” under Marxism theory and in turn no objective value of exchange; for the other, under the theories of subjective value, because they are not “over the counter”, they lack a perfect market where the law of supply and demand is applied and in turn there is no market clearing price. As M. Danet has pointed out: “*La firme a vocation naturelle à être composée d'actifs spécifiques, c'est-à-dire de biens corporels et incorporels dont le prix d'acquisition ou de réalisation sur le marché des biens professionnels serait faible comparé à leur valeur productive.*”³¹¹ Although we do not necessarily agree that the price of shares, coming into being only in every single sale and purchase, is necessarily lower than the “*valeur productive*”, we do believe that shares do not have an objective value of exchange and the eventual price reflects in fact the bargaining powers of the parties to such a sale and purchase.

ii. Unverifiability of subjective values

³¹⁰ D. DANET, op. cit.

³¹¹ D. DANET, *Cessions de droits sociaux: information préalable ou garantie des vices?*, RTD com. 1992. 315

438. In buying shares, it is certain that the buyer would have a subjective evaluation of the shares. However, such an evaluation is unverifiable by judges or arbiters for two reasons: firstly, shares may be bought for varied motives, which reflects different methods of evaluation (a); secondly, even for the same motive, the sacrifice that people would like to suffer varies greatly (b).

a. Different motives

439. Those who would like to acquire shares of a company may be for the purposes of either controlling the company; or receiving future cash-flows; or reselling them in the future.³¹² Each of the purposes correspond to a different method of evaluation.³¹³ If shares are bought for the purpose of controlling a company, what is to be concerned to evaluate the shares is the functions that the company can serve minus liabilities assumed by the company. If shares are bought for future cash-flows, only the operation of the company and its potential is relevant. If shares are bought for a future resale at a profit, the factors just mentioned are to be concerned, yet usually what needs to be concerned more are other external factors like the bargaining power of the potential buyers, the rarity of the shares, even the bulbs in the market.³¹⁴

b. Different preferences

440. Two buyers willing to buy the same shares for the same purpose, may evaluate the shares differently. For example, both for the purpose of acquiring the business of an automobile producing company, two buyers may be willing to pay different prices: it is very possible that the company has only a negative value in the eyes of one buyer, yet are very valuable in the eyes of another. And for the purpose of paying less the one who evaluate highly the company may pass off as someone who view the company as worth nothing. It is nearly impossible for judges or arbiters, without the help of conventional stipulation, to tell a buyer who evaluate highly the company from a buyer who does not.

³¹² For an inexhaustive list of possible motives for a purchaser of shares, v. J. PAILLUSSEAU, *La garantie de conformité dans les cessions de contrôle*, JCP E 2007. 1238, n° 2.

³¹³ V. A. COURET et al., *Les contestations portant sur la valeur des droits sociaux*, Bull. Joly sociétés 2001. 1045 ; D. DANET, *Cessions de droits sociaux: information préalable ou garantie des vices?*, RTD com. 1992. 315; T. LAMBERT, *Le prix de cession des actions et parts sociales*, thèse Nancy, 1991, n° 22, p. 17.

³¹⁴ M. Mousseron has listed a series non-judicial factors to be considered in evaluating shares. Here, we have categorized them according to different motives of acquisition of shares V. P. MOUSSERON, *Les facteurs juridiques dans l'évaluation des droits sociaux*, RJDA mars 2006.

To sum it up, because there is no objective value of shares, it is very difficult to verify by judges or arbiters retrospectively what is supposed to be acquired by a particular buyer.

II. Inherently unmaintainable value of shares

441. It is one thing that something has value and another thing that such a value can be maintained. Therefore, even if we suppose that the value of shares is able to be ascertained and thus set aside disputes arising therefrom, there is still a problem unique to shares that needs to be addressed: the value of shares is much more difficult to maintain than other objects. The unmaintainability of the value of shares is mainly caused by the fact that unmaintainable assets (A), more often than not, constitute an important portion of the patrimony of the company issuing the shares (B).

A. Unmaintainability of some elements

442. By unmaintainability, we mean the difficulty to maintain the value of an object without much additional efforts (1). In the patrimony of a company, there are many elements that fit this description (2).

1. Criteria for unmaintainability

443. - Two methods of maintaining the value of an object. Any object having *utilité et rareté* is of *valeur*.³¹⁵ In order to preserve the said object and to maintain its value, the “owner” has two options: he may either simply use “*moyens de fait*”³¹⁶ that physically make it impossible or difficult for others to interfere with the objects; or he may resort to *l'intervention sociale* or *l'intervention juridique*, if available, that prevents others from interfering with the objects.³¹⁷

444. - Criteria for unmaintainability. As there are two methods to maintain the value of an object, we would describe the value of an object as unmaintainable only when

³¹⁵ V. J. - M. MOUSSERON, *op. cit.*, n° 4.

³¹⁶ V. J. - M. MOUSSERON, *op. cit.*, n° 4 et 7.

³¹⁷ V. J. - M. MOUSSERON, *op. cit.*, n° 7. According to M. Jean Mousseron, for an object of *valeur*, if the corresponding mechanisms of *l'intervention juridique* exist, the object becomes a *bien*.

neither the physical measure nor the legal measure is sufficient. Here, we believe it is necessary to explain what we mean by legal measures. The expression equivalent to “legal measure” that M. Jean Mousseron uses is “*l’intervention juridique*”, which includes both the measures *de plein droit* and the measures established by conventional stipulations.³¹⁸ However, here we will interpret the expression “legal measure” in a restrictive way, so as to exclude all measures deriving from conventions of the parties, because conventional measures are usually not necessary in maintaining the value of objects other than shares and that what we present here is about problems whereas conventional measures are more suitable to be addressed in paragraphs dedicated to solutions. Therefore, by our criteria, as long as the value of an object cannot be sufficiently protected either by resorting to physical measures (like hiding a corporeal thing in a cave³¹⁹ or keep a valuable information as a secret³²⁰) or by resorting to legally prescribed foundations (like the *droit de suite* and *droit de préférence* of *droits réels*), we will say that the value of the object is unmaintainable.

2. Elements of unmaintainability

445. In the patrimony of a company, it should be acknowledged that many of its elements are maintainable to the extent that they can be easily protected either by physical measures (for example, possession of the corporeal elements and keeping confidential the incorporeal elements belonging to the category of business secrets); or by legal measures (claims based upon *droit de suite* or upon foundations in liability law). However, there are still some elements whose maintenance is in peril. Here, it general concerns a problem that after a transfer of control of a company, the seller can easily usurp the valuable elements to the detriment of the target company, as M. Danet has pointed out that it is a “*pratique des cessions de fonds ou de droits sociaux dans lesquelles les cessionnaires acceptent d’acquérir, pour une part essentielle du prix, un actif évanescent qui peut disparaître de lui-même ou sous l’action d’un concurrent dynamique sans que le cessionnaire ne puisse opposer un droit né de la transaction*”.³²¹

These unmaintainable elements are usually “*actifs incorporels*” that provide the

³¹⁸ V. J. - M. MOUSSERON, *op. cit.*, n° 10.

³¹⁹ V. J. - M. MOUSSERON, *op. cit.*, n° 4.

³²⁰ V. J. - M. MOUSSERON, *op. cit.*, n° 8.

³²¹ D. DANET, *op. cit.*

target company with “*un avantage concurrentiel*”.³²² Two typical examples are business secrets and clientele, the violation of both of which is usually embodied in a competition by the seller of shares. We can see neither of them are sufficiently protected by physical measures or by legal measures. From the perspective of legal measures, the said *actifs incorporels* are generally not recognized as *biens* and thus not eligible to be protected in most cases on legal foundations offering protections *de plein droit*. From the perspective of physical measures, they are difficult to be maintained by ordinary measures: the business secrets are by default known to the seller, which means they cannot be protected by being kept in confidentiality; as for the clientele, it is absolutely useless to hide it for the purpose of protecting it. As neither legal measure nor physical measure is sufficient to protect “*actifs incorporels*” from the usurping of the seller, we can safely say that they are not maintainable.

B. Importance of the elements

446. We have mentioned that some elements in the patrimony of the company are difficult to maintain. However, having unmaintainable elements is not tantamount to being unmaintainable *per se*. In order to demonstrate that the value of the company is difficult to maintain, it is necessary to firstly demonstrate that the unmaintainable elements is of central importance in calculating the value of the company and the shares. This task is not without obstacles. A preliminary one is the argument that the said elements do not even belong to the patrimony of the company and thus should not be incorporated in the calculating basis of the value of the shares. Therefore, it is appropriate to firstly rebut this argument (1) before getting down to the task *per se* of demonstrating the importance of the elements (2).

1. Rebuttal of the argument that the elements should not be considered

447. - Presentation of the argument that the elements should not be considered.

The most important element among the unmaintainable elements is the clientele. There are some authors against the idea of incorporating the clientele in the calculation of the value of a company, thus “*la clientèle ne saurait être l'élément le plus important du fonds puisqu'elle n'en est pas un élément du tout*”.³²³ This is because, according to the authors, the clientele is not object of ownership, which is in turn because clientele is in essence “*l'ensemble des*

³²² D. DANET, *op.cit.*

³²³ D. DANET, *op.cit.*

*personnes qui sont liées au commerçant par un contrat d'approvisionnement (clientèle organique) ; ou qui se fournissent habituellement ou occasionnellement auprès de lui (clientèle attirée et achalandage)*³²⁴ and people cannot be objects of ownership.

448. - Rebuttal of the argument that the elements should not be considered. The aforementioned argument is actually based upon a presumption that only objects of ownership can be elements for calculating the value of a company. However, this presumption is mistaken. As M. Jean Mousseron has pointed out: *“la constitution de droits réels – l’appropriation – n’est pas, en effet, la seule forme de l’intervention juridique et la reconnaissance d’une valeur comme bien n’implique pas son appropriabilité.”*³²⁵ In fact, being the object of an ownership provides nothing more than some protections *de plein droit*, which is not at all necessary in the protection of clientele: it is very possible that other recourses to protect the clientele are available to the owner. For example, he can resort to a non-competition clause that prevents those susceptible to usurp his clientele from competing with him. As M. Danet has pointed out: *“n’est-ce pas là faire preuve de quelque prudence alors que cette même cession est validée dès lors qu’elle est revêtue de la fort modeste feuille de vigne que constitue la rémunération du droit de présentation du successeur ou d’une obligation de non-concurrence.”*³²⁶

2. Presentation of the idea that the elements are of central importance

449. Even if the aforementioned elements exemplified by clientele are unmaintainable, this feature would not be transposed to the company level and thus would remain trivial as far as the value of the shares is concerned. However, the experience tells us that the unmaintainable elements are, more often than not, of great importance: generally speaking, in every purchase and acquisition, roughly 34 percent of the total price is in fact paid for goodwill or other intangible assets.³²⁷

Conclusion of Section I

³²⁴ D. DANET, *op.cit.*

³²⁵ J. - M. MOUSSERON, *op. cit.*, n° 9.

³²⁶ D. DANET, *op.cit.*

³²⁷ 2015 Purchase Price Allocation Study, Houlihan Lokey, p. 7. available at https://www.hl.com/uploadedFiles/12_Insights_and_Ideas/Articles/2015-Purchase-Price-Allocation-Study-HL.pdf.

450. In this conclusion, we have presented that what distinguishes shares from other objects of purchase is their value. In particular, it is much more difficult to determine their value than to determine the value of other objects. In addition, even if the value is somehow determined, it is still much more difficult to maintain by their owner.

Section II. Implications of the originalities of shares

451. Technically speaking, originalities of shares are not limited to only those concerning their value: in fact, in discussing the identifications of shares in the precedent chapter, we have already presented some of its original features that make it difficult to identify shares with predetermined categories of objects such as *choses corporelles* and *créances*. However, among all the features of shares, perhaps only those concerning their value as we have just presented in the previous section are of enough interests to be discussed in this thesis, as it is them that makes purchase of shares, the theme of this thesis, distinct from purchase of other objects. In particular, the aforementioned originalities result in the special risks confronted by buyers of shares, which is the *problématique* that we are to solve in this thesis (I) and special requirements for solutions aiming at tackling the said risks, which are our main *thèse* to the *problématiques* (II).

I. Special risks: main problematics to be solved

452. The originalities of shares related to their value as discussed in the previous section give rise to the special risks confronted by buyers of shares. In particular, it makes it more possible for buyers of shares than buyers of other objects to over-pay for the objects (A) and to see the value of the objects, even initially worth the price, later usurped by the sellers, which is in most cases embodied in the form of competitions with the target companies by the sellers of shares (B). The two risks, the features that distinguish purchase of shares from purchase of other objects, are the problematics to be solved in this thesis and in some sense the very *raison d'être* of this thesis.

A. Risk of initial-overpricing for the shares

453. As we have mentioned *supra*, the shares are characterized by the feature of non-determinability of their value. When it comes to a purchase of shares, this feature entails a kind of risks special, if not unique: the risks of paying a price much higher than the value initially expected by the buyer. More specifically, the two aspects of the features of non-determinability of value of shares contribute to the risks.

454. For one thing, the non-determinability of value of shares in an ontological sense is responsible for the risks of initial overpricing. If shares have a manifested objective value, their buyers do not have to rely on his own judgements to determine the value of shares, and the price paid can be fixed at the objective value. However, as there is not such an objective value, in order to acquire the shares at a fair price, the buyers have to determine the value of shares by themselves, which necessarily requires a “due diligence”. However, we will see that the “due diligence”, no matter how thorough, is insufficient to ascertain the value of shares.

455. For the other, the non-determinability of value of shares in an epistemological sense is also responsible for the risks of initial overpricing. By epistemological, we mean the lack of necessary information to evaluate the shares due to asymmetry or non-existence of the information. The absence of necessary information makes the due diligence inherently impotent and thus places buyers of shares in a disadvantaging position where it is difficult to acquire the shares at a reasonable price.³²⁸

B. Risk of post-competition by the sellers

456. On top of the feature of non-determinability of value, the shares are also characterized by the feature of non-maintainability of value. This feature entails another risk special to purchase of shares that even if the price paid initially corresponds perfectly to the expected value of the buyer of shares, the buyers are not entirely safeguarded in so much as the seller has an ability, that does not exist in sellers of other objects, to later usurp some of the elements upon which the price and the expected value are established.

As we have mentioned *supra* that most of the elements whose value are undeterminable are of incorporeal nature. “*Les actifs incorporels présentent, en effet, la caractéristique commune de pouvoir s'analyser comme des situations de rentes ou de quasi-rentes liées à la possession et à l'exploitation d'un avantage concurrentiel.*”³²⁹ Therefore, the main form of post-purchase usurpation by the seller of shares is in the form of competition with the target company. In this sense, the risks of post-usurpation of the value of shares caused by the feature of non-maintainability of their value can be roughly identified with the risks of competition by the seller of shares.

³²⁸ V. J. PAILLUSSEAU, *La garantie de conformité dans les cessions de contrôle*, JCP E 2007. 1238, n° 4.

³²⁹ D. DANET, *Cession de droits sociaux: information préalable ou garantie des vice?*, RTD Com. 1992. 315.

II. Special needs: main opinions to be demonstrated

457. The aforementioned originalities of shares do not only give rise to the special risks as have just been mentioned. Also, they delineate the silhouette of ideal solutions to the risks: for one thing, the solutions should be of conventional nature (A); for the other, the conventional solutions should be out of judicial restraints (B). The two features of ideal solutions to the special risks of purchase of shares are respectively the two main opinions of this thesis, that we will try to explore in its next part.

A. Conventional stipulations

458. Both of the risks of overpricing (A) and risks of competition (B) can be solved by resorting to conventional stipulations. This is why the conventional techniques in the two countries are one of the major objects of our comparison in the next part of the thesis.

1. Conventional stipulations against risks of overpricing of shares

459. - Utility of the conventional stipulations against risks of overpricing of shares. We have mentioned *supra* that the causes for the risks of overpricing is the lack of objective value and the lack of necessary information. The lack of objective value is inherent in shares and cannot be solved. Rather, it is the lack of necessary information that can be solved by conventional stipulations: it is simply enough that the stipulation of a conventional obligation, on the part of the seller, of disclosing necessary information or of indemnifying the buyer (to reduce the price) that is sufficient to eliminate the risks of overpricing.³³⁰

460. - Purpose for the comparison of the conventional stipulations in the following part of the thesis. However, only knowing that conventional techniques are able to solve the risks of overpricing is not enough. In fact, there are various kinds of conventional techniques existent and to be invented aiming at solving the risks. Nonetheless, their

³³⁰ It should be noted that M. Danet believes that there is a distinction between “*information préalable*” and “*garantie des vice*”. In our opinion, however, the two methods are in essence equivalent to each other. V. D. DANET, *Cession de droits sociaux: information préalable ou garantie des vice?*, RTD Com. 1992. 315. What he has addressed is actually a distinction between conventional protections and legal protections, which will be presented in more details when we compare the conventional techniques in the two countries in the next part.

efficiencies and costs are not the same and therefore, it is appropriate for us to compare the techniques invented by practitioners of the two countries, to see their respective pros and cons, so as to improve the techniques in the two countries.

2. Conventional stipulations against risks of competition by sellers

461. - Utility of the conventional stipulations against risks of competition by sellers. We have mentioned *supra* that the cause for risks of the post-purchase usurpation of value of shares is the lack of efficient mode of protections; and if the risks of competition typifies the risks of post-purchase usurpation of value of shares, the cause for the risks is the lack of efficient non-competition obligation *de plein droit*. Intuitively, our response to the risks is to insert a conventional non-competition clause or other conventional means so as to either forbear the seller from competing with the target company; or to encourage him from not doing so. We will see *infra* that it is true that traditional non-competition clauses are not necessarily the best solution to the risks; however, it is also true that other conventional means, as we will present *infra*, are sufficient to solve the risks.

462. - Purpose for the comparison of the conventional stipulations in the following part of the thesis. The risks of non-maintainability of the value of shares are traditionally solved by non-competition clauses. However, a comparison of the implementation of this kind of clauses in the two countries will indicate that they are inherently flawed. A comparison of the possible alternatives to the traditional techniques in the two countries will help us to find the more efficient way to tackle the risks.

B. Judicial restraints (*retenue judiciaire*)

463. We have just demonstrated that conventional stipulations are useful for solving the two risks. However, the heading of the division II of the present section is “special needs” and technically speaking we have yet to demonstrate that the conventional stipulations are “needed” or “necessary” to safeguard the buyers of shares against the risks. In an abstract sense, it is possible that there are other approaches able to achieve the same end and if it is the case, the conventional stipulations cannot be said to be “needed” or “necessary”.

The “necessity” of conventional stipulations, as we will see immediately, are to be established if we manage to demonstrate the inherent insufficiency of allowing judges to provide protections *de plein droit* to buyers (1), as if legal protections are not available, the only option left will be conventional ones which makes them necessary. Also, as the necessity of conventional stipulations is demonstrated, it is naturally to also call for the other judicial restraint on imposing legal restrictions on contractual liberty of the parties to the contract of purchase of shares (2).

1. Judicial restraint on providing protections

464. - Necessity of judicial restraint on providing protections *de plein droit* caused by judicial impotence. In an imaginary world where judges are omniscient to the extent that they are able to find out retrospectively what are the real agreed value when the contract of purchase of shares is concluded, it is more than appropriate to assign the task of protecting the vulnerable buyer to judges. However, as we will demonstrate immediately, judges are inherently impotent in this regard, and also because the information to be disclosed by the seller and the incorporeal assets to be transferred to the buyer are in fact all “*dans la négociation*”,³³¹ which means they themselves have pecuniary value, allowing judges to make decisions as to whether and to what extent to providing protections to aggrieved buyers of shares, without conventional stipulations, is thus tantamount to allowing them to arbitrarily allocate assets between the parties, which is sure to be undesirable. To avoid these problems, it is thus advised that judges should refrain from their impetus to provide protections *de plein droit*.

465. - Judicial impotence as a corollary of the inherent non-determinability of the value of shares. In the event of a dispute on the value or price of the shares, in order for judges to find whether the price paid for the price is higher than the expected value agreed in the original transaction, it is necessary that the judges should know such an expected value. However, as there are multiple possibilities of such an initially agreed value, the judge is evidently impotent to find the one really corresponding to the initial willingness of the parties.

³³¹ J. PAILLUSSEAU, La garantie de conformité dans les cessions de contrôle, JCP E 2007. 1238, n° 10.

This judicial impotence is firstly reflected in the impotence of the judge in solving the risk of overpricing. In order for judges to be able to solve the risk of overpricing, he should know what the value is expected and agreed in the original negotiation, as different types of values require different information to be disclosed and different allocation of risks between the parties. As the judges are inherently impotent to determine the value originally agreed, they are thus also impotent to determine which information is to be disclosed and which risk is to be allocated to the seller or the buyer, which in turn means that they are impotent in solving the risk of overpricing.

This judicial impotence is also reflected in the impotence of the judge in solving the risks of competition by the seller after the purchase. This impotence is caused by the fact that without the help of conventional stipulations, the judge is unable to determine whether the initial price reflects, or whether the initial value agreed by the parties includes, the value of the incorporeal assets, as typified by clientele, whose natural maintenance is at peril. In addition, as we have mentioned above, to provide a legal means to protect the clientele to someone is tantamount to allocate the clientele to someone. Thus, allowing the judge in this case to determine whether the seller should assume an obligation of non-competition *de plein droit*, is similar to allowing the judge to arbitrarily determine whether an asset not explicitly stipulated to be transferred from the seller to the buyer should be so transferred, which is obvious out of the ability of most judges.

466. - Judicial impotence as one of the main opinions to be demonstrated. So far, we have demonstrated why in theory it is inappropriate to rely on protections of buyers of shares *de plein droit*. However, this demonstration is only preliminary and in the next part, a detailed comparison of the legal protections in the two countries will give us more support on this point.

2. Judicial restraint on imposing restrictions

467. - Necessity of judicial restraint on restricting contractual liberty justified by necessity of conventional protections and insufficiency of legal protections. As we have presented *supra*, the risks confronted by the buyer of shares can only be sufficiently and efficiently solved by resorting to conventional stipulations, given the unreliable legal protections. This necessity of conventional protections naturally entails a necessity of absence

of legal restrictions on the contractual liberty of the parties and their attorneys, so as not to restricting their creativity, the source of the various contractual techniques.

468. - Unreasonableness of the legal restrictions as one of the main opinions to be demonstrated. However, unlike legal protections which we believe to be inherently incompatible with purchase of shares, legal restrictions, as a whole, are not inherently inappropriate on purchase of shares. As we have mentioned *supra*, legal restrictions on contractual liberty is reasonable as long as it is justified by some compelling reasons. On that account, another main task of this thesis is to examine the reasonableness of the existent restrictions on contractual liberty that may apply to purchase of shares. In the following part, we will see that all the restrictions exist only in French law, whereas there is nearly no legal restriction. Therefore, another one of our task is to compare the justifications in French law for their legal restrictions and the possible reasons for the lack thereof in China. By this process, we will reach another important conclusion of this thesis: the legal restrictions under French law on contractual liberty, when it comes to purchase of shares, are not so reasonable and judicial restraint in this regard is highly appreciated.

Conclusion of Section II

469. In this section, we have presented that the originalities of shares presented in section I, are not only the causes for the main problematics of the thesis: the risk of overpricing and the risk of competition by the seller; but also give rise to the main opinions of the thesis: the protections of buyers against the said risks should be relied on conventional stipulations and accordingly the judicial restraint is highly appreciated.

Conclusion of Chapter II

470. In this chapter, we have demonstrated that the originalities of shares concerning their value give rise to the special risks encountered by buyers of shares and special needs to protect their interests.

Conclusion of Title II

471. As far as purchase of shares is concerned, the identification of shares, or in other words the category that shares belong to, makes little difference. Rather, what make purchase of shares particular are the originalities of shares in terms of the determination of their value.

Conclusion of Part I

472. This part has been dedicated to the analysis of the two components of the expression “purchases of shares”: “purchases” and “shares”. The analysis thereof has been conducted from opposite perspectives.

473. - Analysis of “purchases” as from the perspective of seeking divergence. Chinese and French jurists have little difference as to the meaning of the word “purchases”. However, the legal regimes for purchases are quite different in the two countries and in analysing the component “purchases”, our focus was on the difference in the legal provisions, or more specifically, on the difference in elements necessary for a contract to be valid and on the difference in the default effects (*effet de plain droit*) of a valid contract. The comparison from the two aspects shows that French law has unquestionably more restrictions on the contractual liberties; whereas as for default regulatory protections (*de plein droit*) Chinese judges usually have more discretion than their French counterparts, except for *garantie d'éviction*.

474. - Analysis of “shares” as from the perspective of seeking convergence. The definition of the word shares is not much different in the two countries either. On top of that, the legal provisions for shares are also similar in the two countries. Hence, it is the originalities of shares in the two countries rather than the differences that are interesting as far as this thesis is concerned. We have shown that the originalities of shares, i.e. the indeterminability and non-maintainability of their value, make purchases of shares especially risky and in need of protections free of regulatory interventions.

On top of this main task in analysing the inherent originalities of “shares”, we have also fulfilled an auxiliary task concerning the identifications of shares: we have firstly explained that the topic of identification of shares is not inherently interesting for the purpose of our main topic; and we have then continued to compare the identifications of shares in the two countries, as it is somewhat interesting for our French readers.

Part II. Implementations

475. Judges have many chances to intervene in purchases of shares without the preliminary consents of the parties (Title I), which in our opinion is undesirable and should be restricted or even eliminated. Rather, the interests of the parties, especially the buyers of shares, should be protected by resorting to conventional techniques (Title II).

Title I. Legal interventions

476. Judges can intervene either by providing protections *de plein droit* to buyers (**Chapter I**), or by annulling the conventional arrangements concluded by the parties, thus directly restricting their contractual liberties (**Chapter II**). It should be noted that the word “legal” in the expression “legal interventions” as well in other occasions in this thesis, instead of designating “legislative”, are in most cases used as the English translation of the French expression “*de plein droit*”, which emphasizes on the fact that a rule is applicable without the preliminary consents of the parties. The English word “legal” can be used in such a way because the English language does not make the distinction between *droit* and *loi* as in the case of French. Therefore, by legal, it can either mean something related to *loi*, or mean something concerning *droit*. In this thesis, the word “legal” is used in the latter sense.

Chapter I. Legal protections

477. As the most severe and inherent problems faced by buyers of shares are the possible overpricing (Section I) and competition by the sellers after the purchase (Section II), legal protections can be provided in the two situations, although they are not necessarily compatible to the special situations of purchase of shares.

Section I. Legal protections against overpricing

478. A comparison (III) of the legal protections against overpricing in France (I) and in China (II) will reveal that the legal protections are inherently unsatisfactory.

I. Legal protections against overpricing in France

479. Under French law, there are several legal foundations that can be used to protect buyers of shares against overpricing. However, it is an observed fact that these foundations are insufficient for the protections of buyers of shares against risks of overpricing (A). However, some French authors believe that in spite of the insufficiency, the legal protections are indispensable (B).

A. Observed insufficiency of the legal protections

480. - Scope of discussion: conditions instead of sanctions. *A proiro*, to present the legal protections, we should present both the conditions for their applications and the sanctions. However, here we will omit the sanctions, discussing only the conditions, as we believe the sanctions are not of enough interests to be discussed. It is true that the different legal foundations provide for different sanctions (nullity of the contract of purchase of shares, contractual liabilities for breach of contracts (article 1217 et s) or a similar regime specifically for *garanties des vices cachés* (article 1642-1s)). However, the different sanctions have one thing in common: they are restrictive in nature, at least much more restrictive than conventional ones. For the purpose of this thesis, therefore, we believe a global idea that legal protections provide only restrictive sanctions is sufficient.

481. - Enumeration of the legal protections. Without considering the *violence économique* seldom applicable in purchase of shares, technically speaking, to protect buyers of shares against the risks of overpricing, four legal foundations are available: the two foundations based upon *vices du consentement* --- *dol* and *erreur*; the *garantie des vices cachés* and the new provision *obligation d'information précontractuelle*. Because *erreur* and *garantie des vices cachés* has similar applying conditions, we will treat them as the same

foundation.³³² And because of the link between *obligation d'information précontractuelle* and *réticence dolosive* we have already mentioned *supra*, we will treat the former as only a complement of the latter. Therefore, we have only two foundations to address: *erreur* and *garantie des vices cachés* (1); and *réticence dolosive* (2).

1. *Erreur and garantie des vices cachés*

482. As we will explore later, the application of *erreur* and *garantie des vices cachés* (i) are insufficient. French authors general believe that the insufficiency of the application of *erreur* and *garantie des vices cachés* is caused by the individual personality of the company (ii).

i. Application of the two foundations

483. In order to apply the two foundations *erreur* and *garantie des vices cachés*, similar subjective (a) and objective condition (b) should be met.

a. Subjective condition

484. - Absence of requirement on the innocence on the part of the seller. What makes the group comprised of *erreur* and *garantie des vices cachés* distinguished from the group comprised of *dol* and *obligation d'information précontractuelle* is that the foundations in the former group do not require the aggrieved buyer to demonstrate the subjective status of the seller in order for them to be applicable. In other words, any defects, even “*cachés au vendeur*”³³³ will be eligible to be treated by the two foundations.³³⁴

485. - Existence of requirement on the innocence on the part of the buyer. However, the two foundations do require that the innocence of the occurrence or the likelihood of the occurrence of the defect by the aggrieved buyer is not due to inexcusable reasons and such a requirement does exist in purchase of shares, both in *erreur* as provided in

³³² V. DANET, *op. cit.*

³³³ L. AYNES et P. STOFFEL-MUNCK, *Quelques questions complexes*, Dr. et patr. juillet-août 2015. 80.

³³⁴ For irrelevance of the innocence of the seller of shares in *garanties de vices cachés*, v. Cass. 1e civ., 25 mai 2005, n° 02-13546; Cass. 3e civ., 12 septembre 2006 n° 05-17228.

article 1132 of *code civil*³³⁵ and in *garantie des vices cachés* as created in jurisprudence.³³⁶

b. Objective condition

486. If the subjective condition for applying the two foundations are alike both in purchase of shares and in purchase of other objects, the objective conditions in purchase of shares are somewhat different: the two foundations are generally applied in a restrictive way in purchase of other objects. Yet, in purchase of shares, due to the unbearable unsatisfaction of the restrictive application, a certain degree of relaxation has been implemented by judges.

487. - Initial restrictive application. In purchase of ordinary objects, the two foundations are applied in a restrictive method. Originally this was true also in purchase of shares. For the foundation *erreur* applicable only on the *qualités substantielles* of shares, it seems that in purchase of shares, the foundation can be applied only if the buyer has made an mistake on the shares *per se*, say when the company in fact does not exist.³³⁷ However, as we have mentioned *supra*, the problem special to purchases of shares, if not unique to it, concerns the over-estimation of the value of shares, which is reflected in the target company instead of on only its shares; and from the perspective of the shares, the objects of *erreur* worth our discussions are thus all those concerning the *valeur* of the *présentation*,³³⁸ the *motif* of the buyer,³³⁹ or an *présentation aléatoire*,³⁴⁰ thus not acceptable as far as the foundation *erreur* is concerned.³⁴¹ Similarly, for the foundation *garantie des vices cachés*, “*une application stricte de ce texte (article 1641 de code civil) conduit à ne prendre en considération que les vices affectant les parts sociales elles-mêmes*”.³⁴²

488. - Current relaxed application. The restrictive conditions for the application of *erreur* caused by the strict requirement that *erreur* should be on the *qualité substantielle* of the *présentation* (formerly *qualité substantielle* of the *chose*) provided in article 1132 of *code*

³³⁵ V. CA Versailles, 10 avril 1992, Rev. bancaire et bourse, 1993. 91, obs. M. GERMAIN et M.-A. FRISON-ROCHE; CA Paris, 24 juin 1994, RJDA 1994. 1300; M. CAFFIN-MOI, *op. cit.*, 2009, n° 41.

³³⁶ V. Cass. com., 26 octobre 1999, n° 96-22538.

³³⁷ V. M. CAFFIN-MOI, *op. cit.*, n° 35.

³³⁸ V. M. CAFFIN-MOI, *op. cit.*, n° 39.

³³⁹ V. M. CAFFIN-MOI, *Les vices du consentement*, in *Le droit des sociétés et la réforme du droit des contrats*, Actes pratiques, mai-juin 2016. 51, n° 235.

³⁴⁰ V. M. CAFFIN-MOI, *op. cit.*, n° 35; B. LECOURT, note sur Cass. com., 30 mars 2016, n° 14-11684, Rev. sociétés 2016. 590, n° 139.

³⁴¹ V. M. CAFFIN-MOI, *op. cit.*, n° 36.

³⁴² A. CHARVERIAT, *Mémento: cession de parts et actions*, Editions Francis Lefebvre, 2015-2016, n° 61190.

civil has been relaxed a little bit by the famous case *Quille*, which came up with the criteria according to which if the target company is deprived of “*l'essentiel de son actif*” to such a point of “*l'impossibilité de réaliser l'objet social, et donc d'avoir une activité économique*”, the buyer of shares is permitted to demand the annulation of the contract of purchase of shares on the basis of *erreur*.³⁴³ Since then, not only the *erreurs* on the shares *per se* (*erreur* on the integrity of the rights constituting the shares and on the possibility of taking absolute control of the target company) are accepted, certain *erreurs*, technically speaking on the *valeur* or the *motif* of the shares, are also accepted,³⁴⁴ as demonstrated in a plethora of judicial judgements.³⁴⁵ Similarly, the restrictive conditions for applying *garantie des vices cachés* has also been somewhat relaxed by the jurisprudence. Since then, any defect “*tel que sa survenance constitue un fait de nature à compromettre la continuité de l'exploitation*” can be said to be the *vice* “*caché qui la rendent impropre à l'usage auquel on la destine*” as targeted by article 1641 of *code civil*.³⁴⁶ In a nutshell, by similar board interpretations, the French judges managed to expand the two foundations to situations, strictly speaking, inapplicable, having surreptitiously replaced the respective applying criteria with a new common one: that the defect is to lead to “*l'impossibilité de réaliser l'objet social*”.

ii. Insufficiency of the two foundations

489. - Presentation of the insufficiency. It is obvious that even if after the aforementioned relaxation, the two foundations are still insufficient, as they cover only a portion of situations where the buyer needs to be protected: the two foundations only cover situations where the defects render the company difficult to continue to operate. However, in most cases the defect is not severe to such an extent, yet the damage suffered by the buyer is not ignorable: the defect may only affect the monetary value of the company without

³⁴³ V. Cass. com., 1er octobre 1991, n° 89-13967; M. CAFFIN-MOI, op. cit., n° 58. It should be noted that M. Caffin-moi believes that actually it is a case rendered in 1979 (Cass. com., 25 mai 1972, n° 71-10663) that is the first case that come up with the criterion “*l'impossibilité de réaliser l'objet social*”. V. M. CAFFIN-MOI, op. cit., n° 57. As the facts and holdings of the two cases are similar, which one is the first case is not a significant issue for the purpose of this thesis and we will not spend more time in discussing this issue.

³⁴⁴ M. Caffin-moi believes that this extended application of provision related to *erreur* in fact permits an extension of its scope to *erreurs* concerning *motif*, only that here the *motif* has been objectivized. V. M. CAFFIN-MOI, op. cit., n° 65 et s.

³⁴⁵ V. Cass. com., 7 février 1995, n° 93-14257, Bull. Joly sociétés 1995.407, note A. COURET; Cass com., 21 octobre 1997, n° 96-10267, Bull. Joly sociétés 1998.25, note P. Le CANNU; Cass. com., 29 octobre 2003, n° 02-11592, Bull. Joly sociétés, 2004.113, obs. T. MASSART.

³⁴⁶ V. J. PAILLUSSEAU, *La cession de contrôle et la situation financière de la société cédée*, JCP 1992. 3578, n° 75. For the jurisprudence in this regard, v. Cass. com., 23 janvier 1990, n° 87-17521; Cass. com., 12 décembre 1995, n° 93-21304. However, it should be noted that neither cases have positively upheld a claim by an aggrieved buyer of shares on the basis of *garantie des vices cachés*. Yet, the reason they have denied the claims are that the claims have failed to demonstrate a defect making impossible the “*objet social*”. Therefore, we can deduct a *contrario* that the criterion for applying *garantie des vices cachés* in purchase of shares is *l'impossibilité de poursuivre l'objet social*.

rendering it impossible to run, it nonetheless makes the buyer pay more than or receive less than expected. Buyers in these situations are not less susceptible to be remedied. Yet, under *erreur* and *garantie des vices cachés*, they cannot.³⁴⁷

490. - Explanation for the insufficiency. Mme. Caffin-moi, as well some other French authors, believe that the difficulty to apply *erreur* and *garantie des vices cachés* is due to the individual personality of the target company. According to her, the individual personality of the target company serves as a screen between a shareholder and the patrimony of the company, which makes the shareholder have no real rights on the assets of the company. As the shareholder has no direct real rights on the assets of the company, any defects affecting only the patrimony of the company have thus no direct impact on the shares *per se*, which makes *erreur* and *garranties des vices cachés* difficult to apply.³⁴⁸

2. *Réticence dolosive*

491. Because of the insufficiency of *erreur* and *garantie des vices cachés*, M. Caffin-moi advocates the replacement of them by *réticence dolosive* in protecting buyers of shares.³⁴⁹ It should be acknowledged that *réticence dolosive* does have some advantages. However, the advantages will soon lose (i). And even before the eventual loss of the advantages, it is still insufficient (ii).

i. Advantage of *réticence dolosive*

492. - Current advantage of *réticence dolosive*. Currently, compared to *erreur* and *garantie des vices cachés*, *réticence dolosive* covers much more situations where buyers of shares need protections against overpricing: the application of *réticence dolosive* is not confined to defects affecting the *qualité substantielle* or *usage que l'one destine*, i.e. not confined to defects rendering the target company impossible to pursue its goal. Rather, all defects intentionally hidden by the seller, which include exactly those excluded in *erreur* and

³⁴⁷ For *erreur*, v. Cass. com., 23 janvier 1990, n° 87-17521; Cass com. 1er octobre, 1991, n° 89- 13967, Rev. sociétés 1992.497. obs. P. DIDIER. For *garantie des vices cachés*, v. Cass. com., 4 juin 1996, n° 94-13047. It is even held that as long as the company can be repaired at the cost of the buyer, it is not qualified as “*l'impossibilité de réaliser l'objet*”. v. Cass. com., 12 décembre 1995, n° 93-21304, Bull. Joly sociétés 1996. 200, obs. A. COURET.

³⁴⁸ V. M. CAFFIN-MOI, op. cit., n° 483.

³⁴⁹ V. M. CAFFIN-MOI, op. cit., n° 580 et s.

garantie des vices cachés.³⁵⁰

493. - Advantage to be lost due to *Loi n° 2018-287 du 20 avril 2018*. The current advantage of *réticence dolosive* presumes the existence of a wider coverage than that of *erreur* and *garanties des vices cachés*. Already, this presumed advantage is challenged by article 1112-1 which excludes the *obligation précontractuelle d'information* from applying to “*l'estimation de la valeur de la prestation*”. Currently, it is possible to try to establish that article 1112-1 and article 1137 are two separate foundations and the *obligation précontractuelle d'information* as required to apply article 1137 does not exclude “*l'estimation de la valeur de la prestation*”. However, this effort will soon become useless with the taking effect of *Loi n° 2018-287 du 20 avril 2018* on October 1st, according to which “*le fait pour une partie de ne pas révéler à son cocontractant son estimation de la valeur de la prestation*” does not constitute a *réticence dolosive*. As after the reform *réticence dolosive* is not applicable either to the aforementioned situations where *erreur* and *garanties des vices cachés* are not applicable, it will lose its advantage compared to them and we predicate that *réticence dolosive* will fall into disuse.

ii. Insufficiency of *réticence dolosive*

494. Even before the taking effect of the new *al. 3* of article 1137, *réticence dolosive* is still not completely sufficient for the task of protecting buyers of shares against risks of overpricing. This is because the application of this foundation is still subject to conditions difficult to meet, which are either subjective (a) or objective (b).

a. Insufficiency due to restrictive subjective condition

495. M. Caffin-moi has mentioned that the obstacle preventing the use of *dol* was the lack of universal obligation of information.³⁵¹ However, this is not the only obstacle. In fact, the more insurmountable obstacle is rather the requirement of subjective bad faith of the seller. As we have mentioned *supra* that to evoke a *réticence dolosive*, the buyer has to firstly prove

³⁵⁰ V. M. CAFFIN-MOI, op. cit., n° 582.

³⁵¹ V. M. CAFFIN-MOI, op. cit., n° 594.

that the seller himself is aware of the information³⁵² and that he is of *l'intention de tromper*.³⁵³ In purchase of shares, we have found cases denied because the aggrieved buyer has failed to prove that the seller is aware of the defect.³⁵⁴ As for cases denied because the buyer has failed to prove that the seller has the necessary "*intention de tromper*", we have not found any. However, we believe this is a difficult obstacle in evoking *dol*, as M. Fages put it: "*Parler de dissimulation « intentionnelle » relève donc du pléonasme. Néanmoins, cela permet de souligner que, sans intention de tromper, il n'est pas possible de caractériser le dol et d'accéder à la nullité du contrat qui s'y attache*".³⁵⁵

b. Insufficiency due to restrictive objective condition.

496. - Requirement of the demonstration that the concealed defect is of determinant characteristic. Although the application of *réticence dolive* is not confined to *qualité substantielle* in a subjective sense, it is subject to the requirement that the defect concealed by the seller should be of determinant characteristic in a subjective sense so that the unawareness of it will possibly discourage the buyer from entering into the contract, as provided in article 1137 of *code civil*. This requirement also applies to purchase of shares,³⁵⁶ which means that buyers of shares cannot be protected in situations where the expected value of shares turns out to be inferior to the price he paid, yet the difference is considered by the judge as not determinant enough.

497. - Uncertainty as to the scope of obligation of disclosure. The divergent views on the relation between *réticence dolive* and *l'obligation d'information précontractuelle* entails different views on the scope of obligation of disclosure assumed by the seller of shares. If article 1112-1 is considered as separated from *réticence dolive*, then scope of information that a seller of shares has to disclose will be infinite as long as he is aware of the information

³⁵² It should be noted that the awareness of the seller should be effective, which excludes the situations where the seller should have known the fact yet in fact does not know it. This requirement of effective awareness is demonstrated in the fact that the final version of *ordonnance* 2016 has eliminated the expression "*ou devrait connaître*" in article 1112-1 existent in the *projet*. V. J. MOURY et B. FRANCOIS, *De quelques incidences majeures de la réforme du droit des contrats sur les cessions de droits sociaux*, D. 2016. p. 2225, n° 5; B. FAGES, *L'obligation précontractuelle d'information, la dissimulation intentionnelle et les cessions de droits sociaux*, Bull. Joly sociétés 2016. p. 529, n° 6. However, if the seller knows that the occurrence of a defect is possible, yet without certainty, he is considered as suffice the requirement of awareness. V. Cass. com., 12 octobre 1993, n° 91-19838.

³⁵³ V. B. FAGES, *L'obligation précontractuelle d'information, la dissimulation intentionnelle et les cessions de droits sociaux*, Bull. Joly sociétés 2016. 529, n° 12; J. MOURY et B. FRANCOIS, *De quelques incidences majeures de la réforme du droit des contrats sur les cessions de droits sociaux*, D. 2016. 2225, n° 18.

³⁵⁴ V. Cass.com., 31 mars 2015, n° 14-10.965, Rev. sociétés 2015. 504, note T. MASSART.

³⁵⁵ B. FAGES, op. cit., n° 12.

³⁵⁶ V. Cass. com., 26 avril 2017, n° 11-25941, Rev. sociétés 2017. 700, note J.-J. ANSAULT.

and the importance to the buyer.

However, if article 1112-1 is considered as the foundation for the *réticence dolosive*, which includes information on the value, the reform of *code civil* in 2016 will be indifferent and it is encumbered on judges to find whether there is an obligation of information on the part of the seller of shares. Some have argued to apply the special obligation of information in *cession de fonds de commerce* as provided in article L.141-1 of *code de commerce*. Yet, this application has always been denied by judges because of the distinction between *cession de droits sociaux* and *cession de fonds de commerce*³⁵⁷ and in purchase of shares, if article 1112-1 is to be interpreted as the foundation for the *réticence dolosive*, the *réticence dolosive* will be always inapplicable in purchase of shares.

B. Declared necessity of the legal protections

498. - Equivalence between the demonstration of the necessity of the legal protections and the demonstration of the insufficiency of the conventional protections. We have presented *supra* that in France the legal protections have been demonstrated insufficient for the protection of buyers of shares. However, the insufficiency of the legal protections would not be a problem if the risks derived from the originalities of shares can be well solved by conventional protections. In order to establish the necessity of the legal protections, Mme. Caffin-moi, as well as other authors, have tried to demonstrate the insufficiency of the conventional protections. In general, the ultimate cause for the insufficiency of the conventional protections is attributed to the ambiguity of the text of the conventional clauses that makes their interpretation and their application difficult,³⁵⁸ and the interpretation generally favour to the seller.³⁵⁹ In particular, the insufficiency of the conventional protections has been demonstrated in two aspects: their badly-defined regimes (1) and their uncertain effects (2).

1. Badly-defined regimes of the conventional protections

499. A classic distinction between conventional anti-overpricing techniques in France

³⁵⁷ V. M. CAFFIN-MOI, op. cit., n° 28 et s.

³⁵⁸ V. M. CAFFIN-MOI, op. cit., n° 578.

³⁵⁹ V. M. CAFFIN-MOI, op. cit. n° 577.

is that between *garantie de valeur*, commonly referred to as *clauses de révision de prix*, and *garantie de reconstitution*, commonly referred to as *clauses de garantie au sens strict*. The principal difference between the two techniques lies in the fact that the former is for the purpose of lower the price eventually paid by the buyer and the latter is for the purpose of indemnifying the patrimony of the company.³⁶⁰ In particular, the difference in the identifications will lead to difference in the determination of the beneficiary where the beneficiary of the *garantie de valeur* is the buyer whereas that of the *garantie de reconstitution* is the target company;³⁶¹ in the transmission of the *garantie* where the *garantie de valeur* is usually not transferrable as its beneficiary is the buyer whereas the *garantie de reconstitution* is usually not as its beneficiary is the target company;³⁶² and in the scope where the *garantie de reconstitution* has no cap of identification whereas the *garantie de valeur* has one equalling to the price paid by the buyer.

Therefore, in the eyes of French authors, if a conventional clause is not one hundred percent well drafted, there might be a problem of whether to identify it with the *garantie de valeur* or with the *garantie de reconstitution*,³⁶³ which will in turn leads to uncertainty in the determination of the beneficiary, the transferability and the scope.

2. Uncertain protections of the conventional protections

500. In addition to the uncertainty derived from the problems in recognizing the category of a clause, there are also other problems that makes the conventional protections not satisfactory, which can be roughly categorized into those about their ineffectiveness and those about their counter-productivity.

501. - Problems about the ineffectiveness of the conventional protections.³⁶⁴

According to Mme. Caffin-moi, there are mainly four causes that lead to the ineffectiveness of the conventional protections. Firstly, the buyer of shares is supposed to rebut the accusation

³⁶⁰ V. M. CAFFIN-MOI, op. cit., n° 538 et 539; P. MOUSSERON, th. précité, n° 229.

³⁶¹ V. M. CAFFIN-MOI, op. cit., n° 547 et s.

³⁶² V. M. CAFFIN-MOI, op. cit., n° 558 et s.

³⁶³ V. M. CAFFIN-MOI, op. cit., n° 542.

³⁶⁴ M. Danet believes that the conventional protections might provide overprotections to the buyers of shares. V. D. DANET, op. cit. We believe this argument is too far-fetched given that, as Mme Coffin-moi has put it, “*il semble inopportune d’adresser une telle critique à un mécanisme purement conventionnel procédant d’une accord de volonté des parties.*” M. COFFIN-MOI, op. cit., n° 569. Therefore, we will allow us to refrain from the discussion of this aspect of the conventional protections and to confine us to only the aspect of their insufficiency.

that he has violated the obligation to inform the seller of the occurrence of the triggering effects of the conventional clauses: this obligation is usually stipulated in the contract.³⁶⁵ Secondly, the buyer of shares have to establish the occurrence of the triggering events, which is usually difficult.³⁶⁶ Thirdly, there is a possibility that the judge regards the ignorance of the buyer of the risks of the triggering events as a factor that prevents the application of the conventional clauses.³⁶⁷ Lastly, the conventional clauses may not cover all the situations where the legal protections are to apply: for example, the *clause de garantie de passif* is not applicable in situations where the aggrieving situation is not about the appearance of a liability on the patrimony of the company, whereas the legal protections based upon *erreur* and *garantie des vices cachés*, which focus on the impossibility for the target company to continue its objective, are well applicable.³⁶⁸

502. - Problems about the counter-productivity of the conventional protections.

On top of the concern that the conventional protections are not effective enough in protecting the buyers of shares, Mme Coffin-moi is even worried that “*dans certains affaires dont on concèdera la rareté... les clauses de garantie produisent, après intervention judiciaire, l’effet inverse de celui que le cessionnaire escomptait.*”³⁶⁹ For example, a buyer evoking the conventional clauses may be held extra-contractually liable for the very fact that he has evoked the clauses, if the triggering conditions have not been fully met and if the buyer is held to have abused his right to sue.³⁷⁰

II. Legal protections against overpricing in China

503. Under Chinese law, it is possible for an aggrieved buyer of shares to get remedied by resorting to legal foundations, mainly *dol* and *garantie des vices cachés*. To certain extent, the conditions for applying the two foundations are somewhat similar to each other, which means we do not have to quite differentiate them in our discussion (A). It should be noted that, in spite of the existence of the two foundations, their actual application is rare (B). And in the rare cases where the legal protections were granted, we can see that there is in fact no consensus as to the scope of the protections (C).

³⁶⁵ V. M. COFFIN-MOI, op. cit., n° 570 et s.

³⁶⁶ V. M. COFFIN-MOI, op. cit., n° 572 et s.

³⁶⁷ V. M. COFFIN-MOI, op. cit., n° 573 et s.

³⁶⁸ V. M. COFFIN-MOI, op. cit., n° 575 et s.

³⁶⁹ M. COFFIN-MOI, op. cit., n° 576.

³⁷⁰ *Ibid.*

A. Universal condition

504. - Enumeration of the possible foundations. As opposed to French law where there are four legal foundations available for an aggrieved buyer of shares in addition to possible conventional protections, under Chinese law the aggrieved buyer of shares has only two options: *réticence dolosive* or *garantie des vices cachés*. The fewer foundations in China are for the one hand because of the absence of a separate *obligation d'information précontractuelle* under Chinese law; and for the other because the *erreur* under Chinese law has a very limited scope of application normally excluding the situations discussed here, as has been presented in the first part of this thesis.

505. - Similar conditions for applying the foundations. We have mentioned *supra* in the first part that the *garantie des vices cachés* under Chinese, as opposed to its French counterpart, lacks a clear criterion as to the meaning of the “*vices cachés*”. This is similar in the case of *réticence dolosive* where the situations constituting it are neither explicitly provided in the legal text nor established as a general rule in jurisprudence. It is admitted that there is a noticeable difference between the two foundations: for *réticence dolosive* to be applied, the subjective intention to defraud should be demonstrated whereas such a demonstration is not necessary in evoking *garantie des vices cachés*³⁷¹. However, as we will very soon find that the obstacles impeding the application of the two foundations, or in other words, the real issues in Chinese law are rarely, if not never, the subjective condition of the seller, it is safe to simply ignore this difference for the purpose of this thesis.

Therefore, to the extent that neither of the two foundations is subject to general conditions and hence their application needs to be judicially examined on a case-by-case basis, we can say their conditions for application are similar, if not entirely identical. Consequently, in the following paragraphs, we will treat the two foundations as the same thing, without further differentiating them.

B. Rare application

³⁷¹ See (2002) 2nd Shanghai intermediary court, 3rd civ. (commercial) first instance, n° 208 ((2002)沪二中民三(商)初字第208号).

506. Although in an abstract sense, it is possible for an aggrieved buyer of shares to be protected *de plein droit* under Chinese law, such protections are in fact rare in practice. And the rarity is demonstrated in the rare judicial litigations (1) and in the rare doctrinal discussions (2).

1. Rare judicial litigations

507. - Rare judicial decisions on disputes arising from disputes on the price or value of shares. We have spent much effort in piecing together a Chinese jurisprudence regarding the conditions for the application of the two foundations, from the available judicial decisions. However, our effort has been proved futile as in an incredible lengthy time span from 2000 all the way to 2015, we have found only 13 cases that can be said to concern the disputes on price or value of shares between buyers and sellers of shares, among which two are arbitral decisions³⁷² and eleven are court decisions. Among the eleven court decisions, one has been made on an unknown level,³⁷³ and one has been made on the local (the lowest) level.³⁷⁴ The other eight have been made on intermediary (the second lowest) level, with one being in the first instance³⁷⁵ and seven being in the second instance³⁷⁶. It is only in 2015 that the first decision in the supreme level that saw the light of day.³⁷⁷

508. - Even rarer judicial decisions concerning cases based upon pure legal foundations. In China, the judicial litigations on disputes of price or value of shares are limited in their quantity. This scarcity is indeed intensified by the fact that out of the 13 cases

³⁷² See (2009) Beijing arbitral tribunal n° 0225 (2009) 京仲裁字第 0225 号; (2010) Beijing arbitral tribunal n° 0378 ((2010) 京仲裁字第 0378 号).

³⁷³ See Triple 9 brewery vs. M. Chengju Bian, in *dir.* Chinese Institution of applied legal science, Anthology of decisions of people's courts, People's court press, sept. 2000, p. 174 (三九啤酒厂诉卞成居案, 载于中国应用法学研究所编: 《人民法院案例选》, 人民法院出版社, 2000 年 9 月, 第 174 页). We have failed to find the formal citation of the case just mentioned and we have to write the name of the parties and the source instead.

³⁷⁴ See (2013) Huangpu, 2nd civ. (commercial) first instance n° 48 ((2013)黄浦民二(商)初字第 48 号).

³⁷⁵ See (2002) 2nd Shanghai intermediary court, 3rd civ. (commercial) first instance, n° 208 ((2002)沪二中民三(商)初字第 208 号).

³⁷⁶ See (2009) 2nd Beijing intermediary court, civ. final instance, n° 8985 ((2009)一中民终字第 8985 号); (2009) 2nd Beijing intermediary court, civ. final instance, n° 10856 ((2009)二中民终字第 10856 号); (2009) 2nd Beijing intermediary court, civ. final instance, n° 17758 ((2009)二中民终字第 17758 号); (2009) 2nd Beijing intermediary court, final instance, n° 21060 ((2009)二中民终字第 21060 号); (2009) 2nd Shanghai intermediary court, 3rd civ. (commercial) final instance, n° 124 ((2009)沪二中民三(商)终字第 124 号); (2010) Huzhou intermediary court, commercial final instance, n° 391 ((2010)浙湖商终字第 391 号); (2014) 2nd Shanghai intermediary court, 4rd civ. (commercial) final instance, n° 123 ((2014)沪二中民四(商)终字第 123 号); (2015) Ürümqi intermediary court, 2nd civ. final instance n° 389 ((2015)乌中民二终字第 389 号).

³⁷⁷ See (2015) Supreme court, 1st civ. final instance n° 81 ((2015)民一终字第 81 号).

aforementioned, only four involve real application of pure legal foundations.³⁷⁸ We have mentioned *supra* that by “legal” we mean “*de plein droit*” in French and the application of pure legal foundations indicates that the existence or not of conventional clauses protecting the buyer of shares is irrelevant. However, except for the aforementioned four decisions, in the other ones, conventional clauses of warranties and representations and/or whereas clauses are of great significance so that it is difficult, if not impossible, to say that they are decisions on actions calling for legal protections. Briefly, if we set aside the decisions not dealing with actions evoking pure legal protections, the decisions in China will be even fewer.

2. Rare doctrinal discussions

509. - Discussions focusing on a particular kind of defects and limited discussions of other defects. If we refer to all the events that reduce the value of shares as “defects”, the scope of defects of shares should be non-exhaustive. However, what is particular in China is that, when it comes to shares, the word “defects” are commonly understood as referring to only one particular kind of defects: “defects in the process of capital contribution”. By this definition of “defects”, defective shares refer to only those shares whose capital contribution has not been fully paid. In other words, for a given set of shares, as long as the capital contribution has been fully paid, there is no defects on the shares, even if the patrimony of the target company is riddled with unbearable defects that make the company and its shares worthless. Besides the limited scope of signified attached to the signifier “defects”, the concerns of Chinese authors are also special in another aspect: instead of caring the eventual assumption of the loss of value caused by the defects, what they usually care is whether a contract trading defective shares should be valid, or to whom the target company can evoke its credit of capital contribution.³⁷⁹

The defects of shares commonly understood in France, on the other hand, have been long ignored and it is only recently that Chinese authors began to realize their importance. In

³⁷⁸ See (2009) 2nd Beijing intermediary court, civ. final instance, n° 17758 ((2009) 二中民终字第 17758 号); (2009) 2nd Beijing intermediary court, civ. final instance, n° 10856 ((2009) 二中民终字第 10856 号); (2009) 2nd Beijing intermediary court, final instance, n° 21060 ((2009) 二中民终字第 21060 号) ; (2009) 2nd Shanghai intermediary court, 3rd civ. (commercial) final instance, n° 124 ((2009) 沪二中民三(商)终字第 124 号); (2015) Ürümqi intermediary court, 2nd civ. final instance n° 389 ((2015) 乌中民二终字第 389 号).

³⁷⁹ See H. XIAO, *The legal effects of transfer of shares whose contribution is defective*, Tribunal of Political Science and Law, March 2013 (肖海军: “瑕疵出资股权转让的法律效力”, 《政法论坛》2013 年第 3 期); L. ZHANG, *A research on the legal issues on defective shares*, China University of Political Science and Law master thesis, 2011 (张丽红: “瑕疵股权法律问题研究”, 中国政法大学硕士论文, 2011 年).

spite of the current recognition of the worthiness of the discussion of other kinds of defects of shares, it should be noted that by default, the expression “defective shares” still commonly refers to only defects caused by unpaid capital contributions, whereas other defects of shares are generally called “defects on the patrimony” “defects of value of shares”, etc., so as to be distinguished from the defects in capital contributions.³⁸⁰

510. - Discussions focusing on the necessity and rationality of the protections of buyers of shares in general and limited discussions of the legal protections in particular.

Even among the few articles and thesis dedicated to the defects of shares interesting to this thesis and interesting to our French readers, the majority of pages are dedicated to the demonstration of the significance of the protections against the defects on the patrimony or the defects of value of shares, and for the purpose of calling for more attention of scholars on the issue. As for the issues concerning legal protections, i.e. what constitutes a *réticence dolive* or *vices cachés* in purchase of shares, we have found only one article having it as the main theme.³⁸¹

Therefore, we believe it is safe to say that the legal protections of buyers of shares against the risks of overpricing is a domain that has received little attention of Chinese scholars.

C. Uncertain application

511. We have tried to find a jurisprudence from the few judicial decisions available or to find a universal scholarly opinion from the few articles and thesis on the conditions for applying the legal protections of buyers of shares. However, we have failed this task as certainty is lacking in the decisions and in the literatures (1). Some authors and judges attribute the cause for the uncertainty to the individual personality, which we do not agree under Chinese law (2).

³⁸⁰ See L. CHENG, The liability of hidden defects of the quality of the assets of the company in sale of shares, Eastern China University of Political Science and Law, 2016 (程丽娅: “股权转让中的公司财产质量瑕疵担保责任”, 华东政法大学硕士论文, 2016年); H. KANG, On the defective transfer of shares, Yangzhou University, 2012 (康辉: “论股权的瑕疵转让”, 扬州大学硕士论文, 2012年) ; H. LONG, *Remedies for defects of subject matter in M&A transactions*, Peking university law review, 2- 2015 (季海龙: “企业并购交易中的瑕疵担保责任”, 《北大法律评论》2015年第2期); J. AN, *On the garantie des vices cachés in transfer of shares --- focused on arbitral practices*, Beijing arbitration, 1- 2015 (安晋城, “论股权转让瑕疵担保责任的认定---以仲裁实践为中心”, 《北京仲裁》2015年第1期).

³⁸¹ See H. LONG, op. cit.

1. Observed uncertainty

512. The application of the legal foundations *réticence dolosive* and *garantie des vices cachés* in China is characterized by an uncertainty in the conditions for applying them.

i. Restrictive application at certain times

513. - Originally, even conventional protections were denied. Originally, Chinese courts took a very restrictive position as to the applying conditions for the legal foundations. In the earliest decision that we can find, the court found that the seller in question was not responsible for any defects on the patrimony of the company, in spite of a conventional warranty concerning the patrimony and the well-running of the company, holding that “seller of shares is responsible only for the authenticity and legality of the shares to be sold. The legal effect of a transfer of shares is only the change of shareholder. It has no effect what’s so ever on the patrimony of the company.”³⁸² This ignorance of the effects of conventional arrangement is widely criticized by Chinese scholars and protections will generally be granted to aggrieved buyers of shares when conventional warranties are existent.³⁸³

514. - Conventional protections are accepted, yet legal protections are sometimes denied. However, if there is no conventional clause, Chinese courts are possible to hold that the defects on patrimony of the target company is irrelevant.³⁸⁴ The irrelevance is held to be true even in situations where the defects are made by the seller: for example, in two cases where the sellers of shares are said to have usurped the cashes of the target companies, the courts held that the sellers had fulfilled their respective duties as sellers. As for the supposed usurp of assets of the companies, it should be solved in a separate litigation between the companies and the sellers.³⁸⁵

ii. Lenient application at other times

³⁸² See Triple 9 brewery vs. M. Chengjun BIAN.

³⁸³ See Chinese Institution of applied legal science, Anthology of decisions of people’s courts, People’s court press, sept. 2000, p. 174 (三九啤酒厂诉卞成居案, 载于中国应用法学研究所编: 《人民法院案例选》, 人民法院出版社, 2000年9月, 第174页) .

³⁸⁴ See (2015) Ürümqi intermediary court, 2nd civ. final instance n° 389 ((2015)乌中民二终字第389号).

³⁸⁵ See (2009) 2nd Beijing intermediary court, civ. final instance, n° 17758 ((2009)二中民终字第17758号); (2010) Huzhou intermediary court, commercial final instance, n° 391 ((2010)浙湖商终字第391号).

515. In spite of the sometimes-outright refusal of providing legal protections to aggrieved buyers of shares, at other times, Chinese courts are more than happy to provide the legal protections, applying conditions much more lenient than France in one aspect: in these cases, not only defects that are determinant, but also the ones non-determinant yet significant in a monetary sense are protected.³⁸⁶ More specifically, in France, the mere fact that an unsatisfactory buyer feels that he has paid a higher price than the real value of the shares, or that he feels the real value of the shares is inferior to the value expected by him, is not sufficient to apply the relevant legal foundations: the defect having caused his non-satisfaction should be considered as determinant either in an objective way (*garantie des vices cachés, erreur*) or in a subjective way. By contrast, in the Chinese decisions lenient in the conditions for providing the legal protections, the mere dissatisfaction is often enough for their protections: the determinant characteristic of the defect having caused the non-satisfaction is rarely, if not never, necessary.

2. Supposed cause

516. - Cause for the uncertainty as come up with by some Chinese authors and judges. The uncertainty as to the conditions for providing legal protections to aggrieved buyers of shares, or in other words, the pendulum of the attitudes of the Chinese judges between a manifested reluctance to apply the legal foundations and a willingness indicating that they are hospitable to even the most far-fetched claims, according to many Chinese authors and judges believe, is due to the different opinions as to the identification of purchase of shares in the schema of distinction between purchase of shares and purchase of enterprise. For them, if the purchase of shares is identified as a purchase of enterprise, the legal protections are to be applied to defects affecting the patrimony of the company and those affecting its ordinary operation; otherwise, the legal protections are to be applied to only defects affecting the shares *per se*. As the judges may have different opinion as to the identification of purchase of shares, they have different opinion as to the conditions for applying the legal protections.³⁸⁷

517. - Our critics to the supposed cause for the uncertainty. However, we believe

³⁸⁶ See (2009) 2nd Beijing intermediary court, civ. final instance, n° 10856 ((2009)二中民终字第 10856 号); (2009) 2nd Beijing intermediary court, final instance, n° 21060 ((2009)二中民终字第 21060 号); (2009) 2nd Shanghai intermediary court, 3rd civ. (commercial) final instance, n° 124 ((2009)沪二中民三(商)终字第 124 号).

³⁸⁷ See L. CHENG, op. cit.; H. KANG, op. cit.; H. LONG, op. cit.; J. AN, op. cit.

the attribution of the cause for the pendulum to the different opinions as to the identification of purchase of shares in the schema of distinction between purchase of assets of an enterprise and purchase of shares, is unsound as far as Chinese law is concerned. In fact, this attribution supposes that the legal protections, even if incompatible with the purchase of shares, is compatible with the purchase of assets of enterprise. This presumption, unfortunately, is not true under Chinese law, as whether the legal protections are to be applied to purchase of assets of an enterprise is not less debatable than the purchase of shares. As an author put it: “The object of acquisition by assets, is it the entire enterprise, or every individual element thereof, such as machines, real estates, patents etc.? This question is important, because the condition for applying article 155 and article 148 of the Chinese Contract law is that the ‘the object does not comply with the requirements of quality’. If the object in question is considered as the enterprise in its entity instead of every individual element constituting the enterprise, defect is to be recognized only if the entire enterprise does not qualify the quality requirements. On the other hand, if the object of an acquisition is considered as every element constituting the enterprise, then defect is to be recognized as long as it exists in the individual element, for example, if a computer of the enterprise is found to be defective, it can be said that the ‘object does not live to the requirements of quality’.”³⁸⁸

518. - Our opinion as to the cause for the uncertainty under Chinese law. Rather, in our opinion, the pendulum is in fact a corollary of the lack of clear descriptions of two key words in the statutory conditions for applying the legal foundations: the “defect (*vices*)” for *garnatie des vices cachés* and the “scope of the obligation of disclosure by the seller” for *réticence dolosive*. As neither Chinese legal text nor jurisprudence has managed to come up with universal definitions for them, it is more than normal that different judges may treat them differently with their own understanding, which gives rise to the phenomenon that some would tend to limit them to most undisputable situations whereas others would try to apply them as long as there is a tiny possibility to do so.

The obscurity of the definitions of the two key words and their effects on the application of the legal foundations seems not have been realized by the Chinese authors and judges. For them, it seems sufficient to define the two notions as those “to a rational extent”

³⁸⁸ See H. LONG, op. cit.

³⁸⁹, those “as required by the principle of good faith”³⁹⁰, or those “as to be determined by resorting to methods of interpretation of contracts”³⁹¹. However, the very fact that Chinese judges have made different decisions to similar cases concerning purchase of shares, has well demonstrated that they are outright wrong.

III. Comparison

519. A comparison of the legal protections against overpricing in the two countries shows that the legal protections in purchase of shares in both countries are unsatisfactory (A). As the dissatisfaction is caused by the inherent originalities of shares (B), we believe it is wise to accept the inherently limited utility of the legal protections in purchase of shares and shunt the attentions and efforts dedicated to the discussion of the legal protections in purchase of shares to other more meaningful topics (C).

A. Presentation of the unsatisfactoriness

520. What we have mentioned *supra* reveals that in both countries the legal protections are unsatisfactory, which is embodied in two sets of dilemma: that between rigidity and uncertainty (1) and that between insufficiency and excess (2).

1. Unsatisfactoriness reflected in the dilemma between rigidity and uncertainty

521. - Role of judges: drawing a line between the risks and obligations to be assumed by the two parties. In essence, the legal protections are to cast a judge in a role of drawing a line between the respective obligations of a buyer and a seller of shares: no matter whether it concerns a supposed defect in shares or whether it concerns a supposed failure of disclosing an information, the judge always has to determine in the first place what defects in general a seller should be responsible for and what information in general a seller is supposed to disclose, before he can decide in a particular case whether the defect of shares or failure of disclosure would bring a negative consequence to the seller involved.

³⁸⁹ See (2002) 2nd Shanghai intermediary court, 3rd civ. (commercial) first instance, n° 208 ((2002)沪二中民三(商)初字第208号).

³⁹⁰ See H. KANG, th. précité, p. 16; (2009) 2nd Beijing intermediary court, civ. final instance, n° 10856 ((2009)二中民终字第10856号).

³⁹¹ See H. LONG, op. cit.

522. - Guidelines for the role: criteria stated in legislative texts or in jurisprudence. To draw the aforementioned line, the judge has to resort to guidelines in legislative texts. For example, the scope of defects (*vices*) in the sense of *garanties des vices cachés*, is provided in French *code civil* as “*défauts cachés de la chose vendue qui la rendent impropre à l’usage auquel on la destine*” whereas the same is provided in Chinese Contract Law as “a failure to comply with the quality requirements”. Sometimes, jurisprudence will also come to complement the legislative criteria. For example, French jurisprudence has interpreted the vague “*défauts cachés de la chose vendue qui la rendent impropre à l’usage auquel on la destine*”, when it comes to purchase of shares, as “*l’impossibilité de poursuivre l’objet social.*”

Comparing the guidelines for drawing the line in the two countries, we can see that judges of the two countries have different degree of discretion. In France, generally speaking the legislative and judicial guidelines are specific enough that judges do not have much discretion: for example, when it comes to *garantie des vices cachés*, French judges are required to only intervene in a specific situation --- “*l’impossibilité de poursuivre l’objet social.*” By contrast, in China, the guidelines are rather vague and accordingly Chinese judges have much more discretion than their French counterparts: for example, when it comes to *garantie des vices cachés*, as the Chinese criterion for *vices cachés* is the “failure to comply with the quality requirements” and there is no fixed criterion for the quality requirements in purchase of shares, Chinese judges have a liberty to find or not to find the existence of a defect of shares, on a case-by-case basis.

523. - Problems of the guidelines: rigidity or uncertainty. Albeit the difference of the guidelines in the two countries in terms of the discretions provided to judges, they share one thing in common: they are both problematic. The Chinese judges, as having more discretions and being more possible to make flexible decisions adaptable to the specific need of every case, lack nonetheless the possibility to render decisions with sufficient certainty: for example, when it comes to *garantie des vices cachés*, as they have different understanding towards the meaning of quality, it is very possible that different judges will have different opinions, facing the same situation, as to whether there is a defect in shares. By contrast, the French judges, as having less discretions and accordingly being more susceptible to render predictable decisions, lack nonetheless the ability to cater to the specific need in every

specific case, as illustrated in the insufficiency of legal protections that are acknowledged by nearly all French authors. Accordingly, the comparison of the two countries show that the legal protections are trapped in a dilemma between rigidity and uncertainty.

2. Unsatisfactoriness reflected in the dilemma between insufficiency and excess

524. - Definitions of insufficient protections and excessive protections. We have just mentioned that the role of judges in applying the legal protections is to draw the line between the obligations and risks assumed by the sellers and the buyers of shares. In theory, there should be a most suitable location to draw the line, where the amount of protections provided to the buyers and the amount of obligations and risks assumed by the sellers is supposed to be optimal. If the line actual drawn is more favourable to the buyers than supposed line that indicates that optimal degree of protections, we say that the protections are insufficient. By contrast, if the line actual drawn is less favourable to the buyers than the supposed line, we say the protections are excessive.

525. - Insufficient protections and excessive protections observed in the two countries. According to the definitions of insufficient protections and excessive protections just mentioned, a preliminary condition for us to determine whether a given protection is insufficient or excessive, is the existence of an optimal level of protections known to us. However, this optimal level of protections, more often than not, is not known: after all, the very purpose of the aforementioned guidelines, legislative or judicial, is for helping the judges to find this level and if it is preliminarily known, the guidelines would become useless. Nonetheless, under certain circumstances, the intuition can help us to determine whether the optimal protection should be higher or lower than a given protection, which makes it possible to appreciate the legal protections in the positive laws in the two countries.

A comparison of the legal protections in the two countries shows that they are either insufficient or excessive. The insufficiency of the legal protections is well recognized in France, as demonstrated in the many articles and thesis written by French authors. The same insufficiency is also found in the limited amount of judicial decisions and scholarly articles we have just mentioned. By contrast, some Chinese decisions illustrates the other extremity: the legal protections are so excessive that as long as a buyer is unsatisfactory, he can always get remedies *de plein droit*, including situations where intuitively we would believe that it is

too burdensome for the seller to assume all the risks and duties as imposed upon him by the judge. The experience in the two countries reveals another dilemma in the legal protections: they are either insufficient or excessive.

B. Causes for the unsatisfactoriness

526. Some authors have tried to explain why the legal protections are unsatisfactory, we do not agree with (1). On the contrary, we believe that in reality, the unsatisfactory protections are because of the originalities of shares (2).

1. Supposed causes

527. Principally, there are two theories as to why the legal protections are unsatisfactory: the first theory is that the legal provisions serving as the foundations for them are unsatisfactory (1) whereas the second theory attributes the unsatisfactoriness to the individual personality of the target company (2).

i. Supposed causes: unsatisfactory legal provisions

528. - Presentation of the supposed cause. In seeking to solve the insufficiency of legal protections in purchase of shares, some French authors suggest reforms of existing legal rules (for example, the suggestion of Mme Coffin-moi of the establishment of a universal obligation of non-disclosure in order to facilitate the application of *réticence dolive*) or choice of foundations other than the one commonly used (for example, the suggestion of Mme Coffin-moi of the replacement of *réticence dolive* with *erreur*). The suggestions indicate that they believe the insufficiency of the legal protections, an important aspect of their unsatisfactoriness, is at least partly due to the unsatisfactory rules in the positive law.

529. - Rebuttal of the supposed cause. However, we do not believe that the insufficiency of the legal protections has much to do with the unsatisfactoriness of the legal provisions. Rather, the insufficiency of the legal protections, as we have presented *supra* and will re-mention briefly immediately, is inherent in purchase of shares and caused by the inherent characteristics of shares. It is extremely difficult, if not entirely impossible, to have the judges to draw an optimal line and between the risks and duties of the two parties; and any

efforts aiming at solving the insufficiency by trying to improve the rules in positive law, are thus doomed to be futile.

ii. Supposed causes: individual personality of the target company

530. - Presentation of the supposed cause. Both French authors and Chinese authors believe that the insufficiency of the legal protections in purchase of shares is caused by the fact that the target company has its own individual personality. This individual personality, according to them, distinguish purchase of shares from purchase of enterprises (or purchase of assets of enterprises). As purchase of shares is not protected to the same extent as purchase of enterprises, the protections for purchase of shares is not satisfactory.

531. - Rebuttal of the supposed cause. If purchase of enterprises, *de lege ferenda*, is not equipped with sufficient legal protections either, the mere fact that purchase of shares is distinct from purchase of enterprises, would be insufficient to explain the cause for the insufficiency of the legal protections for purchase of shares. Accordingly, the rationale aforementioned is flawed in that it presumes that the legal protections for purchase of enterprises is satisfactory: as we will see, *de lege ferenda*, the causes preventing the establishment of sufficient legal protections for purchase of shares, exist in a similar manner in purchase of enterprises and it is not an inherent characteristic of purchase of enterprises that the legal protections are sufficient.

The first reason against the sufficiency *de lege ferenda* of the legal protections for purchase of enterprises is the absence of the special legal protections for purchase of enterprises in China: unlike in France, *cession de fonds de commerce* is not considered as a category of contracts regulated specially by contract law in China. This fact demonstrates that the special protection for purchase of enterprises is not a universal phenomenon all around the world: it is true that under French law (article L.141-1 of *code de commerce*) there is a list of information to be disclosed by the seller of *fonds de commerce*. Yet, from a perspective *de lege ferenda*, this special treatment of *cession de fonds de commerce* different from that of purchase of shares lacks inevitability as it is also possible that legislators could impose the same obligation of disclosure to purchase of shares.

The second reason against the sufficiency *de lege ferenda* of the legal protections for

purchase of enterprises is the fact that the originalities of shares that makes purchase of shares subject to the special risks of overpricing, also exist in enterprises. As we have mentioned *supra* in the Part I, shares are inherently susceptible to be overpriced because of one of their inherent originality: the difficulty in determining the value of shares. In essence, the value of shares is difficult to be determined because the collection of shares is nothing but a black-box whose inside is unknown to potential buyers. This rational in fact applies to purchase of enterprises as well: instead of buying a particular asset, in the purchase of an enterprise, or in the purchase of the total assets of an enterprise, what the buyer intends to buy is also a collection of various items, whose value is difficult to evaluate as well because of the epistemological and ontological difficulties we have mentioned *supra*. In other words, a purchase of enterprise is nothing more than a purchase of a black-box similar to purchase of shares; and the obstacles preventing the legal protections in purchase of shares should prevent the protections in purchase of enterprises as well.

2. Real causes

532. In our opinion, the unsatisfactoriness of the legal protections in purchase of shares is due to the inherent judicial impotence in dealing with disputes concerning the price and value of shares, which is in turn due to the ontological difficulty, inherent in shares, in determining the value of shares by a third-party judge or arbiter, as we have already presented *supra* in Part I. If the authority to intervene in the absence of any conventional clauses is nonetheless granted to judges, it is predictable that such an intervention would be problematic and entailing the two sets of dilemma aforementioned. As a matter of fact, the observed unsatisfactoriness of the legal protections in the positive laws in the two countries serves as a demonstration of our opinion in this regard.

C. Implications of the unsatisfactoriness

533. As the unsatisfactoriness of the legal protections in purchase of shares is caused by the inherent characteristics of shares, it is to some extent unsolvable, which implies that efforts dedicated to solving the unsatisfactoriness should be reduced, if not entirely saved (1). Our suggestion confronts an obstacle: Mme Caffin-moi has argued that the conventional protections are insufficient, which indirectly insinuates that the legal protections are a must. Therefore, in order to solidify the *raison d'être* of our suggestion, we believe it is necessary to

rebut her argument (2).

1. Presentation of the implications

534. - Presentation of the inherent insolvability of the unsatisfactoriness. As the impotence of judicial interventions in disputes concerning price and value of shares is inherent in purchase of shares, the unsatisfactoriness of the legal protections is expected. What is also expected is the uselessness of the efforts to improve the legal protections, no matter through a re-interpretation of existent rules or through an establishment of new rules. In other words, the unsatisfactoriness of the legal protections is inherently unsolvable.

535. - Implications of the inherent insolvability of the unsatisfactoriness. *Prima facie*, the unsatisfactoriness of the legal protections for buyers of shares against overpricing and its inherent insolvability seem to be troublesome. However, as far as the protections for buyers of shares are concerned, the impotence of the legal protections is not a serious problem, if we are forced to acknowledge that it is a problem: a simple recourse to conventional protections is an efficient solution to the vulnerability of buyers of shares. On that account, rather than spending so much effort in trying to improve the legal protections, we suggest that legal scholars and practitioners should be more concerned about how to invent and apply conventional techniques that are both protective of the interests of the buyers of shares and accepted by the sellers.

It should be noted that we are not advocating an entire elimination of the legal protections in purchase of shares. In fact, in purchasing shares, what a buyer is to acquire is both a box and the items inside the box. If the legal protections are difficult to be used to protect the buyer against risks attached to the items inside the box, there is no reason to deny their effective application when it is the box *per se* that is defective. For example, when the shares in question are fake or the target company has been dissolved before the purchase, the legal protections, either based upon *réticence dolsovie*, *erreur*, *obligation précontractuelle d'information* or *garantie des vices cachés* can be well resorted to. Also, the existent jurisprudence about defects of shares in France can be well preserved (for example, the criterion of “*l'impossibilité de poursuivre l'objet social*”), as it reflects a consensus among French judges on how to draw the line between the risks and duties assumed by the two parties in a trade of shares in certain situations, which indicates that in these situations the

inherent judicial impotence has been somewhat solved. Rather, what we advocate is to stop the study, discussion or attempted change of the rules with an aim at improving the legal protections, which we believe is quasi-impossible.

2. Rebuttal of an opposition

536. - Reiteration of the argument of Mme Coffin-moi. According to Mme Coffin-moi, conventional techniques in purchase of shares are not sufficient because of two reasons: firstly, the nature of a conventional clause, whether it is a *garantie de valeur* or a *garantie de reconstitution*, can be uncertain; secondly, the protections that a buyer can receive from the conventional clause can be ineffective under certain circumstances.

537. - Rebuttal of the argument of Mme Coffin-moi. The first concern as to the whether to identify a clause as a *garantie de valeur* or as a *garantie de reconstitution* is actually caused by an unreasonable fear of negative price, which will be discussed in detail *infra* and we will not spend too many words to discuss it here. As for the second concern as to the ineffectiveness of the conventional protections, we believe it is also unreasonable for a simple reason: all the problems, mentioned by Mme Coffin-moi, related to the ineffectiveness of the conventional clauses exist in a more serious way in the legal protections. Even if we acknowledge that the supposed problems are all real, it means at most that the conventional clauses are sometimes impotent as well. Yet, it fails to demonstrate that the legal protections are more effective than the conventional ones in these situations and that the legal protections are more suitable to be relied on than the conventional ones. In our opinion, it may be true that the conventional protections are not perfect, but it is also true that they are much better than the legal ones.

Conclusion of Section I

538. In this section, by comparing the legal protections in the two countries, we have managed to demonstrate that the legal protections are inherently unsatisfactory in purchase of shares, which implies that the legal protections should not be relied on in most cases and, instead, concerns and efforts should be dedicated to the improvement of conventional techniques.

Section II. Legal protections against competition by sellers

539. A comparison (III) will show that the legal protections provided to buyers of sales of shares against competition by the sellers poses different problems in the two countries. In France, it is a matter of scope of application of the protection (I) whereas in China, it is a matter of existence of such a protection (II).

I. In France

540. Under French law, the existence of the protection to buyers of business (*fonds de commerce*), by the operation of law and against competition by the sellers, is a given fact (A). Yet French jurists and scholars are concerned about the transposability of this protection into sales of shares (B). Aside from the foundation of this protection, we would also expound its regimes (C).

A. Foundations of the legal protections for buyers of *fonds de commerce*

541. French statutes rarely provide legal non-competition obligations. When it comes to *cession de fonds de commerce*, the obligation mainly comes from the judicial interpretations of *garantie d'éviction* (1). Before that, there were also other foundations (2).

1. Legal protection based upon *garantie d'éviction*

542. There is no explicit provision in French law related to non-competition obligation of seller of *fonds de commerce*. But since long time ago, French jurists have genuinely created one by applying provisions related to *garantie d'éviction*, or more precisely *garantie du fait personnel*: “*le vendeur est tenu dans tous les cas à la garantie édictée par*

l'article 1626 du code civil, cette obligation comportant de devoir de s'abstenir de tout acte de nature à diminuer l'achalandage et à détourner la clientèle du fonds cédé."³⁹² This application of article 1626 in the context of *cessions de fonds de commerce* is justified by the idea that the acts of a seller of *fonds de commerce*, if it constitutes a *détournement de clientèle*, are amount to *éviction* of the things sold, in this sense the *fonds de commerce*.³⁹³

2. Legal protection based upon other foundations

543. - French jurists used to base the foundation on an implicit clause. When there was no explicitly stipulation of non-competition clause, they used to hold that *cession de fonds de commerce* is necessary to be equipped with a non-competition obligation, and therefore for the *cession* to be completed, an implicit clause of non-competition must be interpreted to exist.³⁹⁴

544. - French authors advocated to base the foundation on provisions related to performance in good faith. Although as we have mentioned the foundation *per se* of *garantie du fait personnel* can be attributed to provisions of "good faith", as provided in former article 1134 and in new article 1104 of *code civil*, some authors advocated to base directly the legal protection on it, leaving *garantie du fait personnel* aside. There are mainly three reasons for this replacement of foundation. Firstly, applying *garantie du fait personnel* necessarily requires the recognition of an ownership on clientele so as to allow it to be the object of a *cession*. By comparison, employing directly the provisions related to good faith does not requires such a preliminary recongition of ownership on clientele, which is controversial, and thus faces less possible oppositions.³⁹⁵ Secondly, the application of *garantie du fait personnel*, an aspect of *garantie d'éviction*, requires the existence of a transfer of possession of things.³⁹⁶ Yet, in many transactions where an obligation of non-

³⁹² Cass. req. 29 juillet 1908, DP 1909. 1. 281, note Lacour, cité in J. DERRUPPE, *Fonds de commerce*, Rép. dr. com. 2016, n°432; V. C. HOCHART, *La garantie d'éviction dans la vente*, LGDJ, 1993, n° 51.

³⁹³ V. C. HOCHART, *La garantie d'éviction dans la vente*, LGDJ, 1993, n° 65, p.42.

³⁹⁴ V. C. HOCHART, *La garantie d'éviction dans la vente*, LGDJ, 1993, n° 65, p.42. An example of sales of shares where the judge did not explicitly mention that there was an implicit non-competition clause, but instead hold that the usurp of the clientele by the seller would deprive the sales of its object: Cass. civ. 1re. 24 janvier 2006, 03-12.736, Bull. Joly sociétés 2006. 965, note H. LÉCUYER.

³⁹⁵ Y. AUGUET, *Concurrence et clientèle --- contribution à l'étude critique du rôle des limitations de concurrence pour la protection de la clientèle*, LGDJ, 2000, n° 311 et s; V. FORTI, *Le fondement de l'obligation de non-concurrence dans les contrats relatifs à une clientèle: pour le remplacement de la garantie d'éviction par le droit commun des contrats*, RDC 2016. 556, n° 5.

³⁹⁶ V. Y. PICOD, *L'obligation de non-concurrence de plein droit et les contrats n'emportant pas transfert de clientèle*, JCP E. 1994. 349, n°2.

competition is required, no detectable transfer of possession is observed and thus the application of *garantie du fait personnel* is to be precluded. If the provisions related to good faith is to be employed, the foundations for legal protections against competition can be universalized and the application of the legal obligation of non-competition would be irrelevant to the existence of a transfer of possession.³⁹⁷ Lastly, *garantie du fait personnel* is of the nature of public order, which entails many problems with respect to its scope and duration. Employing the provisions related to good faith would allow the judge or the parties to have more discretion in these regards.³⁹⁸ Although there are so many advantages in replacing making “good faith” as the foundation of the legal obligation of non-competition in *cession de fonds de commerce*, it seems not to have been generally accepted by French courts.³⁹⁹

B. Transposition of the protection to protect buyers of shares

545. It is now a consensus as to the acceptability of applying article 1626 to *cession de fonds de commerce*. But whether it is also acceptable to applying the same article to sales of shares for the same purpose is with some disputes. To French jurists and scholars, the obstacle of applying article 1626 of *code civil* to sales of shares the same way as it is applied in *cession de fonds de commerce*, is that the object of the legal protection – *garantie du fait personnel* – is the thing sold. In a *cession de fonds de commerce*, the thing sold can be considered to include, even as a major part, the clientele attached to it, and a competing activity by the seller may jeopardize the clientele and in turn disturb the peaceful possession of the thing sold. By contrast, in a sale of shares, what are sold are shares instead of the *fonds de commerce* of the target company. Thus, a competing act, even if it has the effect of disturbing the peaceful possession of the clientele and in turn the target company, cannot be said to disturb the peaceful possession of the shares sold.⁴⁰⁰ This used to be the stance of French jurists⁴⁰¹ and we face the same problem resulted from the individual personality of the target company in applying *garantie de vices caché* and in applying rules related to *erreur*.

³⁹⁷ V. V. FORTI, *Le fondement de l'obligation de non-concurrence dans les contrats relatifs à une clientèle: pour le remplacement de la garantie d'éviction par le droit commun des contrats*, RDC 2016. 556.

³⁹⁸ V. V. FORTI, *Le fondement de l'obligation de non-concurrence dans les contrats relatifs à une clientèle: pour le remplacement de la garantie d'éviction par le droit commun des contrats*, RDC 2016. 556.

³⁹⁹ V. Cass. com. 22 nov. 2016, no 15-18.664, JCP E 2017. 1214, n°4, obs. M. CAFFIN-MOI.

⁴⁰⁰ V. B. LECOURT, *Cession de droits sociaux*, Rép. dr. sociétés 2017, n° 304; P. MOUSSERON, *les conventions de garantie dans les cessions de droits sociaux*, NEF, 1992, n°116.

⁴⁰¹ V. Cass. com. 23 janv. 1990, Rev. sociétés 1990. 248, note Y. GUYON; V. M. CAFFIN-MOI, op. cit., n° 345s.; V. FORTI, *Le fondement de l'obligation de non-concurrence dans les contrats relatifs à une clientèle: pour le remplacement de la garantie d'éviction par le droit commun des contrats*, RDC 2016. 556, n° 13.

Fortunately, French judges have changed their mind. As an author has marked the famous case “*l’affaire Ducros*” which reflects this shift of stance: “*il n’est pas nécessaire, en effet, que le trouble de fait porte atteinte au droit cédé lui-même; il suffit qu’il soit de nature à priver l’acquéreur de tout ou partie des avantages que doit lui procurer la chose vendue.*”⁴⁰² Thus, since an usurp of clientele does jeopardize “*des avantages*” the buyer can receive from the shares, which is the thing sold, it is appropriate and thus admitted to transpose the same legal protection provided for buyers of *fonds de commerce* to buyers of shares. However, the speciality of sales of shares in terms of the application of article 1626 still exists: the condition of application of this article in sales of shares is still more restrictive than in *cession de fonds de commerce*, as we would present immediately.

C. Regimes of the protection for buyers of shares

546. The non-competition obligation based upon article 1626, in both sales of shares and *cession de fonds de commerce*, is perpetual in its duration (2). However, its scope of application is more restrictive in sales of shares than in *cession de droits sociaux* (1). What needs to be specially noted about French law is that such a legal obligation of non-competition, because of its legal foundation being of the nature of public order, is compulsory to the extent that conventional derogation from it is restrictive (3).

1. Scope

547. The scope of application of the legal non-competition obligation of sellers of *fonds de commerce* is decided by the judge on a case-by-case basis (i). However, when it comes to sales of shares, its application should meet very restrictive conditions (ii).

i. Not-so-restrictive scope of application in *cession de fonds de commerce*

548. To apply the legal protection based upon article 1626 of *code civil* to the situations of competition by sellers of *fonds de commerce*, it is necessary to firstly establish

⁴⁰² V. Cass. Com., 21 janvier 1997, n° 94-15.207, RTD com. 1997. 469, obs. B. PETIT et Y. HEINHARD; C. HOCHART, *La garantie d’éviction dans la vente*, LGDJ, 1993, n° 8, p.15; H. AUBRY, *Les obligations de non-concurrence du cédant de droits sociaux en l’absence de clause contractuelle*, in Mélanges MICHEL GERMAIN, LGDJ, 2015, n°7, p. 29.

the existence of a damage to the clientele (a). By contrast, it is not necessary to establish that the competition by the seller is disloyal (b).

a. Usurp of clientele as a condition for the application

549. -The legal protection based upon article 1626 of *code civil* focuses on the objective usurp of clientele resulted from a competing act instead of the act *per se*. The most important thing to be noted is that the legal protection based upon article 1626 does not prohibit all competition by the seller with the target company. The direct purpose of this legal regime is to protect the integrity of the clientele attached to a *fonds de commerce*; whereas the restriction of the liberty of competition of the seller is only a method to achieve this purpose. As long as a competition is considered not to disturb the clientele, it is well allowed. Therefore, “*en l'absence d'une clause expresse portant interdiction au vendeur d'un fonds de commerce de faire un commerce similaire, la vente d'un tel fonds, avec la clientèle et l'achalandage, n'entraîne pas nécessairement pour le vendeur une pareille interdiction.*”⁴⁰³

550. - The legal protection based upon article 1626 of *code civil* encompasses all acts that would usurp the clientele, either directly or indirectly. The acts prohibited may be either a direct reestablishment of a competing enterprise; or being hired by an existing competing enterprise.⁴⁰⁴

551. - The most important element for the application is determined by judges. The legal protection is only applicable if a competing act actually jeopardizes the clientele. Therefore, in order to establish a case, it is necessary to firstly establish that the act of the seller has such a negative effect. This fact is determined by judges (*juges du fond*) on a case-by-case basis.⁴⁰⁵

b. Disloyal competition as not a condition for the application

⁴⁰³ Cass. req. 29 juillet 1908, DP 1909. 1. 281, note Lacour, cité in J. DERRUPPE, *Fonds de commerce*, Rép. dr. com. 2016, n° 433.

⁴⁰⁴ V. F. VIOLET, *Quels rapports entre obligation de garantie et obligation de non-concurrence dans la vente d'un fonds de commerce?*, Defrénois 2006. 467; F. CHALVIGNAC, *La garantie légale d'éviction et la clause de non-concurrence*, LPA 16 décembre 2002. 4, n° 7.

⁴⁰⁵ V. J. DERRUPPE, *Fonds de commerce*, Rép. dr. com. 2016, n° 434.

552. - The legal protection based upon article 1626 of *code civil* does not distinguish between loyal competitions from disloyal ones. Another thing to be noted is that the protection based upon *garantie du fait personnel* is results-focused instead of method-focused. That is to say it would prohibit an act, even if it is absolutely loyal, as long as it would produce the effect of jeopardizing the clientele to be protected. This is what distinguishes it from another legal foundation against competition by sellers of shares --- the disloyal competition.⁴⁰⁶

ii. A restrictive scope of application in sales of shares

553. - The restrictive condition for applying the legal protection. For a *cession de fonds de commerce*”, the condition for applying the legal protection based upon *garantie du fait personnel* is relatively lenient even though it is subject to a judicial assessment: what has to be established is only the fact that the competition by the seller jeopardize the clientele attached to the *fonds de commerce* sold. By contrast, for sales of shares, although we have mentioned that since 1997 it is a consensus that the legal protection is applicable thereto, its application is subject to a more restrictive condition: the eviction which is the essential condition for applying article 1626 should always be on the thing sold, and the things sold in a sale of shares are always the shares instead of the assets of the target company (which includes the clientele in question). However, if the clientele is usurped to such an extent that the company is difficult to continue to run, it constitutes an eviction on the shares *per se*, which makes article 1626 acceptable.⁴⁰⁷

This rationale is similar to that in *erreur* and *garantie des vices cachés* and results in a similar condition for the application of the legal protection based upon *garantie du fait personnel*: “*la garantie légale d'éviction du fait personnel du vendeur n'entraîne pour celui-ci, s'agissant de la cession des actions d'une société, l'interdiction de se rétablir, que si ce*

⁴⁰⁶ V. F. CHALVIGNAC, La garantie légale d'éviction et la clause de non-concurrence, LPA 16 décembre 2002. 4, n° 5; V. Y. PICOD, *L'obligation de non-concurrence de plein droit et les contrats n'emportant pas transfert de clientèle*, JCP E. 1994. 349, n°1; Cass. com. 20 février 2007, n° 04-19.932, RTD com. 2007. 752, note C. CHAMPAUD.

⁴⁰⁷ V. FORTI, *Le fondement de l'obligation de non-concurrence dans les contrats relatifs à une clientèle : pour le remplacement de la garantie d'éviction par le droit commun des contrats*, RDC 2016. 556; Cass. com. 20 février 2007, n° 04-19.932, RTD com. 2007. 752; H. AUBRY, *Les obligations de non-concurrence du cédant de droits sociaux en l'absence de clause contractuelle*, in Mélanges MICHEL GERMAIN, LGDJ, 2015, n°7, p. 29, n°13, p. 33.

*rétablissement est de nature à empêcher les acquéreurs de ces actions de poursuivre l'activité économique de la société et de réaliser l'objet social.*⁴⁰⁸

554. - The consequence of the restrictive condition: indifference to l'éviction partielle. According to article 1626 of *code civil*, the scope of application of *garantie d'éviction* covers “l'éviction qu'il souffre dans la totalité ou partie de l'objet vendu”. However, the special requirements for sales of shares that the competing acts of the seller should have actually made it impossible for the buyer of shares to “poursuivre l'activité économique de la société” and “réaliser l'objet social”, makes the scope of application of the legal protection much more restrictive than the provisions of article 1626 of *code civil*: competitions by the seller that does not totally deprive the target company of all its clientele cannot be said to have prevented it from *poursuivre l'activité économique de la société*” and “réaliser l'objet social” ---“la simple diminution de la clientèle ne suffit pas à justifier un recours fondé sur la *garantie d'éviction*.”⁴⁰⁹ A typical example is that in a sale of shares, the court confirmed that the seller has committed a competing act and it did jeopardize the clientele. However, because such competing act had only resulted in “un pourcentage réduit du chiffre d'affaires”⁴¹⁰ of the target company, it was not considered to have fulfilled the condition of application of article 1626 of *code civil*. This is to say that if a competition has only partially disturbed the peaceful possession of the clientele by the target company (and indirectly by the buyer), i.e. if there is only an *éviction partielle*, it is out of the scope of the protection provided by *garantie du fait personnel*.⁴¹¹

2. Duration

555. Since there is no temporal limitation on the obligation of *garantie d'éviction*, the legal obligation of non-competition there upon, for both *cession de fonds de commerce*

⁴⁰⁸ Cass. com. 21 janvier 1997, n° 94-15.207; V. Cass. com. 9 juillet 2002, n° 98-22.284; Cass. com. 26 novembre 2003, n° 00-18.005; Cass. com. 20 février 2007, n° 04-19.932; Cass. Com. 15 décembre 2009, n° 08-20.522.

⁴⁰⁹ M. CAFFIN-MOI, op. cit., n° 360; the reason to restrict the scope of application of article 1626 of *code civil* is also for another reason particular to the legal obligation of non-competition: “parce qu'elle apporte une restriction à des libertés fondamentales, celle du commerce et d'industrie et celle du travail, la restriction... doit être limitativement interprétée.” (Cass. com. 10 juin 1997, RTD com. 1998. 157, obs. C. CHAMPAUD et D. DANET.)

⁴¹⁰ Cass. com. 9 juillet 2002, n° 98-22.284.

⁴¹¹ There are some exceptions where the requirement of a total eviction is not restrictively observed by the judges. (V. Cass. civ. 1re. 24 janvier 2006, 03-12.736, Bull. Joly sociétés 2006. 965, note H. LÉCUYER; Cass. com. 12 mai 2015, n° 14-11.699, JCP E 2015. 1577, obs. M. CAFFIN-MOI.) However, because there are so rare, we believe it does not change the fact that when it comes to sales of shares, the conditions for application are much more restrictive than in *cession de fonds de commerce*.

and for sales of shares, is perpetual.⁴¹² This perpetuity of the legal obligation of non-competition gives rise to another particular phenomenon in French law: after the expiration of a conventional obligation of non-competition, sellers of shares or *fonds de commerce* cannot be entirely released from the prohibition against them in participating competing activities as they would continue to be subject to the ever-lasting legal obligation of non-competition.⁴¹³ That is to say, sellers of shares in France should be prepared to be haunted forever by this restriction on his personal liberties.

3. Derogation

556. - The nature of public order of the legal protection makes it nearly impossible to derogate from it. Article 1628 of *code civil* provides that: “*quoiqu'il soit dit que le vendeur ne sera soumis à aucune garantie, il demeure cependant tenu de celle qui résulte d'un fait qui lui est personnel: toute convention contraire est nulle.*” This article, which basically qualifies *garantie du fait personnel* as an article of public order, makes it difficult to conventionally derogate from it: “*l'aménagement conventionnel de cette garantie ne pourra porter que sur une extension et en aucun cas sur une limitation ou une suppression de ses effets.*”⁴¹⁴ This article, not only imposes a heavy obligation upon the seller, deprives also the buyer of the possibility of selling the liberty to the seller of shares (or *fonds de commerce*) because even if “*le débiteur avait offert de verser l'indemnité contractuellement prévue pour le libérer de cet engagement de non-concurrence, de toute façon la garantie d'éviction continuait de peser sur lui.*”⁴¹⁵ This has a significant impact on the interests of the parties, especially when we take into consideration the perpetuity of the legal obligation of non-competition.⁴¹⁶

557. - The rare situations where derogation is allowed. The only exception to the

⁴¹² V. F. CHALVIGNAC, *La garantie légale d'éviction et la clause de non-concurrence*, LPA 16 décembre 2002. 4, n° 6; F. VIOLET, *Quels rapports entre obligation de garantie et obligation de non-concurrence dans la vente d'un fonds de commerce?*, Defrénois 2006. 467; V. FORTI, *Le fondement de l'obligation de non-concurrence dans les contrats relatifs à une clientèle : pour le remplacement de la garantie d'éviction par le droit commun des contrats*, RDC 2016. 556

⁴¹³ V. Cass. com., 14 avril 1992, n° 89-21.182, RTD civ. 1993. 150, obs. P.Y. GAUTIER; Cass. com., 16 janvier 2001, n° 98-21.145, D. 2001. 1312, note Y. SERRA; CA Paris, 17 décembre 1999, LPA 19 juillet 2000. 10, note M. MALAURIE-VIGNAL. We have found an exception where the judge held that the duration of non-competition based upon *garantie d'éviction* should be determined according to the principle of good faith. (V. CA Versailles 20 novembre 1997, RJDA avril 1998. 439.) But as there is only one case found, we do not believe it would change much the stance of jurisprudence.

⁴¹⁴ F. CHALVIGNAC, *La garantie légale d'éviction et la clause de non-concurrence*, LPA 16 décembre 2002. 4, n°8

⁴¹⁵ V. Cass. com., 15 déc. 2009, n° 08-20.522, CCC. mars 2010. 66, note L. LEVENEUR.

⁴¹⁶ V. F. VIOLET, *Quels rapports entre obligation de garantie et obligation de non-concurrence dans la vente d'un fonds de commerce?*, Defrénois 2006. 467

rigorous non-derogability rule is when the seller of *fonds de commerce* or shares has already a competing enterprise before the sale, and has disclosed its existence.⁴¹⁷ As the judge of a very old case put it: “*attendu que l’article 1628 ne fait pas obstacle à la validité de la clause de non garantie, destinée à renseigner l’acquéreur sur une circonstance particulière antérieure à la vente et susceptible de provoquer, éventuellement, son éviction ou d’entraîner à son détriment une situation préjudiciable, éventualité dont il a, en se portant acquéreur, accepté de supporter le risqué.*”⁴¹⁸ Aside from this only situation, seller is nearly impossible to get released from this enduring legal encumbrance.

II. In China

558. - No specific provisions for legal obligation of non-competition in *cession de fonds de commerce*. We are certain that under Chinese law there is no special provisions for legal obligation of non-competition assumed by sellers of *fonds de commerce*, simply because there is no such a notion as *fonds de commerce*⁴¹⁹ in the positive law of China. In fact, sale of business of going concern is a common practice in China. However, there is no special legal regimes applicable to such a practice: for a Chinese buyer of business, in light of law, what he would buy are either a significant portion of shares of the target company, or a collection of assets.⁴²⁰ Without even the notion of *fonds de commerce* recognized in positive law (in academia, *fonds de commerce* is well recognized), it is not surprising that there is no legal provision of non-competition obligation attached to such notion.

559. - No possibility of applying *garantie d’éviction*. In fact, there is no special statutes provisions for obligation of non-competition in *cession de fonds de commerce* either in France. However, French judges manage to extend the scope of application of *garantie d’éviction*, or more precisely *garantie du fait personnelle*, to this situation. This solution is

⁴¹⁷ V. F. CHALVIGNAC, *La garantie légale d’éviction et la clause de non-concurrence*, LPA 16 décembre 2002. 4, n° 9.

⁴¹⁸ V. Cass. com. 2 décembre 1965, disponible <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006970508>

⁴¹⁹ We would use the French term because in common law there is no perfect equivalence to this term. The English expression “going concern” can be roughly translated as *fonds de commerce*, yet it is in essence a terminology of accounting instead of law, because there is no special legal regime applicable to it. In the sense that *fonds de commerce* is a particular object of legal regime, we believe it is not interchangeable with the English term “going concern”. And what Chinese authors advocate is the transplantation of the special legal regimes of *fonds de commerce* from other civil law countries. Therefore, in this thesis, for the purpose of precision, we would use the French term *fonds de commerce* when necessary.

⁴²⁰ See X. LIU, *The study of the system of business transfer--- centering on Japanese law*, Press of Renmin University, 2014, p. 3. (参见 刘小勇：《营业转让制度研究---以日本法为中心展开》，中国人民大学出版社 2014 年版，第三页。)

without any doubt impossible in China because the *garantie du fait personnel* simply does not exist in Chinese law.

560. - No recourse to other possible legal foundations. Aside from *garantie d'éviction*, French jurists also base the legal obligation on the principle of good faith or on the implicit clause of non-competition. Technically speaking, the two solutions are both possible under Chinese law and Chinese judges are not willing to intervene in filling gaps in contract if they find that a clause is lacking yet according to the mutual intentions of the parties, it should have existed. Thus, it seems that if a Chinese judge does find that the conventional purpose of a sale of shares or assets is to allow the buyer to continue exploit a business with an existing clientele, he would probably do so.

However, the fact is to the contrary: we have failed to detect any judgements rendered in this way.

III. Comparison

561. The most noticeable difference in the two countries is the existence or absence of the legal protection *per se*. We believe in purchases of shares the legal protection is inappropriate and from a perspective *de lege ferenda*, the legal protection should eventually be eliminated (A). On top of that, even if we refrain from discussing the reasonableness of the protection and presume that its existence is justified, its current regime in France is still problematic, which in our opinion is caused by the recourse to *garantie du fait personnelle* (B)

A. Inappropriateness of the legal protection *per se*

562. In France, the legal protection against competition of sellers of shares is based upon the same legal protection against sellers of *fonds de commerce*; whereas under Chinese law, even the legal protection for *fonds de commerce* is absent. Thus, we should firstly discuss the appropriateness of the legal protection in *cession de fonds* (1). As we will reveal that the existence of the legal protection in *cession de fonds* is not unreasonable, we will then discuss the necessity of transposing the legal protection in a context of sales of shares, and our conclusion is that it is not at all appropriate (2).

1. Appropriateness of the legal protection in *cession de fonds*

563. *Prima facie*, the difference in terms of the legal protection is caused by the difference in terms of the existence or absence of legal foundations (i). However, as we will reveal later, this second difference is not sufficient to justify the first and it is rather the difference in practical needs that is responsible for the difference in the legal protections. The difference in practical needs actually justifies the existence of the legal protection in *cession de fonds* in France (ii).

i. Reflection on the causes for the difference in the legal protection from the perspective of legal foundations

564. The difference in the two countries in terms of the legal protections against competition of sellers of *fonds de commerce*: i.e. the existence thereof in France and the absence thereof in China, *prima facie*, seems to be able to be explained by the fact that *garantie du fait personnel* exists in French law whereas it is lacking in Chinese law, as the French legal protection is based thereupon. However, we believe this explanation is not sufficiently reasonable, as the existence or not of the *garantie du fait personnel* is neither necessary (a) nor sufficient (b) to justify the existence or not of the legal protection against competition of sellers of *fonds de commerce*.

a. Absence of *garantie du fait personnel* as insufficient to explain the absence of the legal protections in China

565. It is true that French jurisprudence uses the *garantie du fait personnel* as the foundation for the legal protections against competition of sellers in *fonds de commerce*. However, that is not to say that without *garantie du fait personnel*, the legal protection against competition should not exist. As has been presented *supra*, French authors have considered the possibility of alternative foundations such as “good faith” or “implicit non-competition clauses”, not to mention the special provisions for non-competition obligations *de plein droit* in some countries. Accordingly, the mere fact that Chinese law does not have a provision similar to the *garantie du fait personnel* is thus not sufficient to explain why there is no such a legal protection in China.

b. Existence of *garantie du fait personnel* as insufficient to explain the existence of the legal protections in France

566. If the absence of *garantie du fait personnel* is insufficient to explain the absence of the legal protection in China, in the other way around, the existence of the *garantie du fait personnel* is insufficient to justify the existence of the legal protection as well. In other words, there is no abstract necessary co-relation between the legal foundation and the legal protection: it is very possible that in another country equipped with the *garantie du fait personnel* in its civil law the judges have not interpreted the legal foundation in such a way as to establish a legal protection against competition of sellers of *fonds de commerce*. The *garantie de fait personnelle*, as has been presented *supra* in Part I, is for the purpose of protecting buyers of things against interference with the peaceful possession and enjoyment of the things sold. To use it as the foundation for the legal protection against competition of sellers of *fonds de commerce*, a presumption is needed: that the competition of sellers of *fonds de commerce* in the domain of the business of the *fonds de commerce* purchased, is to the detriment of the peaceful possession and enjoyment. However, the interference of the peaceful enjoyment and possession of the *fonds de commerce* as supposedly caused by the competition of the sellers is by no means self-evident; rather, the correlation between the *concurrence* and the *éviction* is nothing but a judicial imagination, whose justification needs to be found somewhere else, such as the practical needs external to the law. In other words, if the justification for identifying the competition with *éviction* is lacking, the legal protection against competition of sellers of *fonds de commerce* is unfounded in spite of the existence of *garantie du fait personnel*.

ii. Reflection on the appropriateness from the perspective of practical needs

567. As far as the practical needs are concerned, we believe it is not very inappropriate if the legal protection is lacking (a). However, if the legal protection nonetheless exists, it is not very inappropriate either (b).

a. Legal obligation of non-competition: not indispensable

568. Legal obligation of non-competition is for transferring clientele. However, transfer of clientele is tantamount to a conventional non-competition obligation, which means that legal non-competition obligation is not at all necessary.

569. - Legal obligation of non-competition as the means for a transfer of clientele. As has been presented *supra*, the obligation of non-competition *de plein droit* in *cession de fonds de commerce* is for the purpose of facilitating the transfer of an important asset, in some sense the most important component asset in a *fond de commerce*: the clientele.

570. - Transfer of clientele as a tautology of conventional non-competition clause. As has been presented *supra*, the clientele is the typical asset determining the value of shares, that cannot be maintained with either physical control or legal protections *erga omnes*, and accordingly its transfer can be realized only through a conventional mechanism imposing an obligation of non-interference on the part of the transferor. In this sense, if there is no conventional non-competition clause, there is no transfer of clientele; or in other words, transfer of clientele is tantamount to non-competition clause. In fact, the content of a non-competition clause, or more specifically the scope and duration of the conventional non-competition obligation, determines the portion of the clientele eventually transferred.

571. - Conventional non-competition clause as the reason why legal obligation of non-competition is not indispensable. We have mentioned that legal obligation of non-competition in *cession de fonds* is for the purpose of transferring clientele. However, this is unnecessary as transfer of clientele is just another way of saying “conventional non-competition clause”: if there is no non-competition clause, it signifies that there is no common intent to transfer the clientele and the price paid does not include it, which in turn indicates the unnecessary of any obligation of non-competition *de plein droit*; on the other hand, if there is a non-competition clause, it denotes that the parties have well agreed upon the scope of clientele to be transferred, and it is thus not indispensable either to have a legal obligation of non-competition either.

b. Legal obligation of non-competition: “*la cerise sur le gateau*”

572. - Legal obligation of non-competition as *la cerise sur le gateau*. While the obligation of non-competition *de plein droit* is not indispensable, it is not entirely useless

either to have it in the legal system of a country. The two statements are not contradictory: the legal obligation of non-competition is just like a cherry and the practical needs are just like a cake; the accompany of the cherry will make the cake more beautiful and delicious, yet without the cherry, the cake is still edible.

573. - Legal obligation of non-competition as a tautology of a transfer of clientele *de plein droit*. As the obligation of non-competition on the part of sellers of *fonds de commerce*, is interchangeable with the transfer of clientele, the obligation of non-competition *de plein droit* constitutes a compulsory transfer of clientele. Accordingly, to justify the legal obligation is the same as to justify the compulsory transfer of clientele.

574. - *Raison d'être* of the transfer of clientele *de plein droit*. The transfer of clientele *de plein droit* is possible to be justified as a judicial effort to fill a gap in the manifestations of intents of the parties. Manifestations of intents (*manifestations de volonté*) sometimes may not corresponds to the exact intents of the parties, and the law may come to help by providing some obligations *de plein droit* which are considered as implicit intents that should have been manifested yet due to various reasons failed to be manifested. However, not all the intents failed to be manifested are protected by law. Rather, the legal gaps will be filled only if two conditions are met: firstly, an obligation commonly found in a category of contract is lacking, which should have been in place if the parties are reasonable persons; secondly, the party to be protected by the obligation is not sophisticated enough to be always discreet on the existence or absence of the obligation.

575. - French legal obligation of non-competition as justified by the existence of the aforementioned *raison d'être*. The legal obligation available in France is justified because in France the two conditions aforementioned are met. For one thing, the transfer of clientele in sale of business is a common usage in France, so common that nearly every contract transferring all of the assets for a particular business, concluded by sophisticated parties, will stipulate the transfer and the price paid will include the clientele attached to the business. For another, because the transfer of business is so common, it often involves not-so-sophisticated small business owners who may not be willing to, or able to afford to, resort to legal counsels. Accordingly, as catering to the needs of these numerous and vulnerable small business owners, it is appropriate, although not indispensable, that French positive law has established the legal obligation of non-competition in *cession de fonds de commerce*.

576. - Chinese absence of legal obligation of non-competition as justified by the absence of the aforementioned *raison d'être*. Albeit the justifications given to the legal obligation of non-competition in French law, we would like to emphasize again that the obligation *de plein droit* is not indispensable. In countries like China, because the two aforementioned conditions are not met, it is reasonable that there is no legal obligation of non-competition in *cession de fonds de commerce*. For one thing, it is not a common practice in China that clientele is transferred in every sale of business: maybe because of the large population in China, clientele is not necessarily sold in the event of a transfer of business; only in those profitable trades where clients are limited and thus clientele is precious, will transfer of business associated with a sale of clientele. For another, as profitable trades where clientele is precious are usually operated by shrewd business men, buyers of business in this case are usually sophisticated enough to be able to protect themselves. On those accounts, the positive law of China does not impose any obligation of non-competition *de plein droit* on the part of sellers of business, and the notion of “*fonds de commerce*” has not been adopted as a legal concept specifically regulated by law. In fact, as far as we know, the Anglo-Saxon law does not have an obligation of non-competition *de plein droit* either, which indicates that the absence of the legal obligation is not so abnormal and reinforces our stance that the absence is not so inappropriate.

2. Inappropriateness of the legal protection in purchases of shares

577. -If the legal protection in purchases of shares is to be justified, it should be justified in the same way as in the *cession de fonds de commerce*. As the legal protection of buyers of shares against competition by sellers of shares in France is based upon the legal protection in *fonds de commerce*, and as there is no such a legal protection in *fonds de commerce* in China, it seems that the Chinese experience is not so helpful when it comes to the appropriateness of the legal protection against competition by sellers of shares. However, the Chinese experience is actually still beneficial in this regard, as the reasoning we have used in demonstrating the appropriateness of the existence or absence of the legal protection in *cession de fonds de commerce* in the two countries, is transposable to the discussion of the appropriateness of the legal protection in purchases of shares in France. As we will see, the legal protection in purchases of shares is neither indispensable nor beneficial.

578. - Legal protection in purchases of shares is not indispensable. We have demonstrated *supra* that the legal protection in *fonds de commerce* is not indispensable. As the legal protection in purchases of shares in France is based upon the legal protection in *cession de fonds de commerce*, it is naturally that the legal protection in purchases of shares is not indispensable either.

579. - Legal protection in purchases of shares has no additional advantages. We have mentioned *supra* that the obligation of non-competition *de plein droit* in France, albeit not indispensable, is justified by its additional advantages. However, the additional advantages do not exist in purchases of shares and there is no *raison d'être* for the legal protection of buyers of shares against the competition of sellers. For one thing, unlike in the *cession de fonds de commerce* where the motive of the buyer is usually the acquisition of a business and thus the clientele is to some extent indispensable, there are diverse motives in purchases of shares and it is very possible that the price initially agreed does not include any clientele. To impose an obligation of non-competition *de plein droit* on the part of the seller is thus tantamount to compulsorily require the seller to transfer something he has not received any price. For another, unlike in the *cession de fonds de commerce* where the buyer is often an unsophisticated small business owner, if it is shares that are purchased, the buyer is supposed to be a shrewd businessman, and it is thus useless to protect him by giving him some privileges *de plein droit*. To sum it up, the obligation of non-competition on the part of sellers of shares, far from being a mechanism to fill gaps and realize justice, makes things worse by changing without reasons the conventional arrangement of rights and obligations between the parties.

B. Inappropriateness of the recourse to the *garantie du fait personnel*

580. The current legal protection against sellers of both *fonds de commerce* and shares in France is based upon the *garantie du fait personnel*. Not surprisingly, two features of the legal foundation have been transposed to the legal protection, i.e. the perpetuity and the nature of public order. However, this transposition is admitted as problematic, if not entirely incorrect: it is to some extent self-evident that the legal protection should be only temporary and should be able to be derogated conventionally.

581. In our opinion, the problem is ultimately caused by the problematic features of the *garantie du fait personnel* as have already been presented *supra*. In this section, however, we will leave the legal foundation *per se* intact. Rather, we will present that even if we do not question the appropriateness of the nature of perpetuity and the nature of public order of the *garantie du fait personnel*, the two natures of the legal protection of buyers against the competition of sellers is still inappropriate: for one thing, it is rather dubious as to the appropriateness of using *garantie du fait personnel* as the legal foundation for the legal protection (1); for another, even if we are determined to use this legal foundation, it is inappropriate to interpret it in such a way as to assign the two features to the legal protection (2).

1. Inappropriateness in the application *per se* of the *garantie du fait personnel*

582. If the legal foundation – the *garantie du fait personnel* – is to be applied directly without any pre-treatment, i.e. to treat all the competitions by sellers as *évictions du fait personnel* as regulated by the *garantie du fait personnel*, the legal regime for the legal protection of buyers against competition by sellers will be problematic. As M. Violet has conveyed: “*Si l'article 1626 du Code civil suscite de si nombreuses interrogations en pratique, c'est très certainement parce que les rédacteurs du Code civil n'avaient pas imaginé qu'on puisse en faire une telle application. Essentiellement physiocrate, ce code, comme d'ailleurs celui de 1807, ne connaissait pas la notion de fonds de commerce. C'est donc bien naturellement que certaines de ses dispositions suscitent de délicates questions d'application.*”⁴²¹

However, even if the rationale is to hold whereby the problems of perpetuity and that of the nature of public order are sure to occur because the competitions are always considered as *évictions* and thus the problems of the *garantie du fait personnel* would be transposed to the legal protection, the problems can be avoided by simply changing the legal foundations! As we have mentioned, French authors themselves have come up with two alternatives (implicit conventional obligation and the principle of good faith) whose applications do not entail the problems in question.

⁴²¹ F. VIOLET, *Quels rapports entre obligation de garantie et obligation de non-concurrence dans la vente d'un fonds de commerce?*, Defrénois 2006. 467

2. Inappropriateness of the method of application of the *garantie du fait personnel*

583. - Inappropriateness of the nature of the perpetuity. What has been just presented presumes that the competitions are always identified with *évictions* as targeted by the *garantie du fait personnel*, which is the source of all the problems in question. However, is this really a necessary presumption? We believe the answer is negative: if in the period immediately following the transfer of ownership of a business (either in the form of *cession de fonds de commerce* or in the form of purchases of shares) the competition by the seller constitutes a somewhat undeniable *éviction* on the peaceful enjoyment and possession of the buyer, with time goes by, it is difficult, if not impossible, to always hold the same opinion, as the connection between the seller and the clientele will gradually fade away and eventually the seller will become a random person having nothing to do with the business. In this case, the competition of the seller cannot be said to constitute an *éviction* in the sense of the *garantie d'éviction*. That being so, even if we do not question the appropriateness of the nature of the perpetuity of the *garantie du fait personnel*, we do have a case to make for why the perpetuity of the legal obligation of non-competition by sellers is by no means appropriate.

584. - Inappropriateness of the nature of public order. The nature of public order of the legal obligation of non-competition by sellers requires that the parties cannot stipulate clauses reliving the seller from the obligation *de plein droit* of non-competition. The nature of public order of the legal obligation presumes as well that the competition is always identified with the *éviction* in the sense of the *garantie du fait personnel*. However, we believe another way of interpretation is possible: conventional clauses that relive sellers from the obligation *de plein droit* of non-competition should be interpreted as depriving the competition of the nature of *éviction*. To apply the *garantie du fait personnel* with an eye to impose the legal obligation of non-competition on the part of the seller of a business, it requires to hold the opinion that the thing sold, i.e. the *fonds de commerce* or the shares, is of the function of canvassing customers without any competition of the seller. Even if this opinion is the default one, it is possible to conventionally alter it so as to alter the usage of the thing sold: the thing sold can be considered as purely a collection of assets not for the purpose canvassing customers at all, and in this case the competition by the seller is not an *éviction* in the sense of the *garantie d'éviction*. In disassociating the competition with *éviction*, we manage to deprive

the nature of public order of the legal obligation of non-competition, even if the nature of the legal foundation is to be maintained.

Conclusion of Section II

585. By a comparison of the legal protection against competition by sellers of shares in the two countries, we can see that this legal protection has no reasonable *raison d'être* and *de lege ferenda* should be eliminated. On top of that, even if the legal protection in French law is to be maintained, its current regimes should be altered. In particular, the nature of perpetuity and the nature of public order of the legal protection should not be kept.

Conclusion of Chapter I

586. In this chapter, by comparing the legal protections in the two countries against the two main kinds of risks in purchase of shares, we have demonstrated that the legal protections are inherently unreliable and unnecessary.

Chapter II. Legal restrictions

587. Legal restrictions exist in French law on techniques anti-overpricing (Section I) and those anti-competition (Section II). A comparison with Chinese provisions and doctrines will show that these restrictions are largely undesirable.

Section I. Legal restrictions on conventional arrangements against overpricing

588. On anti-overpricing techniques, under French law there are mainly two kinds of restrictions: those on the clauses of price (Subsection I) and those on the leonine clauses (Subsection II).

Subsection I. Restrictions on clauses of price

589. Clauses of price are subject to much more restrictions in France (I) than in China (II). A comparison (III) of the restrictions would show a possible convergence in the two countries whereby the special restrictions would disappear.

I. More restrictions in French law

590. The special conditions of validity for price poses a problem especially serious in sales of shares (A). Besides that, French practitioners are concerned about the nature of the contracts of sales that may be changed by unqualified clauses of price (B).

A. Clauses of price susceptible to the special restrictions of price for contracts of sales

591. We will firstly present the problems caused by the special restrictions (1) before the solutions French jurists and practitioners advocate (2).

1. Presentation of the problems

592. Because it is difficult to determine the value of shares at the formation of a sale of shares, it is also difficult to fix *ab initio* the price in sales of shares, at least more difficult than in sales of other objects.⁴²² Without a price definitely fixed *ab initio*, validity of contracts of sales of shares are especially vulnerable to requirements of precision (i) and the requirements of objectivity (ii). The real problem of being subject to the special requirements is that it greatly affects the certainty that the parties may expect (iii).

i. Problems caused by requirements of precision

593. Ambiguity of a clause of price as a typical type of imprecision found in all kinds

⁴²² V. M. CAFFIN-MOI, op. cit., n° 168; M. STOCLET, op. cit., n° 336.

of contracts endangers the validity of sales of shares.⁴²³ Yet for purchases of shares, what should be more concerned is more than the ambiguity of terms: there are two types of risks that are particular to sales of shares: the risks associated with an unclear proportion of price (a) and the risks associated with an indeterminable amount of price (b). Fortunately, in some special circumstances, a sale of shares without a precise clause of price is exceptionally allowed (c).

a. Problems caused by an unclear proportion of price

594. We know that under French law, price in contracts of sales is subject to more rigorous restrictions than in other contracts. Therefore, if a contract is qualified as a sale, yet on top of the price for the things sold, the seller would also receive monetary compensation in exchange for another *quid pro quo* that he has offered and the buyer would give a total amount for both the thing sold and the other *quid pro quo* offered by the seller, if the other *quid pro quo* is considered as the object of a separate contract and the parties have not explicitly stipulate the proportion of the price in the total monetary compensation, the amount of price would thus be indeterminable! This risk is especially prevalent in sales of shares because the sellers would often bear other important obligations, maybe more important than the delivery of shares. And if the proportion of each *quid pro quo* is not explicitly specified, a risk of invalidity may be incurred!

For example, in a case where other shareholders of a company promised to buy all the shares of a shareholder-manager who would quit the company, a fixed amount was offered by the buyers of shares as the combination of the price of the shares and the “*indemnités de licenciement*”. From an objective perspective, such contract is entirely enforceable. Yet the judge held it to be invalid because the proportion of price of shares in the total monetary *quid pro quo* offered by other shareholders is unclear, which indicates that the price is not determinable and in contradiction with article 1583.⁴²⁴

b. Problems caused by an indeterminable amount of price

⁴²³ For example, in a case where the seller promised to sell all the shares to a buyer, yet only mentioned in a previous separate letter that according to an estimation, each share was worth a certain amount. The *cour de cassation* held that the value of each share mentioned in the previous letter cannot be interpreted as an offer of price (V. e.g. Cass. com., 9 juin 2004, n°03-11.600, Bull. Joly sociétés 2004, p. 1383, obs. T. MASSART).

⁴²⁴ V. Cass. com., 5 avril 2005, n° 99-13224.

595. The problems caused by unclear proportion of price can be relatively easy to avoid just by specifying it clearly. By contrast, the risks of an indeterminable amount are inherent and not easy to cope with. It cannot be entirely eliminated either by resorting to elements of reference, or by resorting to a third-party evaluator.

596. - Imprecision in resorting to elements of reference. Article 1591, instead of requiring a price fixed *ab initio*, is interpreted by French judges to require only a price whose mode of determination would automatically give out a fixed price later without requiring further negotiation of the parties. French practitioners, thus, would resort to some elements of reference which are, as they believe and expect, able to automatically determine the price before the execution of the contracts of sales. However, this expectation may sometimes be disappointed simply because the elements of reference are themselves not determined and need further specification.⁴²⁵ A typical example is a sale of shares where the parties agreed to base the price on the total book value of all elements figuring on the balance sheet of the company (minus that of liabilities), excluding “*créances douteuses, solde du compte courant du cédant, marchandises difficiles à vendre ou dépréciées*”. The court held that, however, the scope of the assets to be excluded are not self-evident and needs further agreement of the parties to specify it, which means the clause of price is not determinable and the sale is thus invalid.⁴²⁶

597. - Imprecision in resorting to a third-party evaluator. A more reliable way to ensure a determinable price at the formation of the sale is to resort to a third-party evaluator, according to article 1592 of *code civil*, as long as the parties have clearly assigned the evaluator and as long as the evaluator has successfully fulfilled his task. However, if such

⁴²⁵ V. J.-P. GARCON, *Fixation d'un prix de cession de titres et référence aux éléments comptables*, JCP E 2000, p.496; J. PAILLUSSEAU, *La cession de contrôle et la situation financière de la société cédée (de la nature juridique du contrôle et de la cession de contrôle)*, JCP 1992, p. 196, n° 62.

⁴²⁶ V. Cass. com., 23 janvier 1990, n°88-11644, RTD civ. 1990, p. 470, obs. J. MESTRETD. For a case where elements of reference are considered to comply with the requirement of precision, V. Cass. com., 18 juin 1996, n°94-17327, Bull. Joly sociétés 1996, p.1013, note. A. COURET.

evaluator has failed his task,⁴²⁷ generally it means that the contract is invalid.⁴²⁸

it should be especially noted that resorting to a third-party evaluator the task of fixing the price and subjecting him to some elements of reference unaccepted if they are to fix the price themselves, is not sufficient to render such elements of reference acceptable. Under this circumstance, the only fate of the sale of shares in question would be invalidity for lack of price.⁴²⁹

c. Exceptions to the requirement of precision in sales of shares

598. A particularity of sales of shares is that under certain circumstances where shares should necessarily be transferred⁴³⁰ and therefore an annulation of a sale because of lack of conventional determinable price⁴³¹ is intolerable, *code civil*, by its article 1843-4 requires the *président du tribunal* to assign a third-party evaluator to fix the price for the

⁴²⁷ Three obstacles exist to a successful fixation of price by him: Firstly, the evaluator may not be able to fix the price due to insufficient information (V. Cass. civ. 2ème, 8 avril 1999, n°96-18.516, Bull. Joly sociétés 1999, p.1177, note A COURET). Secondly, considered as an agent (*mandataire*) (V. J MOURY, *Des ventes et des cessions de droits sociaux à dire de tiers* (étude des articles 1592 et 1843-4 du Code civil), Dalloz, 2011, n° 13, p. 464.), the evaluator has to abide by the instructions given by the parties, for example the mode of fixing a price. If the price fixed by him does not follow the instruction given by the parties, such fixation is not valid. (CA Paris, 14 novembre 2007, *Dr. sociétés* mars 2008.16, note R. MORTIER). Thirdly, if the evaluator has committed an *erreur grossière* in the process of fixation and render the fixation of price invalid. (CA Paris, 14 novembre 2007, *Dr. sociétés* mars 2008.16, note R. MORTIER). Technically speaking the excess of authority is a type of *erreur grossière* (V. Cass. com. 6 juin 2001, *JCP* G.372, obs. A. VIANDIER et J.-J CAUSSAIN; *JCP* E 2002.1433, note D. COHEN).

⁴²⁸ At least judges cannot intervene (V. J MOURY, *Des ventes et des cessions de droits sociaux à dire de tiers* (étude des articles 1592 et 1843-4 du Code civil), Dalloz, 2011, n° 27s, p. 477; P. MOUSSERON, *Les conventions de garantie dans les cessions de droits sociaux*, NEF, 1992, n° 329; Cass. civ. 1re, 25 novembre 2003, n°00-22086; Cass. civ. 1re, 25 janvier 2005, n°01-10395. The two cases actually involve article 1843-4 of *code civil* instead of article 1592, but to the extent that they convey the idea that the judges cannot fix the price themselves, the disposition is transposable to article 1592).

⁴²⁹ V. Cass. com., 19 décembre 2006, n°05-10.198, *RTD* com 2007, p.169, obs. P. Le CANNU). There is a debate as to whether the same evaluator, after having failed his mission, can get down to fix another price. The majority of jurists seem to take the negative stance (J MOURY, *Des ventes et des cessions de droits sociaux à dire de tiers* (étude des articles 1592 et 1843-4 du Code civil), Dalloz, 2011, n° 27, p. 477).

⁴³⁰ A typical situation of compulsory transfer of shares is where a shareholder would like to sell his shares to someone who is not the shareholder of the target company, which is subject to a preliminary *agrément* of other shareholders (article 1862 al. 3 of *Code civil* for *sociétés civiles*, L. 223-14 of *Code de commerce* for *sociétés à responsabilité limitée*, L. 228-24 of *Code de commerce* for *sociétés anonymes* whose article of association contains a clause of approval), yet such *agrément* is refused and the refusing shareholders have to acquire the shares themselves. For a more detailed description of the two conditions of application of article 1843-4, V.J. MOURY, *Jeux d'ombres sur la détermination du prix par les tiers estimateurs des articles 1592 et 1843-4 du Code civil*, *Rev. sociétés* 2005, p.513, n° 6-8, p. 515-516. L. CADIET, *Arbiter; arbitrator; Glases et post-glases sous l'article 1843-4 du Code civil*, in *Aspects actuels du droit des affaires*, Mélanges en l'honneur de Yves Guyon, Dalloz, 2003, p. 153 -155.

⁴³¹ The text of article 1834-4 of *code civil* use the term "contestation" to designate the situations where the parties fail to reach an agreement on price. For a detailed discussion of the meaning of the term, V. A. COURET et al., *Les contestations portant sur la valeur des droits sociaux*, Bull. Joly sociétés 2001, p. 1045; J.-J. DAIGRE, *Le juge et l'arbitre face aux dispositions de l'article 1843-4 du Code civil*, Bull. Joly sociétés 1996, p. 789.

parties,⁴³² so as to make a sale otherwise invalid under common rules valid.⁴³³ The procedure of application of article 1843-4 is similar to that of article 1592,⁴³⁴ except that it provides more certainty to the sale of shares in question: all defects that would normally make a fixation of price under article 1592 invalid, would only lead to a restart of the whole procedure of fixation of price.⁴³⁵

ii. Problems caused by requirements of objectivity

599. Similar to the requirement of precision, the requirement of objectivity poses particularly more dangers to the validity of sales of shares (except for the limited situations where article 1843-4 would come to apply). Yet seldom would the price of a sale of price be fixed explicitly by the sole willingness of one party. In most cases, the problem exists in either a fixation by third-party or one by the parties who resort to some elements of reference.

If the parties resort to a third-party evaluator to fix the price for them, such evaluator should be impartial and independent of any one party: a personal link between the evaluator and any one party that has the possibility to lead to such partiality and dependence is sufficient to ruin the objectivity in the price fixed by the evaluator.⁴³⁶

Problems become more severe and common in sales of shares whose price is to be fixed by referring to some elements (a), especially when such elements are about the future

⁴³² It should be noted two points: firstly, the judge cannot in this case fix the price himself (V. Cass. com., 18 juin 1996, n°94-17327, Bull. Joly sociétés 1996, p.1013, note. A. COURET) or designate the third-party evaluator; the authority of designating him is reserved to the president du tribunal (V. Cass. com., 30 novembre 2004, n°03-13756, Bull. Joly sociétés 2005, p. 400, obs. H. Le NABASQUE). Secondly, the parties, although are to be subject to this judicially-appointed evaluator, retain the right to stipulate the mode of fixation under which the evaluator has to comply (V. J.-J. DAIGRE, *Le juge et l'arbitre face aux dispositions de l'article 1843-4 du Code civil*, Bull. Joly sociétés 1996, p. 789). Only that under this article, the ambiguity of such conventional mode of fixation has no direct influence on the validity of contract. The evaluator can, in the events where the conventiona instruction is unclear, simply ignore it because “*l'expert détermine les critères qu'il juge les plus appropriés pour fixer la valeur des droits*” (Cass. com., 5 mai 2009, n°07-17468, JCP E 2009, p. 1632, note R. MORTIER).

⁴³³ The function of article 1834-4 of *code civil* has been mentioned in the following observations of cases: CA Paris, 21 mai 1996, et CA Paris, 25 juin 1996, *Rev. arbitage* 1996, p.625, note A. VIANDIER, n° 7, p. 640; Com. 10 mars 1998, 95-21329 Defrénois 1998, p. 679, obs. J. HONORAT et H. HOVASSE.

⁴³⁴ The term referring to the third-party evaluator in article 1843-4 is “*expert*”, yet similar to the “*tiers*” in article 1592, it is considered as in fact designating an agent (*mandataire*) instead of a simple “*expert*” (V. J. MOURY, *Des ventes et des cessions de droits sociaux à dire de tiers* (étude des articles 1592 et 1843-4 du Code civil), Dalloz, 2011, n° 13, p. 464).

⁴³⁵ If the parties again fail to appoint an evaluator themselves (an example where they have successfully done so: V. Cass. Com., 30 novembre 2004, Cass. civ.1re, 25 janvier 2005, et Cass. com., 19 avril 2005, D. 2005, pan. 2950, obs. J. -C HALLOUIN et E. LAMAZEROLLES), the *président du tribunal* should again appoint another evaluator. The judge himself cannot fix the price or assign an evaluator. (V., Cass. civ.1re, 25 janvier 2005, n°01-10395, RTD com. 2005, p.539, obs. C. CHAMPAUD et D. DANET; Cass. com., 30 novembre 2004, n° 03-13.756, Bull. Joly sociétés 2005, p. 400, obs. H. Le NABASQUE; Cass. civ. 1re, 25 novembre 2003, n° 00-22.086, Bull. Joly sociétés 2004, p. 787, obs. A. COURET).

⁴³⁶ V. M. STOCLET, *Le prix dans la cession de droits sociaux*, thèse Lille-II, 2008, p.250, n°354.

performance of the company (b).

a. The commonness of the problem in sales of shares

600. In sales of shares, the elements of reference, generally figuring in the accounting statements of the company, are controlled by the company and thus indirectly by the party who controls the company, who accordingly has both the motivation and the ability to manipulate the elements to his own advantage and to the detriment of the opposing party: usually if the seller controls the company he would try to cover the amount of liabilities and increase the amount of assets in order to increase the value of the company; and vice versa for the buyer.⁴³⁷ Under some special circumstances, for example if the buyer promises to take all the liabilities of the company, the seller may have a motivation to increase the amount of liabilities.⁴³⁸ This motivation and ability to manipulate alone, under the most common interpretation of article 1591, without an actual manipulation, are sufficient to establish a potestative price and thus hold the entire sale of shares invalid.

b. The particular significance of the problem in clause of earn-out

601. The potestative power is especially evident in sales of shares with earn-out clauses whereby the buyers would immediately take control of the target company without a period of *passage de témoin* because now the price would entirely depend upon the indicators of performance of the company and in order to decrease the price the seller, now the controlling shareholder, has the full moral hazard and ability to artificially lower the relevant indicators.⁴³⁹ Courts used to be very hostile to such clause because of its nature of potestativity. In the very famous case “*Crédit Suisse*”, a sale of shares, whose shares constitute a small amount of initial payment and an instalment coming from revenue from a building to be rent, was annulled for the simple reason that the elements of reference to calculate the price – the area of a building that can be rent, the cost price and the conditions of rent were all influenced by the sole willingness of the buyer.⁴⁴⁰ There is now definitely a trend

⁴³⁷ V. J.-J. CAUSSAIN ET M. GERMAIN, *Pratique des cessions de contrôle dans les sociétés anonymes non cotées*, JCP E 1987, n° 25, p. 210.

⁴³⁸ V. Cass. com., 13 février 2001, n° 97-20.741.

⁴³⁹ V. F.-D POITRINAL, *Cession d'entreprise: Les conventions de earn out*, JCP E 1999, p. 18.

⁴⁴⁰ V. Cass. Civ. 1re, 12 novembre 1974, n° 73-10.850. However, an author contended that the annulation is not a purely result of the possibility of manipulation. In fact, in this case the seller has actually manipulated the elements by deliberately lower the rent (V. T. LAMBERT, *L'exigence d'un prix sérieux dans les cessions de droits sociaux*, Rev. sociétés 1993.11, n° 361).

of loosening the restrictions. For example, the court has held that “*si les débiteurs avaient le pouvoir de gérer le patrimoine immobilier et donc d’influer sur le chiffre d’affaires servant d’assiette au prix qu’ils devaient payer, ils n’avaient aucun intérêt à minorer ces chiffres d’affaires, si bien que la condition potestative ne pouvait être constituée.*”⁴⁴¹ Some authors even have gone so far as to contend that “*la cour de cassation, qui maintient en apparence l’exigence de détermination objective ab initio, l’applique d’une manière qui revient en réalité à la remettre en cause*”,⁴⁴² whereby the court may even interpret the ambiguous terms as “*évolution des résultats*” and “*valeur réelle de l’entreprise*”⁴⁴³ as objective elements of reference. However, we believe that as long as the common interpretation of article 1591 (the requirement of objectivity) is not explicitly precluded, risks of invalidity would always haunt sales of shares, especial those with earn-out clauses.

iii. A consequence of the problems: the uncertainty of the contract

602. In discussing the disputes related to price, an author put it that: “*certaines contentieuses sont naturelles, résultant de la complexité du réel. D’autres sont artificielles, liées aux imperfections de la règle légale.*”⁴⁴⁴ As for the disputes over fixation of price, some belong to those “*résultant de la complexité du réel*”: for example, when the parties really differ in the scope of “*marchandises difficiles à vendre ou dépréciées*” that should be excluded,⁴⁴⁵ when the party who controls the target company has really manipulated the elements,⁴⁴⁶ or that the third-party evaluator has actually given a price to that obviously favours one party. However, we can see that disputes of this kind are very rare. By contrast, it is those artificial ones “*liées aux imperfections de la règle légale*” that makes the French law particular.

In France, we can see that the special requirements of price in terms of validity of sales of shares, which aims at either ensuring the consents of the parties (requirements of precision, the literal meaning of article 1591) or to maintaining a certain level of justice (requirement of objectivity, the extended interpretation of article 1591), have been abused by parties whose consents are well formed and who have not suffered any injustice from

⁴⁴¹ Cass. com., 15 juin 1982, n°79-13.367, *JCP N* 1985. 66, note D. GRILLET-PONTON.

⁴⁴² V. M. CAFFIN-MOI, *op. cit.*, n° 197. The judicial judgements supporting this argument can be found in the same place of the book.

⁴⁴³ V. Cass. com., 10 mars 1998, n°96.10168.

⁴⁴⁴ M. A. FRISON-ROCHE, *L’indétermination du prix*, *RTD civ.* 1992, p.269, n° 7.

⁴⁴⁵ V. Cass. com., 23 janvier 1990, n°88-11.644.

⁴⁴⁶ V. Cass. Civ. Ire, 12 novembre 1974, n° 73-10.850.

potestative prices. An author mentioned that: “*la lourdeur des consequence de l’annulation de la cession de droits sociaux est d’autant plus regrettable que ce contentieux est essentiellement artificiel. On sait en effet que l’article 1591 du Code civil est souvent dévoyé et pris comme prétexte pour faire annuler une cession que l’une des parties vient à trouver lésionnaire*”⁴⁴⁷ Another pointed out that: “*Certains cédants ou certains cessionnaires n’invoquent l’indétermination du prix que pour faire anéantir une opération dont les conditions ne leur conviennent plus, alors pourtant qu’ils avaient consenti en pleine connaissance de cause au contrat litigieux.*”⁴⁴⁸ Clearly, these artificial disputes are not at all desirable, either to the parties, or to the legislators.

2. Solutions to the problems

603. To cope with the problems mentioned above, one method is to adapt to the requirements: for this purpose, the parties should choose elements of reference both precise and objective, or assign a third-party evaluator who is both capable and impartial. However, a better solution consists of entirely precluding the application of the special requirements of price for contracts of sales. To achieve this end, there are mainly two solutions.

604. -The doctrinal solutions: a re-identification of sales of shares. A solution given by most French authors is to re-identify “sales of shares”: authors have devoted much effort in demonstrating that contracts belongs to a specific category of contracts other than sales (*vente*), in order to convince the judges that it is appropriate to preclude the application of all legal regimes only applicable to sales, which in turn precludes the special rules for validity of the sales.⁴⁴⁹

605. - The practical solutions: a re-identification of price. By contrast, French practitioners seem to like to preclude the requirements of price while maintaining the qualification of sales of sales of shares, as we will discuss *infra* immediately. To achieve that, they would probably work on the re-identification of the price instead of on the re-

⁴⁴⁷ M. CAFFIN-MOI, op. cit., n° 198.

⁴⁴⁸ V. M. STOCLET, Le prix dans la cession de droits sociaux, thèse Lille-II, 2008, p.246, n° 345.

⁴⁴⁹ There are also authors who directly advocate a reform of the special rules for contracts (V. M. CAFFIN-MOI, op. cit., n° 608). But most of them seem to favour the method of requalification. Among them, some advocated to qualify “sales of shares” as “transfers of contracts” (V. S. LACROIX-DE SOUSA, op.cit., n°141s, p.133s). whereas others suggested a qualification of “innominate contracts” (V. M. STOCLET, Le prix dans la cession de droits sociaux, thèse Lille-II, 2008, n° 623s, p.419s). Although they may differ on the qualification of sales of shares, they have one thing in common: they devote a tremendous effort in demonstrating the new qualification, which to some extent is the main subject of their thesis.

identification of the contracts: they would insert a clause of price perfectly complying the requirements of price and have the seller bear other obligations. This will be discussed in detail when we present the practices to maintain the identification of contracts.

Unfortunately, this attempt to bypass the requirements of validity seems to be futile. This mechanism “*conçues à l’origine pour permettre de prendre en considération l’évolution de la valeur des droits sociaux tout en échappant au grief d’indétermination du prix, elles n’ont pas trompé la cour de cassation.*”⁴⁵⁰ In a sale of shares where on top of a formal price, the main *quid pro quo* that the seller was to provide is the assumption of some liabilities, and the scope of liabilities is held to be potestative because the seller has the full possibility to manipulate it, the validity of the sale of shares is denied because the assumption of liabilities by the buyer was also considered to be part of the price, which means that the total price failed the requirement of determinability.⁴⁵¹

B. Clauses of price essential in maintaining the identification of contracts of sales

606. French practitioners have another concern: even if a sale of shares is valid, it may be considered as something other than a “sale”. This concern comes from the fact that sometimes, in exchange for the shares sold, what a buyer offers as *quid pro quo* is not necessarily a monetary amount of cash that would be certainly qualified as price. The most typical case is when what the buyer promises to offer is that he shall assume some liabilities that are previously supposed to be assumed by the seller. We observe that the French practitioners have mainly invented two kinds of mechanisms to maintain the nature of sales for sales of share. They may either insert a symbolic price in the contract, hoping to remind the judges to apply legal regimes of sales in the sales of shares (1). Or they may divide a price into two parts: an initial price and a mechanism for price-adjustment, hoping that the judges would consider all the price-adjustment would not affect the amount of price (2)

1. A symbolic price with another real *quid pro quo*

⁴⁵⁰ M. CAFFIN-MOI, op. cit., n° 174; v. J. -P LANGLAIS et E. OZDEMIR, *Quelques obstacles à surmonter pour la mise en oeuvre d’une garantie de passif*, Actes pratiques, novembre-décembre 2006, p.24-26.

⁴⁵¹ V. Cass. com., 13 février 2001, n° 97-20.741.

607. - Symbolic price is used by the practitioners to subject a sale of shares to the legal regimes for contracts of sales. In France, when it comes to price of sales of shares, symbolic price is usually an important topic. In fact, as foreigners we were at first surprised by the very existence of this topic: why would someone bother to insert a symbolic price in the contract, if in reality the price is not what the seller wants? For someone who comes from a country where clauses of price are subject to nearly no restrictions, if the shares are exchanged for some *quid pro quo* other than a monetary price, shouldn't the parties simply write that in the contract instead of artificially inserting a monetary price? Later on, after we have learnt the "logic chain" under French law that price determines the nature of sales of shares, and the nature of sales of shares in turn determines the rules applicable to the contract, we began to realize the symbolic price reflects the willingness of the parties to identify the contract with a sale or at least subject the contract under the legal regimes for sales.⁴⁵²

608. - The general respects by French judges of the willingness of the parties reflected in the symbolic price. If whether a sale of shares with only a symbolic price should be identified with a sale remains a debatable issue,⁴⁵³ it is a nearly universal consensus among French authors and jurists that a symbolic price, no matter whether it can identify a contract with a real sale, does indicate the willingness of the parties to apply legal regimes of sales, and in most cases where no concern of public order is involved, such willingness should prevail.⁴⁵⁴

2. A provisional price with a post-sale *garantie*

609. Aside from deliberately inserting a symbolic price to remind the judges to apply legal regimes of contracts of sales, another kind of methods usually employed by French practitioners is to insert a provisional price and a post-sale *garantie* which imposes upon the seller certain obligations to compensate either the buyer (i) or the target company (ii), in order

⁴⁵² V. B. GARRIGUES, *La contre-prestation du franc symbolique*, RTD civ. 1991.459, p. 461; T. LAMBERT, *L'exigence d'un prix sérieux dans les cessions de droits sociaux*, Rev. sociétés 1993.11, n° 5, p. 14; C. FREYRIA, *Le prix de vente symbolique*, D. 1997. 51, n° 1, p. 51.

⁴⁵³ V. M. CAFFIN-MOI, op. cit., n° 150s; V. M. STOCLET, *Le prix dans la cession de droits sociaux*, thèse Lille-II, 2008, p.352, n° 513.

⁴⁵⁴ V. C. FREYRIA, *Le prix de vente symbolique*, D. 1997. 51, n° 12, p. 55; M. CAFFIN-MOI, op. cit., n° 155.

to maintain the identification of contracts of sales.⁴⁵⁵

i. Mechanisms beneficial to the buyer

610. A mere resort to a post-sale *garantie* may not bypass the requirements of seriousness as far as the identification of contracts of shares is concerned. For French authors, it is true that price consists of the monetary amount paid by the buyer to the seller and thus it seems that a *garantie* which requires the seller to indemnify the buyer certain amount has no effects on the amount of price: the parties seem to be able to fix a serious price at the formation of the contract, and latter have the seller pay back to the buyer an amount equivalent to or greater than the initial price, without having the contract disqualified from being a sale.

However, this attempt proves to be futile. As the obligation of indemnification produced by post-sales *garantie* “*modifie le montant des sommes que le vendeur escompte effectivement recevoir en échange de la cession des droits*”⁴⁵⁶.

ii. Mechanisms beneficial to the target company

611. A post-sale *garantie* imposing on the seller a monetary obligation to compensate the buyer is considered to modify the price, as far as the qualification of sales is concerned. By contrast, if the one whom the seller is to compensate is someone other than the buyer, in most cases the target company or its creditors, price is considered to be unaffected and so is the qualification of the contract, because the amount paid by the seller would never directly figure in the patrimony of the buyer.⁴⁵⁷

⁴⁵⁵ It may be said that this kind of mechanisms is for the purpose of a better compliance with the conditions of validity for contracts. Yet, it seems that the special requirements of determinability for price imposes also to post-sales *garantie* (V. Cass. com., 13 février 2001, n° 97-20.741) whereas the requirements of seriousness for price usually does not affect the validity of a contract as long as the total *quid pro quo* is serious (V. T. LAMBERT, *L'exigence d'un prix sérieux dans les cessions de droits sociaux*, Rev. sociétés 1993.11, n° 7, p. 16; C. FREYRIA, *Le prix de vente symbolique*, D. 1997. 51, n° 9, p. 54). We thus believe there must be other reasons for their existence, which are to maintain the identification of contracts of sales for sales of shares. The concern of maintaining of qualification of sales has been expressed by some authors: “*les cessions de droits sociaux à un prix nul, négatif, ou symbolique apparaissent ainsi exposées à un risque de requalification en contrats innomés...le contenu des contrats innomés n'est en effet en principe pas régi par des dispositions spéciales, mais par le droit commun des contrats.*” (V. M. STOCLET, *Le prix dans la cession de droits sociaux*, thèse Lille-II, 2008, p.527, n° 360).

⁴⁵⁶ M. STOCLET, *Le prix dans la cession de droits sociaux*, thèse Lille-II, 2008, p.317, n° 460.

⁴⁵⁷ V. F. TERRE et al., *Droit civil, Les obligations*, Dalloz, 11e éd., 2013, n°498, p. 479.

The different effects of *garanties* with different beneficiaries, as we believe, is the source of a famous distinction in France. It is partly due to the concern of maintaining the seriousness of price, in other words due to the fear of a “negative price”, that French practitioners have put forward the distinction between “*garantie de valeur*” and “*garantie de reconstitution*”:⁴⁵⁸ by the former the seller would guarantee the buyer that the value of the shares is well worth the value, and he would compensate him for its depreciation. Whereas by the latter, what the seller would guarantee is rather the integrity of the patrimony of the target company, which means that in the events where the patrimony suffers from a reduction of value, the seller would reconstitute it by bearing the liabilities that impoverishes the company or compensating the company for any depreciation of assets.⁴⁵⁹ And because the *garantie de valeur* is to guarantee the total monetary amount paid by the buyer, it is naturally limited to the price paid, whereas *garantie de reconstitution* is not subject to this cap.⁴⁶⁰

II. Less restrictions in China

612. In China, generally speaking, clauses of price in sales of shares are subject to no particular restrictions just like in sales of any other objects (A)⁴⁶¹, except in some rare cases (B).

A. Clauses of price usually not provoking special problems

613. Because Chinese judges can be resorted to when price is unclear, precision of price is seldom an issue in China (1). Also, because qualification of sales plays little role in China, no mechanisms would be implemented particularly for the identification (2).

⁴⁵⁸ There are of course other reasons for the existence of this distinction, for example the concern for tax. (V. P. MOUSSERON, *Les conventions de garantie dans les cessions de droits sociaux*, NEF, 1992, n° 277s.) And the fear of negative price is even not the main reason to distinguish the beneficiaries of a *garantie*. However, we cannot deny that at least the fear of negative price somehow contritue to the existence of the distinction, as authors usually suggest that if the price is only symbolic, *garantie de reconstitution* should be used instead of *garantie de valeur* because it is inherently limited in the amount (V. P. MOUSSERON, *Les clauses de garantie d'actif et de passif*, Actes prat. septembre-octobre 2012, n° 48; J. PAILLUSSEAU, *La garantie de conformité dans les cessions de contrôle*, JCP E 2007. 1238, n° 25 et 40). It should be noted that commonly the distinction is falsely made between “*garantie de valeur*” and “*grantie de passif*”, v. P. MOUSSERON, *Conventions de garantie*, JCL. Sociétés, Fasc.165-35, 2018, n° 6.

⁴⁵⁹ V. M. CAFFIN-MOI, *op. cit.*, n° 350s.

⁴⁶⁰ V. M. CAFFIN-MOI, *op. cit.*, n° 562s.

⁴⁶¹ There is a tiny problem particular to sales of shares involving foreigners. Article 14 of Regulation related to acquisition of domestic enterprises by foreign investors provides that: “The parties shall fix the price according to the evaluation of the value of the shares or assets to be sold. The parties can choose the evaluating institution legally established in China. The method of evaluation shall be that is prevalent internationally. It is prohibited to transfer the shares or assets at a price significantly lower than the evaluation, and to transfer the capital abroad in disguise.” This article actually is to prevent a capital drain and has only some far-fetched relation with the subject of this dissertation.

1. Little attentions paid to the validity of contracts

614. - Chinese practitioners generally pay little attentions to the precision of price and Chinese authors seldom discuss it from a legal perspective, because price is not an indispensable element for validity of any contract and it is expected that judges would fill gaps if a precise price is lacking (as long as the price is not completely lacking): we have used “股权价格” (literally translated as “price of shares”) as keywords to search on www.cnki.net (a database including most academic journals published in mainland China) and except for one concerning legality of “bet-on clauses” (price-adjusting clauses based upon future performance of the company), nearly all the results returned are of economic or financial nature.

615. - The lack of interests in this topic does not signify that Chinese practitioners are used to leave the price non-agreed upon at the formation of contract. In fact, in a sale of shares, the methods to fix a price in China is not too different from France: aside from prices fixed *ab initio*, Chinese practitioners also resort to elements of reference not yet determined to fix price.⁴⁶² The difference is that Chinese parties seem extremely rare, if not never, to resort to a third-party evaluator in the sense of article 1592 and article 1843-4 of French *code civil* because it is unnecessary: they may hire some professional staff to answer some technical questions and use their answers as evidence in court if dispute is to occur, yet they would not appoint someone who has the power to impose a price on them.

616. - Because of the lenient requirements, Chinese contracts of sales of shares are rarely annulled for its price. It may be impossible for Chinese practitioners to imagine that a contract whereby a former shareholder would sell his shares and leave the company in exchange for a monetary *quid pro quo* for both the price of the shares and for his employment termination compensation would be annulled simply because the portion of price is unclear. It may be also impossible to believe that somewhere in the world a sale of contract whose price is fixed on “the total book value of all net assets excluding those receivables hard to collect” would be annulled because the parties failed to identify clearly the scope of “receivables hard to collect” or that a sale of shares whose price would be determined by the future performance

⁴⁶² “Types of stock sales in M&A and its application” (股权并购类型及应用), available at: http://www.sohu.com/a/61375522_270543.

of the company may have the risk to be annulled simply because the buyer or the seller may have the possibility to manipulate the result. Theoretically there may be controversy as to the interpretation of an element of reference or as to the fairness of a price whose elements of reference may be influenced by one party,⁴⁶³ yet it is pretty sure that a sophisticated party would have no excuse to abandon a sale (or a purchase) that becomes less profitable.

2. Little attentions paid to the identification of contracts

617. Because under Chinese law, a contract of sale is treated exactly like a contract of any other kinds, there is no need to specially identify it as a sale in order to benefit some special legal regimes. This indifference to the identification leads to the little use of mechanisms specially invented to qualify a contract as a sale.

618. - Little use of symbolic price. In China, symbolic price is sometimes used for administrative purpose: a lawyer friend told us that some local administration who is charged with register transfer of ownership of shares requires the parties to fulfil a standard format where price is necessary. But except that, we have failed to find their existence. If the *quid pro quo* provided by the buyer is something other than a monetary amount, it would be just written that way in the contract.

619. - No distinction between *garantie de valeur* and *garantie de reconstitution*. Lack of the fear of negative price, Chinese practitioners do not pay much attention to the question of beneficiaries of a *garantie*. Sometimes the beneficiaries are not specified: “*the seller guarantees to take responsibility for all losses incurred by the target company*” “*any damages... shall be indemnified by the seller.*” “*if any liabilities assumed by the company that is outside the audit report is found, the seller shall pay off these liabilities.*” Sometimes the beneficiaries are both the company and the buyers: “*the seller shall accordingly indemnify the buyer and/or the target company.*” But in either way, one thing is certain: there would be no inherent cap whether the beneficiary is the company or the buyer.

B. Clauses of price sporadically provoking special problems

⁴⁶³ Although we have failed to find any, which indicates that perhaps the many disputes in France related to price are the pure product of its particular rules.

620. Although generally speaking sales of shares are nothing more than an ordinary kind of sales, a problem is to occur if there is not any price or mode of pricing stipulated. We have mentioned *supra* that there is a Chinese word “转让” (literally “transfer”) which can be either interpreted as an onerous translative contract or as a gratuitous contract. When it comes to shares, this becomes a particular problem because the typical name of a contract of sale of shares is usually entitled “股权转让协议” (literally Shares Transfer Agreement), which can be also interpreted as a contract of donation of shares. Thus, judges should firstly come to determine whether the contract is a donation (1) or an onerous contract (2), in which case it would be considered as non-formed because of a particularity of shares.

1. Cases where a “transfer of shares” is identified with a gratuitous contract

621. To identify a contract with a contract of donation, the court will look for an *animus donandi*, usually the special relations between the parties, which is in most cases kin relationships.⁴⁶⁴ However, this is not necessary as Chinese judges sometimes take a very lenient position as to find the *animus donandi*. In a case where two shareholders of a company, A and B, who has contributed 400 thousand and 100 thousand RMB respectively in the company as contribution to the capital, by a Share Transfer Agreement, have stipulated that: “A shall transfer to C 100 thousands of his 400 thousand worthy shares to C and B 50 thousand to C”. The Chinese court held that there is no stipulation of price and the acquirer has no obligation to pay any price, implying that the transfer of shares involved is actually a donation.⁴⁶⁵

2. The problem related to the lack of guideline on the fixation of price

622. But once if a contract is found to be onerous, the lack of any price would render the contract as not properly formed because there is no standard of price upon which judges can rely on. According to article 62 of Chinese Contract law, if the parties have not stipulated a price, then the market price or the government-guided price should apply. However, as a judge has mentioned “the value of shares is determined by various factors, it cannot be

⁴⁶⁴ See (2015) 3rd Beijing civ. (com.) Final instance, n° 06649 ((2015) 三中民 (商) 终字第 06649 号); ((2014) 3rd Beijing civ. Final instance, n° 07976((2014) 三中民终字第 07976); (2009) 2rd Beijing intermediary civ. Final instance n° 03118 ((2009)二中民终字第 03118 号)

⁴⁶⁵ See (2009) Chaoyao civ. first instance n° 14001 ((2009) 朝民初字第 14001 号)

determined by trade usage or the market value of *lex loci contractus*.” Because it is objectively impossible for judges to give a price, they have no other option but to declare such a contract not-properly formed.⁴⁶⁶

III. Comparison

623. French jurists are concerned about two problems whereas neither of them are of much interests to their Chinese counterparts. However, we believe one of these concerns, that about the maintaining of qualification of contracts, should be of no particular interest even to French jurists (A). The concern or lack of concern of validity of the contracts is the only real difference in the two countries (B).

A. A fake difference: the concern of the identification of the contracts

624. Although there is not any interest in maintaining the identification of contracts of sales for sales of shares, it is still a concern in France that draw attentions of practitioners and scholars. However, we believe the concern of French jurists is useless even under French law because the effect of identifying a contract as a sale --- the applicability of special legal regimes for contracts of sales, now does not have much interest (1). Besides that, even if the legal regime of sales is of significant value, a mere symbolic price or an explicit expression of the application of rules for sales are sufficient for the applicability. (2). If the qualification ceases to be an interesting topic, the fear of negative price would disappear, accompanied with the famous distinction in France: that between *garantie de valeur* and *garantie de reconstitution* (3).

1. Lack of interests of the applicability of legal regimes specially for contracts of sales

625. “*Les cessions de droits sociaux à un prix nul, négatif, ou symbolique apparaissent ainsi exposées à un risque de requalification en contrats innomés... Le contenu des contrats innomés n’est en effet en principe pas régi par des dispositions spéciales, mais par le droit commun des contrats. Le risque est alors celui fréquemment associé à l’absence*

⁴⁶⁶ (2007) 1ST Beijing civ. Final instance n° 7430((2007) 一中民终字第 7430 号). See also (2014) Zhuanghe civ. First instance n° 3084 ((2014) 庄民初字第 3084 号).

*de qualification: celui de l'incertitude quant au contenu exact du contrat.*⁴⁶⁷ However, as we can see, in addition to some tiny problems, the identification of contracts only determines the applicability of legal warranties: *garantie d'éviction* and *garantie de vices cachés*,⁴⁶⁸ which we have shown have extremely limited use in purchases of shares. If a buyer of shares really cares about the availability of the legal protections, he may well demand to insert in the contract of sales a more conventional one more detailed in serving the same purpose.

2. Sufficiency of a mere symbolic price to apply the legal regimes specially for contracts of sales

626. Even if the buyer insisted on being protected by the legal warranties provided for contracts of sales, as we have mentioned, a mere insertion of a symbolic price would already remind the judges of applying them. And if the buyer fears that such hint would be ignored by the judge when there is a dispute, he may demand instead to insert a clause explicitly stipulating that the contract should be subject to the regulation of all legal regimes for contracts of sales. It lacks accordingly any necessity to discuss the real qualification of the contract or to apply other mechanisms for the purpose of maintaining the qualification of contracts of sales.

3. Expected disappearance of distinction between *garantie de valeur* and *garantie de reconstitution*

627. If the concern of maintaining the qualification of contracts of sales cease to exist, we believe a famous distinction in France--- that between *garantie de valeur* and *garantie de reconstitution* ---would disappear as well. We have mentioned that this distinction is mainly for the fear of a negative price, which is in turn caused by a fear of the loss of the identification of purchases of shares as *ventes*. If such fear disappears, the necessity to let the target company be the beneficiary of a *garantie* would decrease because now a *garantie* with the buyer as beneficiary would not automatically be imposed a cap of indemnification, which is the main reason why would the target company be chosen as the beneficiary.

⁴⁶⁷ M. STOCLET, *Le prix dans la cession de droits sociaux*, thèse Lille-II, 2008, p.360, n° 527.

⁴⁶⁸ V. S. LACOROIX-DE SOUSA, *La cession de droits sociaux : à la lumière de la cession de contrat*, LGDJ, 2010, p.322, n° 398.

B. A real difference: the concern of the validity of the contracts

628. What the two countries really differ is the conditions for a valid sale of share. However, we would very soon see a convergence in the two countries whereby the special requirements of price for contracts of sales in France would be eliminated (1). Before the convergence, however, in order to relieve sales of shares in France from the restrictive requirements, we suggest to French parties to conventionally disqualify the contract from being a sale (2).

1. A possible convergence

629. We believe the special requirements of price for contracts of sales would give way to more lenient ones similar to that of China (i). If this evolution in law is to happen, we believe the focuses of practitioners (ii) and scholars (iii) would change accordingly.

i. A possible convergence in rules

630. The special requirements of price for contracts of sales is to protect the consensus of the parties (requirements of precision) and the justice of contracts (requirements of objectivity). What we have presented above actually shows that in most disputes arising from the special requirements of price, neither the consents nor the justice is violated. By contrast, such requirements are usually only used as excuse for an opportunist party to get relieved from a trade that he deems no longer profitable. The necessity to inhibit this opportunism, as is reflected in sales of shares, asks for a complete change of rules: the complete elimination of the special requirements of price for contracts of sales.

ii. A possible convergence in practice

631. The special requirements of price are sure to disappear for its absurdity. However, lack of legal requirements for precise price does not mean that the objective requirements of a precise price can be overcome: in sales of shares, a contract cannot be completely deprived of any clauses stipulating price. As a French author has mentioned: "*Il n'existe pas de méthode unanimement admise pour évaluer une entreprise, de sorte qu'il n'en existe pas plus pour déterminer le prix des droits sociaux, qui ne font, en outre, l'objet*

d'aucun marché de référence."⁴⁶⁹ And judges may objectively lack the required standard to fix the price for the parties when with an absolute absence of price.

Nevertheless, absence of price *per se* has never been the major problem in France. In France in most cases the problems lie in that a mode of fixing price is not completely clear, which requires some judicial interpretations, or lies in that a precise mode of pricing is found to be potestative. Therefore, French practitioners would devote much effort in producing a mechanism of fixation of price just to avoid these problems of special requirements of law. If the French law is to evolve as we suggest, practitioners can be discharged from these tiresome tasks, and concentrate on more meaningful problems already abundant in this complicated world. Also, we believe we would see a sharp decrease of assigning third-parties evaluators to fix the price for the parties under article 1592 of *code civil*, as we believe it is a pure adaption to the special legal requirements and serves no particular function without such requirements.

iii. A possible convergence in doctrine

632. – A disappeared necessity to discuss nature of shares and requirements of price. Presently French scholars, in order to disqualify sales of shares from being contracts of sells, would devote many efforts in discussing the nature of shares and the meaning of price. However, if the Chinese logic is to be adopted, the necessity of this work would be e: for any special condition for a particular category of contracts, it can be interpreted as a condition for validity only if it is to protect some public interests. Otherwise it should be only interpreted as conditions for qualification. Thus, article 1591 would be only interpreted as the conditions for identification of contracts of sales, whose violation would only lead to a re-identification instead of an invalidity. Because the identification of shares would become much less important if the convergence is to happen, there would be little use to use to discuss the legal qualification of shares and the requirements of price.

633. - A diminished importance of the topic of price in sales of shares. With the disappearance of the requirements of price, what left in the topic of price would be only the method of evaluation, yet "*les questions d'évaluation appellent l'intervention d'un homme du chiffre car elles échappent au juriste*",⁴⁷⁰ which means the topic of requirements of price

⁴⁶⁹ M. CAFFIN-MOI, op. cit., n° 167.

⁴⁷⁰ A. COURET et al., *Les contestations portant sur la valeur des droits sociaux*, Bull. Joly sociétés 2001, p. 1045 n° 2.

would be less interesting.

2. An expedient suggestion

634. Before the would-be reform of law in France is to happen, we suggest that French practitioners, instead of trying to maintain the nature of contracts of sales for sales of shares, should rather try to dis-identify it from being sales. As we have mentioned above, the identification of sales of shares with a contract of sales is of no particular good even under French law and maintaining it would be somewhat absurd. To so disqualify, the first thing to do is to stop the use of any symbolic price. But this is not enough, we believe it is better also explicitly mention in the contract that: “the parties agree that this contract is not subject to any legal rules specially for contracts of sales, particularly those concerning price as far as the validity of the contract is concerned”.

Conclusion of Subsection I

635. As China lacks the requirements of price existent in France, price is not a topic usually discussed when it comes to purchase of shares there. As a possible convergence of the legal provisions related to price is under way, which will lead to an eventual disappearance of the requirements of price in French law as well, we expect that many topics currently heatedly discussed in France concerning purchase of shares will disappear as well.

Subsection II. Restrictions on leonine clause

636. A comparison (III) of the prohibition of leonine clauses in French law (I) and Chinese law (II) would reveal that the prohibition is not entirely reasonable.

I. Restrictions under French law

637. The prohibition of leonine clauses in *code civil* constitutes a non-ignorable restriction on conventional arrangements in purchases of shares (A). In spite of its significance, there is no consensus on the justifications of the very existence of this prohibition (B).

A. Implementations of the prohibition of leonine clauses

638. The prohibition of leonine clauses is provided in *code civil* (1), which makes it difficult to implement many legal mechanisms in purchases of shares (2).

1. Presentation of the prohibition of leonine clauses

639. The very ancient prohibition of leonine clauses dated back to as early as Roman time (i) has been inherited in modern French law (ii).

i. Origin of the prohibition in Roman law

640. The adjective “leonine” as used to describe an unacceptable arrangement of benefits and losses among partners, was firstly attested in *Digeste*. Here, the famous Roman jurist Cassius Longinus was said to have asserted that a partnership cannot be established if one partner was to obtain all the profits and the other partner was to suffer all the losses; and if a partnership was constructed in this way, it was to be considered as “leonine” and null.⁴⁷¹ The word “leonine” as used here alluded to a famous story in Aesop’s fables, whereby a lion in hunting with some friends, took all the prey without leaving anything to his peers. In a

⁴⁷¹ V. D. 17, 2, 29, 2; *Inst.* 3, 25, 2; *Gai Inst.* 3, 149.

leonine partnership, “*l'un des associés, à l'instar du lion, se taille la plus belle part sans se soucier du sort de ses partenaires.*”⁴⁷²

ii. Inheritance of the prohibition in French law

641. -The prohibition of leonine clauses *per se*. In *code civil*, the prohibition of *leonine clauses* is provided in article 1844-1 (former article 1855), which reads as: “*la stipulation attribuant à un associé la totalité du profit procuré par la société ou l'exonérant de la totalité des pertes, celle excluant un associé totalement du profit ou mettant à sa charge la totalité des pertes sont réputées non écrites.*”

642. - The prohibition of clauses of fixed interests. According to M. Lucas, a prohibition of clauses of fixed interests laid down in *code de commerce* has a “*consanguinité évidente*” with the prohibition of leonine clauses laid down in *code civil*. Article L.232-15 of *code de commerce* provides that: “*Il est interdit de stipuler un intérêt fixe ou intercalaire au profit des associés. Toute clause contraire est réputée non écrite.*” This article prohibits “*de promettre à un associé d'une société commerciale un intérêt faisant fructifier sa mise sans égard pour le caractère bénéficiaire ou déficitaire de l'activité sociale.*” Similar to the prohibition of leonine clauses, the prohibition of fixed interests is also to prohibit conventional arrangements that make a shareholder immune to *aléa social*.⁴⁷³

2. Application of the prohibition of leonine clauses

643. The prohibition of leonine clauses as previously presented in the positive law of France would entail a non-negligible restriction on conventional arrangements in purchases of shares (i), although a certain degree of relaxations of the rigid legal obstacle can be observed (ii).

i. Supposed restrictions

⁴⁷² F. -X. LUCAS, *Théorie des bénéfices et des perts-clauses léonines*, JCl. sociétés Fasc. 15-30, 2013, n° 1; See J. J. HENNING, *Influence of societas leonina on law of partnership*, J. Contemp. Roman-Dutch L., Vol. 76, 2013, p. 159.

⁴⁷³ V. F. -X. LUCAS, note sous Cass. com., 27 septembre 2005, n° 02-14009, RDC 2005. 443.

644. Article 1844-1 of *code civil* would become a troublesome problem in purchases of shares because *a priori* it would prohibit any clauses against depreciation of value of shares.

As we have mentioned *supra*, the value of shares can be calculated on the basis of its discounted future cash flow; and shares can be considered to have been over-evaluated if it turns out that the cash flow received by the target company is not satisfactory. To ensure would-be buyers of shares that the shares are not over-evaluated, would-be sellers would be willing to engage in so-called clauses of *garantie de rentabilité* or *clauses de earn-out*, whereby the sellers would promise to the buyers that the companies shall achieve certain financial goals, otherwise the sellers shall compensate the buyers so as to reduce the price to a level corresponding to the real value of the shares. In France, this is usually achieved by a *promesse de rachat* of the sellers to buy back the shares at a certain price higher than the original price with some conditions comprised of financial goals.

In spite of its usefulness, this *promesse de rachat* faces a severe legal risk in terms its validity. At least *prima facie*, this kind of promise is exactly an object of the prohibition of leonine clauses: its very *raison d'être* is to protect a shareholder, i.e. a buyer of shares, from all the losses when it should incur to the target company and to allocate all the profits to him when the company fails to make enough profit.

ii. Attempted relaxations

645. To annul *promesse de rachat* in all circumstances is admitted as ridiculous even in France. Because on top of protecting buyers of shares, this conventional mechanism is useful also for other purposes in a sale and purchase of shares: for one thing, it is used to protect a seller of shares in an instalment purchase whereby he remains nominally the owner of shares (and thus a shareholder) in order to guarantee the payment; for another, it is used to protect a financial institution who has provided funds to a real buyer of shares and thus nominally holds the shares as guarantee of the credit. Obviously, to invalidate *promesse de rachat* for all these purposes would cause tremendous problems and is thus highly undesirable.

After a long period where such problems were tolerated,⁴⁷⁴ French jurists began to cope with it by relaxing the rigid prohibition.⁴⁷⁵ Generally speaking, there are two ways supporting the relaxations: to demonstrate that a particular *promesse de rachat* is not leonine (a); or to establish that the prohibition of leonine clauses is not applicable to the said *promesse*, whether leonine or not (b).

a. Relaxations based upon a denial of the leonine characteristic of a *promesse*

646. To deny the leonine characteristic of a particular *promesse de rachat* can be achieved by either demonstrating that the said *promesse* does not deprive all the possibility of loss suffered by its beneficiary or that what the *promesse* has eliminated is not loss as required to be participated by shareholders in article 1844-1 of *code civil*.

647. - A relaxation by demonstrating that a *promesse de rachat* still allows certain losses to incur to its beneficiary. *Promesse de rachat* is *prima facie* targeted by the prohibition because it is supposed to protect its beneficiary from any participation of losses incurred during the operation of the company, which means *a contrario*, as long as the beneficiary of a *promesse de rachat* is still haunted by a certain degree of risks of losses, the *promesse* should not be invalidated by the prohibition. For that reason, a “*critère de la fenêtre de tir*”, for excluding the applicability of the prohibition to a *promesse*, has been laid down by French judges whereby as long as the right to exercise the option by the beneficiary of a *promesse de rachat* is confined to a certain period, the *promesse* would not be invalidated by the prohibition of leonine clauses.⁴⁷⁶ The justification of the criterion is understandable: the fact that the beneficiary of a *promesse* is only protected within a limited “launch window” (*fenêtre de tir*) indicates that the beneficiary is subject to the same risks of losses outside this launch window and thus should not be considered as being totally discharged from the obligations of participation of losses, justifying accordingly the *promesse de rachat* with respect to the prohibition of leonine clauses.

⁴⁷⁴ V. Cass. com. 10 février 1981, n° 79-13.376; Cass. 1re civ. 22 juillet 1986; n° 84-85.177; Cass. 1re civ. 7 avril 1987, n°85-11.774.

⁴⁷⁵ The two *chambres* of *cours de cassation*--- *chambre civile* and *chambre commerciale*, diverge on this point: *chambres civiles* are more reluctant in relaxing the prohibition whereas nearly all the relaxations have been initiated by *chambre commerciale*. However, since now the jurisdiction over disputes involving purchases of shares are largely reserved to only *chambre commerciale*, the divergence is less a problem and we accordingly would not spend too much effort on presenting it. V. H. Le NABASQUE, *Clause de prix insérées dans les promesses d'achat de droits sociaux: l'interrogation continue*, Rev. sociétés 2005, p. 593.

⁴⁷⁶ V. Cass. com. 22 février 2005, n° 02-14392; H. Le NABASQUE et M. BARBIER, *Les clauses léonines*, Dr. sociétés, actes prat. 29/1996, p. 6, n° 23s.

648. - A relaxation by demonstrating that a *promesse de rachat* does not at all aim at eliminating possibility of loss-participation by its beneficiary. On top of the judicial method just presented, scholars also have their own version of story whereby a *promesse de rachat* is demonstrated as not leonine. The obstacle imposed by the prohibition of leonine clauses to the validity of a *promesse de rachat* is that it eliminates all risks of losses supposed to be borne by the beneficiary. Here, what are eliminated is actually the risks of depreciation of value of shares and if it is proved that the depreciation of value of shares is not tantamount to losses (*pertes*) as referred in article 1844-1, then the *promesse de rachat* would not violate the said article. For many authors, the losses as referred in article 1844-1 should be understood as the impossibility for shareholders to reclaim his investments in the companies, which means that the losses would only occur at the liquidation of the companies. By contrast, for them, the depreciation of value of shares occurs normally during the operation of the companies and when it occurs, it does not necessarily exclude the possibility that shareholders are able retrieve his investment in the companies. Thus, the *promesse de rachat* has no impact on the participation in losses, is not leonine in nature and does not violate article 1844-1 of *code civil*.⁴⁷⁷

b. Relaxations based upon a denial of the applicability of the prohibition to a *promesse*

649. French jurists have mainly established three kinds of exceptions to the general applicability of the prohibition to *promesse de rachat*.

650. - Relaxations based upon the idea that the prohibition is only applicable to *promesse de rachat* laid down in articles of association. The earliest attempt to relax the rigid prohibition relied on the so-called “*critère géographique*” according to which the prohibition has been laid down for relations within companies and thus applicable only to that. That being the case, only conventional arrangements contained in articles of association (*contrat de société* or *statuts*) would have their validity threatened by the prohibition; an

⁴⁷⁷ V. H. HOVASSE, note sous Cass. com., 22 février 2005, n° 02-14392; JCP E 2005, 938, n° 58; A. PIETRANCOSTA, *Promesses d'achat de droits sociaux et clauses léonines: critique d'une sollicitation excessive et hasardeuse de l'article 1844-1 du Code civil*, Rev. Lamy dr. contrats 2006, n° 1, p. 67; M. BUCHBERGER, *Le contrat d'apport - Essai sur la relation entre la société et son associé*, Panthéon-Assas, 2011, n° 68; E. SCHLUMBERGER, *Les contrats préparatoires à l'acquisition de droits sociaux*, Dalloz, 2011, n° 380.

extra-statutaire promesse de rachat, outside the article of association “geographically”, has no problem of validity as far as the prohibition of leonine clauses is concerned.⁴⁷⁸ Nowadays, the relaxations based upon *critère géographique* are considered to be too far-fetched⁴⁷⁹ and not worth too much discussion.

651. - Relaxations based upon the idea that the prohibition is only applicable to *promesse de rachat* binding the companies. We have mentioned *supra* that the same purpose of prohibiting leonine clauses are achieved by two articles: article 1844-1 of *code civil* (the prohibition of leonine clauses *per se*) and article L.232-15 of *code de commerce* (the prohibition of fixed interests). The applicability of the prohibition based upon L.232-15 has been excluded by *cour de cassation* in a case involving a *promesse de rachat* fixing a fixed return to the benefits of a buyer of shares, on the following reason: “*l'article L. 232-15 du Code de commerce est sans application à la stipulation d'intérêt insérée dans une promesse de cession d'actions, qui oblige le seul cessionnaire et non la société.*”⁴⁸⁰ In other words, based upon this judgement, the prohibition constitutes a problem only to those *promesse de rachat* with the companies as debtors of the obligation of repurchase. If it is a shareholder that is stipulated to bear the obligation, the prohibition has no foundation to be applied. However, this justification of the non-application of the prohibition may only work in contexts involving article L.232-15; if in contrast it is article 1844-1 that is in question, the reasoning may be not effective.⁴⁸¹

652. - Relaxations based upon the idea that the prohibition is only applicable to “*promesse de rachat* to the benefits of real shareholders”. Aside from focusing on the location or debtor of a *promesse de rachat*, the applicability of the prohibition of leonine clauses can also be excluded because of its beneficiaries: French jurists would demonstrate that a beneficiary of a *promesse de rachat*, although he is technically and nominally a shareholder of the target company, lacks what is called *affectio societatis* and should not be considered as a “real shareholder”; and accordingly, the validity of the convention of *promesse de rachat* should not be affected by the prohibition of leonine clauses. In particular, two ways can be resorted to dis-identify a beneficiary from being a real shareholder.⁴⁸²

⁴⁷⁸ V. P. le CANNU et B. DONDERO, *Droit des sociétés*, Montchrestien, 4e éd., 2012, n° 185; Cass.com. 15 juin 1982, *Rev. société* 1983, p. 329, note Y. GUYON; Cass. com. 27 septembre 2005, n° 02-14009.

⁴⁷⁹ V. F-X. LUCAS, note sous CA. Paris, P. 5, ch. 6, 7 févr. 2013, *Bull. Joly* 2013. 394.

⁴⁸⁰ Cass. com., 27 septembre 2005, n° 02-14009.

⁴⁸¹ V. F. -X. LUCAS, note sous Cass. com., 27 septembre 2005, n° 02-14009, *RDC* 2005. 443.

⁴⁸² *ibid.*

The first way is to demonstrate that a beneficiary does not participate in any benefit and loss at all, and thus only a nominal or even fake shareholder. There are two kinds of beneficiaries-nominal shareholders. The first kind are sellers in an instalment sale of shares: in a famous case named *Bowater*, the court held that the prohibition of leonine clauses does not apply to convention between shareholders “*dont l'objet n'était autre...que d'assurer...la transmission des droits sociaux*”.⁴⁸³ The second kind are financial institutions funding a purchase, mostly by the way of a convention of *portage*, who expect nothing but a fixed fee from the real buyer of the shares.⁴⁸⁴ In both cases, the beneficiaries/nominal shareholders would only temporarily hold shares on behalf of others and it is thus natural that it is allowed for them to transfer the burden of losses to the real shareholders.

The second way is to demonstrate that a beneficiary, although willing to participate in profits realized in the company, is in fact more a quasi-creditor than a shareholder. As we would explain in more details *infra*, the prohibition of leonine clauses (article 1844-1 of *code civil*) is a corollary of the definition of *société* as defined in *code civil* (article 1832 of *code civil*), which focuses on the common intention of the participation of loss and profits among shareholders (*affectio societatis*). If the beneficiary of a *promesse de rachat*, although nominally a shareholder after he exercises the option conferred by the promise, is understood as having an intention other than *affectio societatis* when he bought the shares, naturally he should not be bound by article 1844-1 of *code civil* to the same degree as real shareholders who do have such an intention.⁴⁸⁵ The most typical intention other than *affectio societatis* that a nominal shareholder may have is to provide funds and to receive benefits, an intention similar to the typical one of a creditor. Accordingly, since 2000s, French courts have accepted the identification of a beneficiary with “*bailleur de fonds*” (funds provider) as a justification to validate an otherwise invalid *promesse de rachat prima facie* contravening

⁴⁸³ V. Cass. com., 20 mai 1986, n° 85-15.716, JCP N 1987. 221, note M. GERMAINE. Aussi Cass.com. 20 m.com. 10 janvier 1989, n° 87-12.155.

⁴⁸⁴ In cases involving *portage*, the justifications for excluding the prohibition of leonine clauses in the beginning is based upon the existence of a reciprocal promise (*promesse croisée*), which makes it impossible for the nominal shareholder to both enjoy the profits or assume losses, and thus not a shareholder in essence. V. Cass. com., 24 mai 1994, n° 92-14.379; D. 1994. 503, note A. COURET; See. F.-X. LUCAS, *Promesses d'achat de droits sociaux à prix garanti et prohibition des clauses léonines. À la recherche de la cohérence perdue*, JCP E 2000, n° 5, p. 168; v. aussi J.-P. BERTREL, *Portage de droits sociaux*, Rép sociétés. 2014, n. °38-40.

⁴⁸⁵ V. D. MARCHETEAU, *Capital risque-Création*, JCl. sociétés, Fasc.2003 2008, n. 89.

article 1844-1 of *code civil*.⁴⁸⁶ Interpreted *a contrario*, if the beneficiary of a *promesse de rachat* is considered as a real shareholder, the validity of the *promesse* would be at stake.⁴⁸⁷

B. Foundations of the prohibition of leonine clauses

653. According to the principle that “*les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits*” as laid down in article 1103 of *code civil*, all conventional stipulations, including any clauses susceptible to be identified with leonine clauses, should be *a priori* valid, the exception to which must be specifically provided in law. The prohibition of leonine clauses is obviously an exception to the general force of contracts and must be justified by some compelling reasons. Roughly speaking, the reasons can be divided into those based upon the necessity of protecting the interests of the debtors of the leonine clauses (1); and those based upon the necessity of protecting something else (2).

1. To protect the interests of debtors of leonine clauses

654. The prohibition of leonine clauses can be interpreted as an exception to the rational person assumption (i), which means that legislators believe leonine clauses, even if out of real intentions of the parties, are too one-sided and should not be given enforceability. Yet, it should be noted that here it is not for the protection of a weaker party (ii). Instead, the judicial intervention is a corollary of the requirement of *cause objective* in the common provisions of contracts (iii).

i. Prohibition as an exception to the “rational person” assumption

655. The general validity of conventional stipulations is justified by the idea that parties of contracts, as rational persons, are the best judges of their own interests and that granting them the discretions to arrange rights and duties between themselves would achieve optimal results. However, sometimes this presumption would be untrue since parties to contracts are not necessarily always rational persons and would be very likely to unwarily conclude contracts to their great detriments. Law, in this kind of situations, should intervene

⁴⁸⁶ V. Cass. com., 16 novembre 2004, n° 00-22.713, Dr et patr. févr. 2005. 133, obs. D. PORACCHIA; Cass. com., 8 mars 2005, n° 02-11.462; Cass. com. 27 septembre 2005, n° 02-14.009, Bull. Joly société 2006. 92, note A. COURET; M.BERTREL, *La société, contrat d'investissement?*, RTD com. 2013 p.403

⁴⁸⁷ V. CA. Paris, 7 février 2013, Bull. Joly sociétés 2013. 394, n° 6, note. F. -X. LUCAS.

to invalidate certain conventional stipulations that are, although “*légalement formés*”, too unconscionable. The prohibition of leonine clauses, accordingly, has been justified in France by such a reason: leonine clauses, although well and legally formed, are too unbalanced that it dictates judicial interventions.

ii. Prohibition not as a special protection for a weaker party

656. It should be noted that although the prohibition has been interpreted in France as for the purpose of curing imbalance between parties to a contract, it is a consensus that the prohibition is not to protect a weaker party. In French law, there are many provisions for the purpose of protecting someone who is vulnerable, for example the rules for protecting costumers (Article L. 132-1 of *Code de la consommation*) and the rules for protecting employees (see our discussions *infra* of restrictions to non-competition clauses). The prohibition of leonine clauses, although seem to be for protecting weaker shareholders from being bullied by leonine shareholders, is in fact not so since the debtors of a leonine clause, usually being merchants, are supposed to be as sophisticated as its beneficiaries and need no special protections.⁴⁸⁸

iii. Prohibition as a transposition of the former requirement of *cause objective*

657. The prohibition as interpreted as being for the purpose of curing contractual imbalance have been traditionally justified by the former requirements of *cause objective* in a similar way as how the requirements of serious price have been justified (discussed *supra*): leonine clauses, as contravening the principle of participation of loss and benefits, violate the *cause objective* of *contrats de sociétés* (a) and should accordingly be annulled(b).

a. Leonine clauses as depriving *cause objective* from *contrats de sociétés*

⁴⁸⁸ V. F. X.-Lucas, *Théorie des bénéfices et des pertes- clauses léonines*, JCl sociétés Fasc. 15-30, 2013, n° 4.

658. Article 1832 of *code civil* defines the concept “sociétés” as “*instituée par deux ou plusieurs personnes qui conviennent par un contrat d'affecter à une entreprise commune des biens ou leur industrie en vue de partager le bénéfice ou de profiter de l'économie qui pourra en résulter.*” This definition dictates that for there to be a *sociétés*, its shareholders should have a common intention to share risks and benefits⁴⁸⁹ (the common intention is commonly referred as *affectio societatis*⁴⁹⁰). And such an intention is the essence or *cause objective*⁴⁹¹ of the category of *contrats de sociétés*.

b. Cause objective of *contrats de sociétés* as a condition for the validity of leonine clauses

659. As having been presented *supra*, *cause objective* would be an element for validity of a contract only if two conditions have been met. For one thing, the category of a contract would be fixedly identified before evaluating its validity; for the other, for a given category of contracts, legally provided *cause objective* is not replaceable by other counterparts, as far as its validity is concerned. In France, when it comes to the validity of a suspected leonine clause in a purchase of shares, the relation between the buyer and the seller would be *a priori* identified with one governed by provisions in *code civil* regulating *sociétés* unless the relaxations we have mentioned (such as *bailleur de fonds*) come into play. Under this identification of the contract of purchase of shares, the *cause objective* of participation in losses and benefits is a must and cannot be replaced by other counterparts like giving cashes.

⁴⁸⁹ V. D. RANDOUX, obs. sous Com., 20 mai 1986, Rev. sociétés 1986, p. 587; D. RANDOUX, obs. sous Com., 20 mai 1986, Rev. sociétés 1986, p. 587; J. MESTRE et D. VELARDOCCIO, Lamy sociétés commerciales, Lamy, 2016, n° 314; V. MAGNIER, Droits des sociétés, Dalloz, 8 éd., 2017, n° 73.

⁴⁹⁰ V. Y. GUYON et A. MAIROT, *L'affectio societatis*, JCl. Sociétés, Fasc. 20-10.

⁴⁹¹ V. F. X.-Lucas, *Théorie des bénéfices et des pertes- clauses léonines*, JCl sociétés Fasc. 15-30, 2013, n° 25; P. GOUTAY et D. DANOS, *De l'abus de la notion d'intérêt social*, D. affaires 1997, p. 877; J. ROCHFELD, Cause et type de contrat, LGDJ, 1999, n° 162; F. CHENEDE, Les commutations en droit privé, Contribution à la théorie générale des obligations, *Economica*, 2008, n° 304; J.-F. HAMELIN, Le contrat-alliance, *Economica*, 2012, n° 508.

For example, in a Paris case a buyer of shares has been interpreted as a real shareholder because it has engaged in the daily operation of the company; in other words, the relation between the buyer and the seller is considered as governed by provisions for *sociétés*. Because of the relation between the buyer and the seller is considered to be governed by provisions for *sociétés*, any conventional clauses contriving the *cause objective* of participation in losses would be considered as invalid, even if in an abstract case, the buyer has provided other counterpart in exchange for his shares --- say, a price substantially higher than the real value of the shares.⁴⁹²

2. To protect something else

660. The prohibition of leonine clauses, on top of being justified by the necessity to protect the interests of the debtors, can also be justified as one protecting the interests of others, for example the interests of other shareholders (a) or the interests of creditors of the company (b).

i. To protect other shareholders of the company

661. Planiol believed that "*chaque associé doit être exposé à perdre afin que tous soient intéressés à la bonne gestion de la société*".⁴⁹³ In other words, the function of the prohibition is nothing but to give all shareholders an incentive to devote efforts to the operation of the company and even if a leonine clause is beneficial to both its debtor and its beneficiary, the mere fact is not sufficient to validate the leonine clause because it has an external effect to the detriment of other shareholders: the carelessness of a shareholder under the aegis of a leonine clause would eventually decrease the profits eventually realized by the company and thus harm the interests of other shareholders. On that account, the *raison d'être* of the prohibition is to protect the shareholders other than the parties to a leonine clause.

ii. To protect creditors of the company

662. The prohibition of leonine clauses can be also understood, to some extent, as being laid down for the purpose of protecting creditors of the company: if the debtor of a

⁴⁹² V. CA. Paris, 7 février 2013, Bull. Joly sociétés 2013. 394, n° 6, note. F. -X. LUCAS.

⁴⁹³ V. F. X.-Lucas, *Théorie des bénéfices et des pertes- clauses léonines*, JCl sociétés Fasc. 15-30, 2013, n° 7.

leonine clause is the company, a leonine clause that ensure its beneficiary that his investment is always profitable, is obviously to the detriment of “*l'intégrité du capital social*” and accordingly to the detriment of the ability of the company to pay off all its debts. In fact, article L.232-15 of *code de commerce*, the prohibition of fixed interests, is exactly for this purpose.⁴⁹⁴ Although M. Lucas has pointed out that the *raison d'être* of article 1844-1 of *code civil*, “*qui s'applique tant dans les rapports que l'associé entretient avec la société que dans les rapports entre associés*”, is different from that of article L.232-15, which “*fixe ne joue donc que dans les relations verticales, soit les relations société/associé*”⁴⁹⁵; some author believe to the contrary that article 1844-1 of *code civil* is also for the purpose of protecting the creditors of the company.⁴⁹⁶

II. Restrictions under Chinese law

663. Under Chinese law, there is a provision similar to the French provisions related to prohibition of leonine clauses (A). However, the predominant judicial view is that the application of the prohibition should be abandoned, at least limited (B). The jurisprudence has been justified by scholars on several accounts (C).

A. Legislative basis for the prohibition of leonine clauses

664. In China, under the formal statute laws, there is no prohibition of leonine clauses. However, in a directive of judiciary interpretation in 1990 entitled “Supreme People's Court Answers to Questions concerning the Trial of Cases Involving Joint Venture Contract Disputes”, there is a provision somewhat similar to a mixture of article L.232-15 of French *code de commerce* and article 1844-1 of French *code civil*. Article 4 of this directive provides that “all joint ventures entities shall follow the principle that profits and losses shall be jointly shared and that risks shall be jointly undertaken” and “any fixed-interests clauses regardless of losses incurred by the joint venture entities shall be deemed unwritten” or in the cases where the beneficiary of a fixed-interests clauses does not participate in the operation of the joint venture, “the supposed ‘joint-venture contract’ is in fact a loan in disguise and shall be invalid because of the contradiction with relevant financial regulations”.

⁴⁹⁴ Cass. com., 27 septembre 2005, n° 02-14009.

⁴⁹⁵ V. F. –X. LUCAS, note sous Cass. com., 27 septembre 2005, n° 02-14009, *RDC* 2005. 443.

⁴⁹⁶ V. T. MASSART, obs. sous CA Paris, 21 décembre 2001, *Bull. Joly sociétés* 2002. 109, p. 499

B. Judicial limitation of the prohibition of leonine clauses

665. Although the prohibition of leonine clauses does exist in Chinese positive law (directives of judicial interpretations are considered as a type of sources of law), the predominant judicial view is that its scope of application is only limited to investment contracts binding the target companies.

666. -The starting point: “bet-on clauses”. The expression “bet-on” is a synonym for what is called “value-adjustment mechanism (VAM)”. The VAM is a common practice widely used in capital-investment. It is used to reconcile difference between an investor and an investee about the value of the company to be invested, which is constituted of conventional mechanism whereby a certain future event, usually some financial indicator or the listing in a securities exchange, is stipulated as the indicator of the real value of the company; and the occurrence or not of the future event as the trigger of a value-adjustment (or price-adjustment) process. If the value reflected by the triggering event is lower than the price paid, the investee would have to compensate the investor so as to make equal the ultimate price paid and the real value of the company. To the extent that the interests of the parties eventually depend upon a future event whose occurrence is not certain, the VAM resembles a bet and accordingly colloquially referred by Chinese practitioners as “bet-on clauses” or “bet-on agreements”.⁴⁹⁷

667. -Prima facie, this kind of conventional mechanisms contravene the prohibition of leonine clauses (or the prohibition of fixed-interests) as laid down in the directive of judicial interpretations, since under the aegis of a “bet-on clause”, an investor would be guaranteed at least a fixed return regardless of whether the invested company has made a profit or not. In the most famous case involving “bet-on clauses” *Haifu* (the name of the plaintiff company), the court of the second instance ruled that the entire investment contract involved was null because of a leonine bet-on clause stipulated in the investment contract. This bet-on clause, according to the court, along with the fact that the investor did

⁴⁹⁷ See L. PAN, *A re-evaluation of “contract” and “company”*, Peking University Law Journal, Jan. 2017. 250, p. 250 (潘林: “重新认识合同和公司”, 《中外法学》2017年第1期, 第250页).

not participate in any management activities, had turn the joint-venture contract into a lending contract in disguise which was prohibited at that time.⁴⁹⁸

668. - However, this application of the prohibition of leonine clauses between shareholders was eventually overthrown by the supreme court and since then the limitation of the scope of application of the prohibition constitutes a jurisprudence: In dismissing the judgement of the court of second instance, the Supreme People's court did not directly address the issue of the applicability of the prohibition of leonine clauses. The supreme court simply stated that the identification by the court of second instance of the investment contract with a lending contract in disguise was unfounded; and the bet-on clause involved was valid because of two reasons: for one thing, the validity is dictated by contractual liberty; for another, the conventional mechanism is not to the detriment of the capital integrity of the company and thus does not harm the interests of the creditors of the company.⁴⁹⁹ Here a praetorian rule has been created: leonine clauses binding shareholders are valid and leonine clauses binding the target company are invalid.⁵⁰⁰ It should be noted that Chinese courts have not given a clear justification for this jurisprudence and it is thus necessary to resort to doctrines to have a better understanding of its theoretical foundations.

C. Doctrinal discussions on the prohibition of leonine clauses

669. The two aspects of jurisprudence related to the applicability of the prohibition of leonine clauses have been paid different attentions to: the non-applicability of the prohibition in a context with another shareholder as the debtor of the leonine clause is generally considered as self-evident and thus has been little discussed (1) whereas the applicability of the prohibition in a context with the target company as the debtor is the real issue much discussed in China (2).

1. Consensus as to the validity of leonine clauses binding only certain shareholders

⁴⁹⁸ See (2011) Gansu 2rd civ. Final instance n.° 96 ((2011) 甘民二终字第 96 号).

⁴⁹⁹ See (2012) civ. Retrial. n° 11 ((2012)民提字第 11 号).

⁵⁰⁰ Followed by other cases ruled by inferior courts and arbitration tribunals. See (2013) Shanghai 1st intermediary court 4th civ.(commercial) final instance n° 574 ((2013) 沪一中民四 (商) 终字第 574 号); (2013) Beijing 1st intermediary court civ. first instance n° 6951((2013)一中民初字第 6951 号); (2014) China International Economic and Trade Arbitration Commission, Arbitration award n° 0056 ((2014) 中国贸仲裁字第 0056 号); (2014) Shanghai 1st intermediary court 4th civ. (commercial) final instance n° 730 (2014)沪一中民四 (商) 终字第 730 号); (2014) 2th civ. Final instance n° 111 ((2014) 民二终字第 111 号); (2015) Zhejiang com. Final instance n° 144 ((2015) 浙商终字第 144 号) .

670. If the debtor of a leonine clause is only another shareholder or certain shareholders, there is a consensus that the prohibition of leonine is not applicable. For Chinese scholars, validity of leonine clauses binding only shareholders is a corollary of the contractual liberties and thus self-evident.⁵⁰¹ In fact, the only doctrinal discussions in this regard that we have found are all in comments about the *Haifu* case.⁵⁰² In these comments, scholars have tried to justify the non-applicability of the prohibition in this context by attacking the supposed theoretical foundations of the prohibitions. Roughly speaking, the foundations attacked can be divided into two categories: to protect interests of the debtors of the clauses (i) and to protect other interests (ii).

i. Criticisms to the foundations based upon the necessity of the protection of the interests of debtors

671. The first kind of criticisms to the application of the prohibition in contexts with only shareholders as debtors of the leonine clauses, is an attack on the view that the prohibition is for the purpose of the interests of the debtors of leonine clauses. In particular, the refutation is carried out on two accounts.

672. - The first account: debtors of leonine clauses are usually sophisticated merchants. If legislators would provide special protections to certain individuals, it is because such individuals are weak and vulnerable. In an investment contract, “because of the commercial natures of the parties” neither parties are weak or vulnerable. Thus, special protections to debtors of leonine clauses are not necessary.⁵⁰³

673. - The second account: leonine clauses are not necessarily unfair. Before the recent promulgation of the General Provisions of Civil Affairs, another foundation upon

⁵⁰¹ See L. PAN, *A re-evaluation of “contract” and “company”*, Peking University Law Journal, Jan. 2017. 250, p. 252 (潘林：“重新认识合同和公司”，《中外法学》2017年第1期，第252页)；Q. YU et Q. XIA, *On the validity of “bet-on” agreements conditioned upon a successful IPO*, People’s court daily, 25 mar. 2015 (俞秋玮、夏青：“以上市为条件的‘对赌协议’的效力评价”，载《人民法院报》2015年3月25日)。

⁵⁰² J. JING, *On the correction of mistakes about “bet-on” agreement and its application*, People’s Judicature, Oct. 2004 (季境：“‘对赌协议’的认识误区修正与法律适用”，载《人民司法（案例）》2014年第10期)；Z. HUANG et L. YANG, *On the validity of promises of repurchase used as bet-on agreements*, People’s Judicature, Oct. 2004 (黄占山、杨力：“附‘对赌协议’时股东承诺回购约定的效力”，载《人民司法（案例）》2014年第10期)。

⁵⁰³ J. JING, *On the correction of mistakes about “bet-on” agreement and its application*, People’s Judicature, Oct. 2004 (季境：“‘对赌协议’的认识误区修正与法律适用”，载《人民司法（案例）》2014年第10期)。

which judges could intervene was a pure objective obvious unfairness. However, this foundation was of little use even at that time because, according to Chinese scholars, the leonine clauses are not at all unfair: “the principle of shared risks is neither a general nor a mandatory principle. In the field of investment, it is only one way to distribute risks...a fixed-interests clause is essentially a clause of distribution of risks and benefits. Based on the principle of autonomy of will, clause of fixed return for the benefit of one or a few investors is not only a common phenomenon in the market, but also of valid legal basis.”⁵⁰⁴ And “from the perspective of the entire trade chain, it is an exchange of equal value between investors and investees.”⁵⁰⁵

ii. Criticisms to the foundations based upon the necessity of the protection of other interests

674. Some authors believe that the prohibition was initially established for the purpose of a tighter control over economy by the state. Because nowadays the economic situations have dramatically changed, the state-control over economy has become redundant, which makes it also redundant to have such a prohibition.⁵⁰⁶

Here, the state-control over economy alludes primarily to the prohibition of private lending when the entire finance was controlled by the state. In this sense, the prohibition of leonine clauses was established to throttle any attempts to bypass the prohibition of private lending. This can be attested in the text of the provisions of prohibition of leonine clauses whereby the existence of a leonine clause alongside the fact that its beneficiary does not participate in the operation of the company, is to change the nature of an investment contract (joint-venture contract) to that of “a loan in disguise”, which would render the contract invalid because of “the contradiction with relevant financial regulations”. With the passing of a new directive of judicial interpretations legalizing private lending in 2015, the prohibition of

⁵⁰⁴ J. JING, *On the correction of mistakes about “bet-on” agreement and its application*, People’s Judicature, Oct. 2004 (季境: “对赌协议”的认识误区修正与法律适用”, 载《人民司法》2014年第10期).

⁵⁰⁵ L. PAN, “Renovation of finance and Judicial judgements: focusing on the cases doctrines and practices related to bet-on agreements in China”, *Journal of Nanjing Normal University*, May 2013 (潘林: “金融创新与司法裁判:以我国‘对赌协议’的案例、学说、实践为样本”, 载《南京师大学报(社会科学版)》2013年第5期).

⁵⁰⁶ See J. JING, *On the correction of mistakes about “bet-on” agreement and its application*, People’s Judicature, Oct. 2004 (季境: “对赌协议”的认识误区修正与法律适用”, 载《人民司法》2014年第10期); R. LI, *On the validity of fixed-interests clauses*, thesis of China University of Political Science and Law, 2012 (李若愚: “保底条款效力研究”, 中国政法大学硕士学位论文 2012年).

leonine clauses would thus lose all the *raison d'être*, if the prohibition serves only the purpose of state-control over economy.

2. Divergences as to the invalidity of leonine clauses binding the target companies

675. In contrast to the scarcity of discussions of the validity of leonine clauses binding only shareholders, what Chinese scholars are concerned most is the validity of leonine clauses binding the target companies. The focus of the discussions is whether a leonine clause, even if with only the target company as its debtor, really inflicts prejudice upon the capital integrity of the target company. In other words, whether a leonine clause is to the detriment of creditors of the target company.⁵⁰⁷

However, we believe this aspect of discussions are of little use for the purpose of this thesis because any possible invalidity of a leonine clause can be avoided by having the majority shareholder as the debtor instead of having the target company as the debtor; thus, we would not go into details of this kind of discussions.

III. Comparison

676. Leonine clauses binding the target companies are prohibited in both countries for the purpose of protecting the capital integrity of the companies, or more precisely for the purpose of protecting the creditors of the companies. The prohibition in this sense, as we believe, plays no vital roles in practice because it can be easily circumvented by resorting to a clause binding one or several shareholders. Thus, this side of the prohibition would not be discussed in detail. And in the paragraphs of comparison, we would limit our discussion to only the clauses binding other shareholders.

As for leonine clauses binding shareholders, the preceding paragraphs have revealed that the prohibition of leonine clause exist in both countries and judges and scholars of both countries feel a certain impetus to relax this restriction to the contractual liberties. However, the two countries differ in the way to realize the relaxations: the French jurists, while coming

⁵⁰⁷ See L. PAN, *A re-evaluation of "contract" and "company"*, Peking University Law Journal, Jan. 2017. 250, p. 252 (潘林: “重新认识合同和公司”, 《中外法学》2017年第1期, 第252页).

up with some exceptions to the prohibition, try to retain the prohibition as a general rule; whereas Chinese jurists simply abandoned it entirely. The paragraphs of comparison would thus be dedicated to contemplating one question: from the perspective *de lege ferenda*, should the prohibition of leonine clauses be abolished completely; or should it be kept in most cases and excluded only in some cases.

Our opinion is that the Chinese way, i.e. to eliminate entirely the prohibition of leonine clauses, should prevail. We are not alone as far as this opinion is concerned. In fact, in a sense of comparative law, to laid down a prohibition of leonine clauses is a rare fact in other jurisdictions.⁵⁰⁸ Another fact that supports our opinion is that even many French authors find it ridiculous to have this prohibition.⁵⁰⁹

In the paragraphs for comparison, our main aim is to expound the justifications for our opinion. The justifications can be summarized as the following: in both countries, the contractual liberty is the general principle and any restrictions to it are only exceptions and should be justified by some specific reasons. For that reason, the prohibition of leonine clauses, as an exception, should be backed by some justifications. However, as we believe, the justifications supporting the prohibition, both that based upon the necessity of protecting the debtors of leonine clauses (A) and that based upon the necessity of protecting some other interests (B), are not sound.

A. Necessity to protect the debtors of leonine clauses as not a sufficient *raison d'être* of the prohibition of leonine clauses

677. If laws and judges are to intervene to protect a particular party to a contract, it should be either because the party is inherently vulnerable or that the category of contract is inherently one-sided. As has been presented *supra*, scholars of both countries believe that the debtors of leonine clauses are not so weak that special legal protections need to be provided. Thus, it is pretty clear that the prohibition cannot be justified as a special legal protection for

⁵⁰⁸ V. K. PEGLOW, *Le contrat de société en droit allemand et en droit français comparés*, Bibl. dr. priv., t. 402, LGDJ, 2003, n° 50, p. 35.

⁵⁰⁹ V. G. KESSLER, *La validité des promesses unilatérales d'achat à prix plancher*, D. 2005, p. 973; P.-M. de GIRARD et C.-A. PASCAUD, *Les promesses d'achat de droits sociaux à prix plancher à l'épreuve de l'interdiction des clauses léonines*, RDC 2006, p. 955, n° 12; A. COURET, note sous Cass. com., 27 septembre 2005, Bull. Joly société 2006, p. 92.

someone who is vulnerable. Since there is no divergence between the scholars of the two countries on this point, it would not be covered here in our discussions.

What is left to be discussed is thus only whether leonine clauses are unconscionable enough to dictate a judicial intervention that overrides the contractual liberty. No matter what the eventual answer is, we believe it is necessary to firstly point out that the methodologic approach used by French scholars to answer the question, is somewhat unreasonable and should be discarded (1). After pointing out that, we will continue to explore whether in a substantive sense, the leonine clauses are inherently unconscionable (2).

1. Insufficiency expounded from a formal perspective

678. - The French approach: to treat *cause objective* as conditions for validity instead of as conditions for categorization. As has been mentioned *supra*, the main theoretical foundation of the prohibition of leonine clauses in France is the argument that leonine clauses contradict the *cause objective* of *contrats de sociétés*. In the previous subsection, we have already mentioned the unreasonableness of a similar argument to support the special restrictions on clauses of price. The similarity of the two arguments is that both of them are based upon the idea that the *cause objective*, on top of being a condition for categorization, is also a condition for validity.

Here, the participation of losses and benefits is considered as *cause objective* of *contrats de sociétés*. If the *cause objective* is considered as only a condition for categorization, a leonine clause, i.e. a clause contravening the *cause objective* of *contrats de sociétés* would only lead to the consequence that the beneficiary of the clause is not recognized as a party to the *contrats de sociétés*; the leonine characteristic would not prevent the beneficiary from becoming a party to another category of contracts (or other legal relation, as a member of a group) and it would not thus make the clause any less valid. However, because the French positive law treats the existence of a given type of *cause objective* as a condition for validity, the participation of losses and benefits, instead of categorizing a supposed *contrat de sociétés* as another category of contracts, would render any conventional clauses contravening it to be invalid.

679. - Criticisms to the French approach. Why to treat the existence of a typical *cause objective* as a condition for validity is unreasonable and should be discarded, has already been expounded in the previous sections. A short reiteration of our reasoning: the French requirement of *cause* is justified by some reasons (what are the reasons can be discussed, as it can be either to ensure a serious consent or to ensure a fundamental objective balance in counterparts given by the parties). Yet, from a perspective *de lege ferenda*, the *cause* should be able to consist of any kind of legal obligations to the detriment of debtors and in the benefits of creditors, as long as it is serious. To assign a given kind of legal obligation as a condition for validity to a given kind of contracts would only cause an undesirable consequence: a contract, although backed by a pair of serious counterparts, is declared invalid only because that the counterpart given by a party is not the one required by the categorization of that contract.

Let's try to apply the reasoning in the context of leonine clauses. A leonine clause, although certainly violating the principle of participation in losses and benefits, is possible to be for the exchange of a counterpart given by the beneficiary. As far as the *raison d'être* of the requirement of *cause* is concerned, in order to determine the validity of the clause, what is to be done is to evaluate the seriousness of the counterpart given by the beneficiary. However, the current French law, or more specifically the prohibition of leonine clauses, actually eliminates the possibility to provide counterparts other than to assume the obligation of participation in losses and benefits, simply because what it concerns is a *contrat de société* instead of other kinds of contracts.

Others may argue that the current French jurisprudence excluding the applicability of the prohibition in the context of *bailleur de fonds*, *portage* and instalment sales of shares is sufficient to solve the problem: if it is something other than the willingness of participating in losses and benefits (roughly equivalent to *affectio societatis*) that is provided, doesn't that mean the contract involved is not a *contrat de société*? Thus, it seems that the French approach consisting of a general prohibition and exceptional relaxations is sufficient to solve the problem.

This argument has so oversimplified the situations. If real shareholders characterized by *affectio societatis* can be always distinguished from "fake shareholders" not so

characterized, like in the case of the distinction between *commandités* and *commanditaires*⁵¹⁰, the French approach can be somewhat retained as a “kluge”. However, things are not always black and white. In our opinion, real shareholders and fake shareholders are only two ends of a spectrum; and in most cases of leonine clauses, it is someone in between that is involved: for example, someone who is guaranteed a fixed profit in spite of the fact that he does participate in the daily operation of the company. This kind of beneficiaries of leonine clauses are definitely out of the scope of any relaxations on the prohibition.⁵¹¹ Yet, to exclude this kind of beneficiaries from the scope of the relaxations is not necessarily reasonable because it is very possible that the beneficiary has offered something of great value to the company and it is thus to the common benefits of all shareholders to allow him to be protected from operating loss of the company. And in this case, it would be quite unreasonable to invalidate a leonine clause just because its beneficiary is characterised by a certain degree of *affectio societatis*. Just as M. Couret has pointed out, "*pourquoi notre droit devrait-il être plus exigeant envers ceux qui sont animés par un véritable affectio societatis qu'envers ceux qui n'en ont aucun?*"⁵¹²

680. - An optimistic projection of an abandon of the approach based upon the reform of *code civil* in 2016. Fortunately, the recent reform of *code civil* has replaced the requirement of *cause objective* with a substantive evaluation of the seriousness of counterparts given by each party. Thanks to the disappearance of the concept of *cause*, the French approach of treating the typical obligation of a contract as a condition for validity is to be discarded.

2. Insufficiency expounded from a substantive perspective

681. We have demonstrated that the mere fact that the participation of losses and benefits is the *cause objective* of *contrats de sociétés* is not sufficient to justify the prohibition of leonine clauses in a sense *de lege ferenda*. Yet, if it has been proved that leonine clauses are in most cases unfair, one-sided or unconscionable in nature, the prohibition of leonine clauses can be justified by the new provisions against unserious counterparts as provided in article 1168 of French *code civil*: if leonine clauses, i.e. conventional mechanisms that allow

⁵¹⁰ V. M. BERTREL, *La société, contrat d'investissement?* RTD com. 2013 p.403; J. JING, *On the correction of mistakes about "bet-on" agreement and its application*, People's Judicature oct. 2004.

⁵¹¹ V. CA. Paris, 7 février 2013, Bull. Joly sociétés 2013, p. 394, n° 6, note. F. -X. LUCAS.

⁵¹² A. COURET, note sous Cass. com., 27 septembre 2005, Bull. Joly société 2006, p. 92.

a shareholder to be discharged from all possible losses, are always deprived of any serious counterpart given by the protected shareholder, the leonine clauses can be considered as in general contravening article 1168; and the prohibition against leonine clauses can be considered as a special application of this article.

Unfortunately for those who advocate the survival of this prohibition, the Chinese authors, as we have presented *supra*, have demonstrated that leonine clauses are not necessarily unfair as far as the entire trade-chain is concerned. Ergo, the prohibition of leonine clauses cannot be justified by a substantive unfairness (in the case of French law, by a lack of serious counterpart) either.

B. Necessity to protect other interests as not a sufficient *raison d'être* of the prohibition of leonine clauses

682. On top of the justifications based upon the necessity of protecting debtors of leonine clauses, the prohibition of leonine clauses is justified in France also by the necessity to protect the interests of other shareholders not parties to the contract of purchases of shares. We believe this reason is not sufficient to support the existence of such a prohibition (1). Besides, we would like to point out that the prohibition is to some extent a tool to implement the now obsolete “prohibition of usury”, the obsolescence of which should be also passed to the prohibition of leonine clauses (2).

1. Necessity to protect other shareholders as not a sufficient *raison d'être*

683. As has been mentioned *supra*, M. Planiol believe the prohibition is also for the purpose of protecting other shareholders. The logic is simple: if a shareholder is allowed to be protected against any losses, he would not have the necessary motive to well run the company. This justification of the prohibition based upon the externality of the leonine clauses, in our opinion, is at least *prima facie* reasonable. It is regretful that Chinese scholars have failed to even address it.

Reasonable as it seems, we believe this justification alone is not sufficient to constitute a *raison d'être* of the prohibition. This justification has merely pointed out that there would be a conflict of interests, or a principal-agent problem if not all shareholders

participating in the operation of the company, is subject to the risks of losses incurred by the company. It addresses nothing about whether such a problem is insurmountable. In fact, the risks posed by the problem of “agent dilemma” is at least as salient in a relation between management and shareholders as that between different shareholders. If we can accept a CEO who controls the company yet suffer no risks of losses, why cannot we accept in a similar way a shareholder protected by a leonine clause? After all, any justifications supporting the separation of management and ownerships of companies⁵¹³ can be transposable to the contexts of a shareholder characterised by *affectio societatis* yet bound by no risks of losses.

2. Links with the prohibition of usury as a sufficient *raison d’écarter*

684. - The exclusion of the prohibition of private lending as a sufficient reason to exclude also the prohibition of leonine clauses. Chinese authors have mentioned that one of the initial motives of Chinese judges to establish the prohibition of leonine clauses, is to suppress any attempts to circumvent the prohibition of private lending. Because of the relation of means and end between the two prohibitions, if the “end” prohibition of private lending is eliminated, the “means” prohibition of leonine clauses should be accordingly eliminated as well. Because since 2015 private lending has been legalized in China, authors believe the prohibition has lost its *raison d’être*.

If the Chinese reasoning can be transposable into a French context, the theoretical pillar of the prohibition would be severely shaken, if not completely collapse. Since it is not a question as to the legality of private lending under French law, the only factor that determines the transposability of the reasoning is whether in the beginning the prohibition of leonine clauses was also introduced for the purpose of preventing private lending.

685. - The initial link between the prohibition of leonine clauses and the prohibition of private lending (or the prohibition of usury) in French law. Although we have not found any French authors who have mentioned that in the beginning the prohibition of leonine clauses was used as a tool to implement the prohibition of private lending, a Dutch author has given us some insight as to the initial link between the prohibition of leonine

⁵¹³ For a thorough presentation of all the issues in and all the solutions to the agent dilemma in corporate governance, see K. LIPARTITO et Y. MORII, *Rethinking the Separation of Ownership from Management in American History*, Seattle university law review, vol. 33, 2010, p.1025 – 1063.

clauses and another prohibition similar to the Chinese prohibition of private lending. The following is our rephrasing of the relevant paragraphs of an article by Mr. Henning.⁵¹⁴

In the medieval time, in Europe there used to be a prohibition on “usury”. The term “usury” here designates all charge above the principal that has been lent. That is to say, in the medieval time, interests were prohibited. The theoretical origin of this prohibition could be traced back as early as to Ancient Greece and it was reinforced by Christian philosophy in latter time.⁵¹⁵

Ancient as it was, the prohibition of usury became contradictory to the needs of medieval merchants. Many ruses were thus invented to circumvent this annoying prohibition, one of which was to establish a fake *societas*: interests were camouflaged as dividends transformed from profits realized by the *societas* backed by a promise of insurance of profits by the borrowers. This attempt to get around the prohibition of usury (or prohibition of interests) soon faced with the confrontations from legal scholars and judges, who tried to prevent it by implementing the prohibition of leonine clauses and considering a *société* so constructed as a *societas leonina*.

The legal history so presented to some extent establishes the link between the prohibition of leonine clauses and the prohibition of usury. True, *sensu stricto*, the prohibition of leonine clauses did not “derive” from the prohibition of usury: after all, the name of the prohibition uses the word “leonine” and seems to have been established to treat unfairness. However, it cannot be denied that in medieval time, the main function of the prohibition of leonine clauses was to prevent interests-charging: *a contrario*, without the prohibition of usury, it would have been an alternative history that has happened: the prohibition of leonine clauses may have gradually fallen into disuse and never been incorporated in French *code civil* in 1804.

That being the case, if it is not entirely appropriate to say that the prohibition of usury had in the past totally justified the prohibition of leonine clauses, it is at least

⁵¹⁴ See J. J. HENNING, *Perspectives on the influence of the Societas leoninas on the law of partnership*, Journal of contemporary Roman-Dutch law, vol. 76, 2013, p. 167-168.

⁵¹⁵ The medieval prohibition of usury is different from the Chinese prohibition of private lending in their goals: the latter is to ensure a monopoly of state-owned banks and a state-control over financial markets whereas the former is mainly out of ethical and religious concerns. However, to the extent that interests are prohibited, the two prohibitions are similar and comparable.

appropriate to say that the former has reinforced the justification of the latter. Thus, the elimination of the prohibition of usurp in the modern time, to some extent, dictates the elimination of the leonine clauses. And the survival of the prohibition of leonine clauses in spite of the disappearance of the prohibition of usurp, in our opinion, is just a remnant of a moribund ancient legal regime that “rules us from grave”.

Conclusion of Subsection II

686. The main divergence between French and Chinese jurists with respect to the prohibition of leonine clauses, is that French jurists believe the prohibition should survive as a general principle limited by many exceptions; whereas Chinese jurists advocate a complete elimination of the prohibition. Having a thorough examinations of the supposed justifications for the prohibition as proposed in the two countries, we believe that these justifications are not quite sound, and that the prohibition of leonine clauses, as a restriction to the contractual liberty, should be eliminated from a perspective *de lege ferenda*.

Conclusion of Section I

687. A comparison of French provisions with their Chinese counterparts shows that the legal restrictions on anti-overpricing techniques in France lack reasonableness *de lege ferenda*.

Section II. Legal restrictions on arrangements against competition by sellers

688. One noticeable phenomenon that practitioners of the two countries need to pay attention to is the different legal restrictions to non-competition clauses. In France, non-competition clauses are only valid if certain restrictive conditions are met. By contrast, to non-competition clauses in sales of shares, Chinese law and judges imposes nearly no special restriction: for a non-competition clause, as long as it meets all the conditions for any ordinary conventional clauses, its validity will normally be granted.

Since the problem of conditions of validity of non-competition clauses that receive much attention in France is not even a problem in China, it is somewhat useless to compare in detail the conditions in the two countries, otherwise the prolonged lists of conditions in France – “existence of spatial-temporal limitations⁵¹⁶; indispensability for realization of legitimate interests⁵¹⁷ and most importantly the proportionality⁵¹⁸ between the restrictions imposed by the clause and the “*function qu’elle remplit*”⁵¹⁹” – would be contrasted with an empty list of conditions in China, which is not at all interesting.

Rather, what we will compare in this section would be the reasons for these different requirements of validity. So, what on earth makes the legislators and judges in one country require something that judges in another country do not so require? The answer is to some extent a simple one: French legislators and judges believe that contradictory to the contractual liberty which is the foundation for the validity of conventional clauses in general, there are some other fundamental values that the law needs to protect. And the special restrictions to non-competition clauses are just trade-offs between the contractual liberty and the fundamental values to be protected.⁵²⁰ By contrast, Chinese judges, for some reasons, do not believe or realize the importance of these fundamental values and thus impose no special restriction to the clauses.

⁵¹⁶ V. Y. PICOD et al., *Concurrence (Obligation de non-)*, Rép. dr. com., n° 108; Cass. soc., 18 décembre 1997, D. 1998. 214, obs. Y. Serra

⁵¹⁷ V. Cass. com. 6 octobre 2015, n° 13-27.419, Contrats, conc. consom. 2015. 282, note M. Malaurie-Vignal.

⁵¹⁸ V. C. -E. BUCHER, *Clause de non-concurrence. – Validité*, JCL, n° 60; Y. AUGUET, *Au nom de la cause- Vive la généralisation du critère de proportionnalité!*, Dr. et patr., mars 2001. 33; Cass. soc., 20 janvier 1999, n° 96-45669; Cass. com. 4 juin 2002, n° 00-15790.

⁵¹⁹ V. Y. PICOD et al., op. cit., n° 130; Cass. com. 4 mai 1993, no 91-17.937.

⁵²⁰ V. Y. SERRA, obs. sous Cass. com., 4 janvier 1994, D. 1994. 205; D. FERRIER, obs. sous Cass. com., 4 juill. 1995, D. 1997. 59.

In France, these fundamental values that restrain the non-competition clauses are two-fold: the personal liberties of the debtor (Subsection I) and the smooth operation of the market (Subsection II). In this section, we will emphasize on the different treatment of these two values in the two countries.

Subsection I. Restrictions for protecting the debtors of the clauses

689. A comparison (III) of the legal doctrines and positive laws in France (I) and China (II) will partly reveal the causes for the different requirements on non-competition clauses, from the perspective of protection of the debtors of the clauses.

I. Restrictions in France

690. In France law, the main foundation to specially protect the debtor of non-competition clause is a liberty called “*liberté du commerce et de l’industrie*” (A). Besides that, a new legal basis of “*déséquilibre significatif*” (B) can also be used to annul a non-competition clause.

A. “*Liberté du commerce et de l’industrie*”

691. The most common basis in France to annul a non-competition clause is “*liberté du commerce et de l’industrie*” (1), which has the nature of constitutionality and is accordingly to some extent superior to contractual liberty (2). Sellers of shares, the debtors of non-competition clauses, are considered to be holder of this fundamental liberty, and thus are able to evoke it to annul non-competition clauses (3).

1. “*Liberté du commerce et de l’industrie*”: the foundation of the special restrictions

692. In France, one of the main reasons to specially restrict the validity of non-competition clause is that it contradicts with a liberty, which may be referred either as *liberté d’entreprendre*, *liberté du travail* or more generally as *liberté du commerce et de l’industrie*.⁵²¹ Under this liberty, everyone is able to freely engage in any “*l’exercice de l’activité professionnelle*” that he sees fit.⁵²² Accordingly, a non-competition clause, as

⁵²¹ V. Cass. soc. 19 novembre 1996, n° 94-19404; Cass. civ. 1re, 11 mai 1999, n° 97-14.493; Cass. com. 4 juin 2002, n° 00-15.790, D. 2003. 902, obs. Y. AUGUET; Cass. com., 3 octobre 2006, n° 04-16.679, D. 2008. 248, obs. M. GOMY.

⁵²² V. Cass. com. 9 juill. 2002, n° 00-18311; Cass. soc., 10 juill. 2002, JCP G 2002.10162, note F. PETIT; JCP E 2002, 1511, note D. CORRIGNAN-CARSIN.

supposed to impair this liberty, should be annulled unless there is a compelling legitimate interests to protect by the clause.⁵²³

2. “*Liberté du commerce et de l’industrie*”: a constitutional liberty

693. “*Liberté du commerce et de l’industrie*” imposes special restrictions to non-competition clauses because it is considered to be fundamental. But what is the basis for it to be so qualified?

For a liberty to be qualified as fundamental, usually it means that a liberty is laid down in the constitution or in a document that has similar statute. However, French constitution does not explicitly provide this liberty, instead, its origin is found in a very ancient statute called *décret d’Allarde (la loi des 2-17 mars 1791)*, whose article 7 provides that: “*il sera libre à toute personne de faire tel négoce ou d’exercer telle profession, art ou métier qu’elle trouvera bon.*” In 1982, the *conseil constitutionnel* identified this article with article 4 of *Déclaration des droits de l’homme et du citoyen* (which is included as part of the current French constitution and provides that “*la liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui*”) and thus affirmed its constitutionality.⁵²⁴

3. “*Liberté du commerce et de l’industrie*”: a liberty protecting sellers of shares

694. We have presented that the special restrictions to non-competition clauses in France is to protect a fundamental liberty called *liberté du commerce et de l’industrie*. But do sellers of shares enjoy this liberty (ii)? To answer this, we need to firstly present the contents of the liberty (i).

i. Contents of the “*Liberté du commerce et de l’industrie*”

695. *Liberté du commerce et de l’industrie* is described as a liberty “*de faire tel négoce...qu’elle trouvera bon*” or “*d’exercer telle profession, art ou métier qu’elle trouvera*

⁵²³ V. Cass. com. 6 octobre 2015, n° 13-27419, Contrats, conc. consom. 2015. 282, note M. MALAURIE-VIGNAL; CA Bourges, 30 juin 1995.

⁵²⁴ V. Décis. Cons. const. n° 81-132 DC du 16 janvier 1982; Décis. Cons. const. n° 2001-455 DC du 12 janv. 2002.

bon”. Accordingly, it can be divided into two kinds of liberties: and *liberté du concurrence* and *liberté d’entreprendre*.

696. -Liberté d’entreprendre. The direct corollary of *liberté du commerce et de l’industrie* is the “*libre accès des citoyens à toute activité professionnelle non interdite*”.⁵²⁵ This liberty conveys different connotations to entrepreneurs and workers. **For entrepreneurs, this liberty mainly signifies “la faculté de créer une entreprise”:** an entrepreneur has the liberty of establishing such an enterprise, in such a trade, by employing such employees, as he sees fit. It emphasizes on the liberty to establish an enterprise and benefits its profits for one’s own purpose. **For employees, the liberty is reflected in *liberté du travail*:** a worker has the liberty of being employed by any employers that he sees fit.⁵²⁶ The latter has another legal foundation aside from the *décret d’Allarde* which provides for the *liberté du commerce et l’industrie* in general: the *liberté du travail* is also mentioned in the the *préambule* of the French constitution of 1946 (which is interpreted to have the constitutional effects by the *Conseil constitutionnel* in 1971⁵²⁷): “*Chacun a le devoir de travailler et le droit d’obtenir un emploi.*” And in article 1121-1 of *code du travail*: “*Nul ne peut apporter aux droits des personnes et aux libertés individuelles et collectives de restrictions qui ne seraient pas justifiées par la nature de la tâche à accomplir ni proportionnées au but recherché.*” Therefore, non-competition clauses, because of its very nature of restricting personal liberties, clearly risk of being invalid by violating the *liberté du travail*.⁵²⁸

697. -Liberté du concurrence. Some authors tend to identify the *liberté du commerce et de l’industrie* with the *liberté d’entreprendre*.⁵²⁹ However, it is only one aspect of the *liberté du commerce et de l’industrie*⁵³⁰: aside from the liberty of choosing one’s own trade, the *liberté du commerce et de l’industrie* also allows its holder to freely participate in the market competition of that trade (“*Il sera libre à toute personne de faire tel négoce...qu’il*

⁵²⁵ V. M. GUIBAL, *Commerce et industrie*, Rép. dr. com., 2015, n° 57; Cass. soc. 10 juill. 2002, n° 99-43.334, n° 00-45.135 et n° 00-45.387

⁵²⁶ V.J. PÉLISSIER, *La liberté du travail*, Rev. dr. sociétés, 1990. 19; N. CATALA, *Liberté d’entreprendre et droit à un emploi: entrepreneurs et salariés face à nos principes fondamentaux*, in Mém. B. OPPETIT, Litec 2009, p. 95; J.-P. GRIDEL, *Les droits fondamentaux du contractant au quotidien sont l’objet d’une attention prétorienne renouvelée*, in *Liber amicorum Ch. LARROUMET*, Economica 2010, p. 195.

⁵²⁷ V. Cons. const. 16 juillet 1971, n° 71-44 DC.

⁵²⁸ V. Cass.soc. 10 juillet. 2002, n° 99-43334, n° 00-45.135 et n° 00-45387.

⁵²⁹ V. M. GUIBAL, op. cit., n° 57.

⁵³⁰ V. J.-B. BLAISE, R. DESGORCES, *Droit des affaires, commerçants, concurrence distribution*, LGDJ, 8e éd. 2015, n° 573.

trouve bon”)⁵³¹. This liberty, as another aspect of *liberté du commerce et de l'industrie*, is called the *liberté du concurrence*.

It should be noted that the *liberté du concurrence* should not be confused with another foundation for the legal restriction on non-competition clauses: the “*conditions objectives du marché*”⁵³² as we will expound immediately: the *liberté du concurrence* focuses on the protection of individual liberty of the debtor whereas the *conditions objective du marché* focuses on the external impact of non-competition clauses on the market.

ii. Holders of the “*liberté du commerce et de l'industrie*”

698. The contents of the liberty indicate that it aims at protecting both the one who employs and the one who is employed. To some extent, the origin of the liberty is rather to protect more entrepreneurs than employees: both entrepreneurs and workers enjoy the liberty “*d'exercer telle profession, art ou métier qu'elle trouvera bon*”, but the liberty “*de faire tel négoce... qu'elle trouvera bon*”, at least in the time when *décret d'Allarde* was passed, is only reserved to entrepreneurs: in order to do the business, they inevitably have to compete with other entrepreneurs, in which negotiation is an indispensable part; whereas employees do not own the business and thus do not enjoy the profits out of the market competition, and do not need the liberty to negotiate and compete. In fact, the name and history of this decree shows that it is originally a law for a more liberal economy and against “corporatism”.⁵³³ It is in this sense a weapon of the emerging bourgeois against the *Ancien Régime*.

A seller of shares falls perfectly into the category of holder of such liberty for being an entrepreneur – the prototype of the holder of the liberty when it was passed. Non-competition clauses, for restricting both his “*liberté d'entreprendre*” and “*liberté du concurrence*”, infringe the fundamental liberty of “*liberté du commerce et de l'industrie*” and should thus be subject to special restrictions.⁵³⁴

⁵³¹ V. J.-B. RACINE, *L'ordre concurrentiel et les droits de l'homme*, in Mél. A. PIROVANO, Editions Frison-Roche, 2003, p. 419; L. IDOT, *La liberté de la concurrence en France*, LPA 2000, n° 59, p. 8; Y. SERRA, *Le droit français de la concurrence*, 1993, Dalloz, p. 11.

⁵³² V. M. GUIBAL, op. cit., n° 63; J.-B. BLAISE et R. DESGORCES, op. cit., n° 569; A. DECOCQ et G. DECOCQ, *Droit de la concurrence*, Droit interne et droit de l'Union européenne, LGDJ, 6e éd. 2014, n° 1.

⁵³³ V. P. MINARD, *Le métier sans institution : les lois d'Allarde-Le Chapelier et leur impact au début du xix^e siècle*, in dir. S. Kaplan et P. Minard, *La France, malade du corporatisme ? xviii^e-xx^e siècles*, Belin, 2004, p.560.

⁵³⁴ Cass. com. 19 oct. 1981, D. 1982, IR 202, obs. Y. SERRA; Cass. com. 4 juill. 2006, no 03-19.900, D. 2006, pan. 2924, obs. M. GOMY.

B. Déséquilibre significatif

699. Generally speaking, “*défaut d'équivalence des prestations n'est pas une cause de nullité du contrat*” (new article 1168 of *code civil*). But in 2008, *code de commerce* adopted a new term “*déséquilibre significatif*” where its article L. 442-6-I-2° and L. 442-6-III, read together, provide that “*président de l'Autorité de la concurrence*” may “*demander à la juridiction de faire constater la nullité des clauses*” “*de soumettre ou de tenter de soumettre un partenaire commercial à des obligations créant un déséquilibre significatif dans les droits et obligations des parties*”.⁵³⁵ This new basis may be used to challenge validity of non-competition clauses if judges find that the clause imposes a “*déséquilibre significatif*” on a “*partenaire commercial*” of the creditor of the clause.

However, we do not believe this new basis is of much interest for the purpose of this thesis because of two reasons: for one thing, the non-competition clauses as discussed in this thesis impose restrictions on only sellers of shares, who is doubtful to be regarded as a “*partenaire commercial*”. For another, it is used to determine whether the limitations imposed by a clause of non-competition clause is of “*déséquilibre significatif*” to the purpose of the principal transactions the clause is attached to (in our case the sale of shares). This function certainly overlaps with the “test of proportionality” in *liberté du commerce et de l'industrie* and *liberté*, and judges thus usually identify it with *liberté du commerce et de l'industrie* and *liberté*, making it less an autonomous legal basis than just a criterion of *liberté du commerce et de l'industrie* and *liberté*.⁵³⁶

II. Lack of restrictions in China

700. We dare to say that non-competition clauses in China are subject to no special restriction at all, as far as the protection of the debtors is concerned. There are two foundations that seem to be able to impose special restrictions --- the special restrictions laid down in Chinese Labour Contract Law (A) and the rules related to obvious unfairness (B). Yet, a close examine will show that neither of them actually achieves the end.

⁵³⁵ V. CA Paris, 7 juin 2013, n° 11/08674; CEPC, Avis n° 14-02, 13 février 2014; CEPC, Avis n° 16-9, 12 mai 2016; M. CHAGNY, *L'essor jurisprudentiel de la règle sur le déséquilibre significatif cinq ans après?*, RTD com. 2013, p. 500.

⁵³⁶ V. CA Paris, 12 septembre 2013, n° 11/22934; CA Paris, 12 décembre 2013, n° 11/18274; M. CHAGNY, *L'essor jurisprudentiel de la règle sur le déséquilibre significatif cinq ans après?*, RTD com. 2013, p. 500.

A. Non-application of the special restrictions in employment law

701. The only legally prescribed restrictions to non-competition clauses are laid down in Chinese Labour Contract Law (1). Because such restrictions are for the sole purpose of protecting employed workers (3), Chinese judges generally refuse to apply it to non-competition clauses in sales of shares, where the debtor of the clause involved is not technically an employed worker (2).

1. Presentation of the legal restrictions in Chinese Labour Contract Law

702. Chinese Labour Contract Law is the only Chinese statute law that deals with the validity of non-competition clauses. Article 23 of this law provides that a worker who has a confidentiality obligation may be subject to a non-competition clause in exchange for a monthly financial compensation and article 24 of the same law provides the restrictions in the scope of employees and the duration (not exceeding 2 years).

2. Applicability of the legal restrictions in Chinese Labour Contract Law

703. Our thesis is about sales of shares. So, do the restrictions set in the Labour Contract Law applicable to sales of shares? The answer by a literal interpretation of the text is negative: the purpose of Labour Contract law is to protect “*the legitimate rights and interests of employees*” (article 1) and except for the situations where a seller of shares is also employed by the sold company, it is obviously that he is not protected by any rules or principles set in the said statute.

Also, the applicability of the special restrictions is also denied by Chinese judges. Several judgments have pointed out that merely being a shareholder does not bear any non-competition obligation,⁵³⁷ with some even holding explicitly that there is no employment relation between a shareholder and the company whose shares are owned by him, thus excluding the applicability of employment law and its special restrictions to non-competition

⁵³⁷ See (2015) Haidian civ. (com.) First instance n° 18810; (2016) Suzhou civ. Final instance n°4664; (2013) Jiaxing com. Final instance n° 157 ((2015)海民(商)初字第 18810 号; (2016)苏民终 4664 号; (2013)浙嘉商终字第 157 号).

clauses.⁵³⁸ In fact, we have found a case where the judge did apply the special restrictions to a non-competition clause in a sale of shares, but this application, as the judge himself pointed out, is only an application by legal fiction: “*the method of ‘balancing the interests’ is mainly applied in situations where the legal provisions are ambiguous or lacking; Its essence is that the court chooses among different interests involved in the dispute; it is the implementation of discretion of judges... Therefore, when there is no specific legal provision and the court has to decide the case, the judge, in overseeing the validity of a conventional non-competition clause, is supposed to take into consideration of all the interests, in order to maximize the total benefits.*”⁵³⁹ The foundation of this *balancing the interests* method is in fact the “obvious unfairness”, which will be discussed *infra*, and thus the judge did not base the special restrictions on the protection of a fundamental liberty.

3. Foundation of the legal restrictions in Chinese Labour Contract Law

704. So, why are the special restrictions inapplicable to sales of shares? To answer this, we shall refer to the legal foundation of the legal restrictions in Chinese Labour Contract Law.

The special restrictions to non-competition clauses attached to an employment contract, as Chinese scholars believe, is an application of the right of work laid down in Chinese Constitution.⁵⁴⁰ Article 42 of Chinese Constitution provides that: “*citizens of the People’s Republic of China have the right as well as the duty to work*”, which is an article of socialist nature: it is for the very purpose of arming employees against their employers and it is obviously that seller of shares, as shareholders of the company, do not fall into the category of employee, belonging rather to the group against which the law has been made—the employers. As an author contended: “*the relation of labour and relation of proxy (the relation between controlling shareholders/senior management of a company and the company) are different from each other in that (the parties to) the former is inherently on unequal foot whereas the latter is of civil characteristic whereby no one is attached to the other. Just*

⁵³⁸ See. (2013) Guangzhou (2013) Guangzhou 2nd civ. Final instance n° 126 ((2013) 穗中法民二终字第 126 号).

⁵³⁹ G. WANG et J. SHI, On the effectiveness of non-competition clauses attached to sales of shares, *People’s judiciary*, 22-2015, p. 59. (王国侠, 施俊杰: “股权转让合同所附竞业禁止条款的效力”, 《人民司法》, 2015 年第 22 期, 第 59 页).

⁵⁴⁰ Y.LI, *Several issues related to non-competition*, Chinese journal of law, 2002-5, p. 87 (李永明: “竞业禁止的若干问题”, 《法学研究》, 2002 年第 5 期, 第 87 页).

because of the inequality and attachments in labour contract, weaker parties (the employees) need to be specially protected.”⁵⁴¹

B. Rare application of “obvious unfairness”

705. Before the taking effect of “the General Provisions of Civil Affairs” in 2016, unlike French law, Chinese law used to allow judges to substantially appreciate the fairness of a contract and annul it upon the demand of the aggrieved party if he finds an “obvious unfairness”. However, to non-competition clauses in sales of shares, Chinese judges seldom applied this basis and also there is few cases where the seller of shares and debtor of a non-competition clause has demand to annul the clause thereon.

The reason for the reluctance of Chinese judges to find an “obvious unfairness” in non-competition clauses in sales of shares, was partly attributed to the general tendency of reluctance of Chinese judges to apply it in commercial cases. But it is also justified by the fact that such clauses are, overall speaking, fair. As a judge has pointed out: *“the defendant is of a position high enough in the company to be equipped with many secrets of the company, which requires a non-competition obligation to be assumed by him, so as to protect the company and the plaintiff. Furthermore, the obviously over-evaluated price clearly includes the compensation for his forbearance. Thus, it is without any ground to say that such a non-competition clause is unfair, letting alone obvious unfair.”*⁵⁴²

In fact, we have found one case where an “obvious unfairness” have been found where the judge applied by analogy the special restrictions in employment law to sales of shares on the basis of “*balancing the interests*”, as we have mentioned *supra*.⁵⁴³ However, we believe this judgment means little to us because for one thing, it is only an exception among many cases that refused do so. And for another, even if there is a tiny risk that Chinese courts may annul the clause on the basis of fairness, it can be easily eliminated by stipulating a “fair”

⁵⁴¹ L. WANG, A comparison of non-competition obligations from the perspective between labour law and company law, *Tribunal of political science and law*, 1-2013, p. 96 (王林清, “公司法与劳动法语境下竞业禁止之比较”, 《政法论坛》, 2013年第1期, 第96页).

⁵⁴² See (2013) Guangzhou 2nd civ. Final instance n° 126 ((2013) 穗中法民二终字第126号).

⁵⁴³ G. WANG et J. SHI, On the effectiveness of non-competition clauses attached to sales of shares, *People’s judiciary*, 22-2015, p. 59. (王国侠, 施俊杰: “股权转让合同所附竞业禁止条款的效力”, 《人民司法》, 2015年第22期, 第59页)

monetary compensation because the test of fairness focuses on the substantial equivalence between the *quid pro quo* of each party.

After the recent taking effect of the new General Provisions of Civil Affairs, the foundation of “obvious unfairness” as a remedy focusing on objective balance of interests of the parties has been replaced by one focusing on the subjective fairness, which in our opinion would eliminate any possibility to even apply this foundation to annul a non-competition clause.

III. Comparison

706. By exploring the reasons for the different requirements in the two countries (A), we can expect that the two countries will not change much in the future, and the requirements may remain different (B).

A. The reasons for the different requirements

707. The main reasons for the different requirements in the two countries is the different qualification of the “*liberté du commerce et de l’industrie*” in the two countries (1). Aside from that, the Chinese interpretation of “*Désequilibre significatif*” is also responsible for its lack of restrictions in non-competition clauses (2).

1. Different qualification of “*liberté du commerce et de l’industrie*”

708. French judges restrict the validity of non-competition clauses on the basis of “*liberté du commerce et de l’industrie*”. Chinese constitution recognizes a similar liberty (liberty of work), and such liberty also serves as the foundation of special restrictions to such clauses in employment law. However, the Chinese restrictions do not apply to non-competition clauses in sales of shares because sellers of shares, being shareholders of a company instead of its employees, is excluded from the protection of such special restrictions. So why does the liberty protect shareholders in France whereas it does not in China? This is because of the different nature (i) and historic origins (ii) of the liberty in the two countries.

i. Different nature of the liberty

709. In France, the liberty has a larger scope than in China: the French liberty protects all liberties associated with making a living, whether by working for another or being others' boss. The French liberty also has more holders: The French liberty is held by every citizen alike, whereas the Chinese liberty is held by only workers employed by someone else. To some extent, the Chinese liberty is only part of the French liberty: it is like if in France, there has never been *décret d'Allarde* while only the *liberté du travail* in the *préambule* of 1946 Constitution is existent. The *liberté du travail*, being a liberty of working class who seek the opportunity to be employed, naturally excludes shareholders from the scope of its protection.

ii. Different historic origins of the liberty

710. We believe that the aforementioned difference in nature is resulted from a difference in the historical origins of the respective liberties or right in the laws of the two countries. The historic task of *la liberté du commerce et de l'industrie* under French law is to liberate individuals from the intervention of a public power or a quasi-public power with respect to his personal activities. In a Marxist narrative, it allows all bourgeois to freely “exploit” the proletariats and all proletariats to be freely “exploited” by bourgeois, allying the two classes (*tiers état du ancien régime*) against a common enemy -- feudal guilds. As Karl Marx and Friedrich Engels put it: “*the bourgeoisie, wherever it has got the upper hand, has put an end to all feudal, patriarchal, idyllic relations. It has pitilessly torn asunder the motley feudal ties that bound man to his ‘natural superiors’, and has left remaining no other nexus between man and man than naked self-interest, than callous ‘cash payment’*”.⁵⁴⁴

By contrast, the right of work under Chinese Constitution is a creation by the intervention of the state with a pure aim at protecting only the employees against the “exploitation” of the employers. Its logic is not that *tier état* needs freedom from the intervention of public powers, but rather that a part of *tier état* (proletariats) are weaker than the others (bourgeois), thus the public power should intervene to grant more rights and protections to the weaker ones. Shareholders of a company, being someone “exploiting” and

⁵⁴⁴ K. MARX et F ENGELS, Manifesto of the Communist Party.

supposed to be sophisticated and strong enough to protect his own interests, are naturally excluded from the scope of the holders of the liberty.

2. Different usage of “*déséquilibre significatif*”

711. Chinese law used to have a general legal basis for annulling a contract – “obvious unfairness”, which was similar to “*déséquilibre significatif*” in France. If Chinese judges interpreted “obvious unfairness” as designating an obvious unbalance between the purpose of the clause and the limitations a non-competition clause imposes on the debtor just as their French counterparts do in interpreting “*déséquilibre significatif*”, it would be still possible for Chinese judges to impose special restrictions to non-competition clauses. However, Chinese judges interpret “obvious unfairness” as the substantial unbalance between the interests of the parties, meaning that a “*déséquilibre significatif*” between the purpose of a clause and the limitations it imposes does not necessarily equal to unfairness --- it can be well justified by a generous compensation. Thus, the different usage of the term “*déséquilibre significatif*” is also attributable for the different requirements of validity related to non-competition clauses in the two countries.

B. The projections of the possible evolutions

712. Now we know that the two countries differ in the requirements of validity of non-competition clauses. But will they somehow converge in the future? Or in other words, will Chinese judges start to impose special restrictions as their French counterparts do (1); or *vice versa* (2)? We believe the answer is negative and in the foreseeable future, the two countries will continue to diverge in their requirements of validity of non-competition clauses.

1. Chinese law will not impose special restrictions

713. If Chinese judges start to impose special restrictions to non-competition clauses, it must be out of two circumstances: either the judges consider shareholders as holders of liberty to work (i); or that they believe that “unnecessary limitations imposed by the clause” *per se* constitute an obvious unfairness (ii), neither of which we believe is possible.

i. It is impossible that Chinese judges consider shareholders as holders of liberty to work.

714. We believe by no means will shareholders be considered as holders of liberty to work. Aside from the reason that to so interpret will be too far-fetched, the main ground for this projection is that there is no realistic benefit in doing so.

It should be noted that saying Chinese shareholders are not protected by *liberté du commerce et de l'industrie*, does not signify that they are vulnerable to the risk of being deprived of the liberty in doing business: the principle of “everything which is not forbidden is allowed” is a well-recognized principle for civil affairs in China,⁵⁴⁵ which means citizens are free to engage in any kinds of activities – including doing business and being entrepreneurs. Rather, to some extent actually it insinuates a more liberal choice for shareholders: we can see that to identify liberty to work with a fundamental liberty actually deprives the holders of a liberty of the choice to sell the liberty of work for other benefits --- say monetary compensations. And the reason for such a deprivation is because the legislators believe that workers are of a weaker position and lack the ability to get the outcome they want by participating in a free negotiation with the employers; besides, the right to work is essential for their survival. On the contrary, shareholders are generally sophisticated merchants and well-to-do citizens. They do have the ability to negotiate and accept such rights and duties as they see fit; and their survival do not rely on their possibility to make a living on their own labour. Therefore, there is no use to grant shareholders the liberty to work.

ii. It is impossible to consider unnecessary limitations *per se* as unfair.

715. In order for “obvious unfairness” to serve as a basis to annul clauses of non-competition clauses with unnecessary limitations, Chinese judges should use it to designate the non-proportionality between the purpose and limitations, as their French counterparts do in interpreting *déséquilibre significatif*. However, we believe this usage is very unlikely if not entirely impossible, because it is in conflict with the traditional Chinese interpretation of this term, without any compelling reason.

⁵⁴⁵ See F.LIU, *The Chinese meaning of “everything which is not forbidden is allowed”*, Shandong social science, 8-2014 (刘风景, “法无禁止即自由”的中国意义, 《山东社会科学》2014年第8期).

2. French law will continue to impose special restrictions

716. If French judges consider *liberté du commerce et de l'industrie* as only protecting employees, and use *déséquilibre significatif* to designate the overall unbalance instead of the non-proportionality between purpose and limitations imposed, as their Chinese counterparts do, the special restrictions to non-competition clauses in sales of shares will disappear in France. But there is obviously no compelling reason that French judges will do so, and we expect that the legal restrictions will continue to exist in France.

Conclusion of Subsection I

717. In this subsection, we have demonstrated that the different legal restrictions in the two countries are mainly due to the fact that they have different legal provisions related to personal liberties, which differs in whether to include employers in the scope of holders. We believe these difference is of historic and social nature and will not easily disappear. Therefore, the difference in the legal restrictions will survive for a long time.

Subsection II. Restrictions to the clause for protecting the market

718. A comparison (III) of the legal doctrines and positive laws in France (I) and China (II) will partly reveal the causes for the different requirements to non-competition clauses, from the perspective of the protection of the market.

I. Restrictions in France

719. From the perspective of the protection of the market, non-competition clauses seem to be always invalid (A). However, the exceptions to the general provisions against anti-competition stipulations come to save many such clauses (B). The sophisticated discussion of validity of non-competition clauses actually focuses on the application of the said exceptions, which is of little interests for this comparative comparison and will not be discussed in detail (C).

A. General prohibition of non-competition clauses

720. To protect the efficiency and effectiveness of the market (on top of protecting the personal interests of the debtors)⁵⁴⁶, French laws (national laws and European laws) in general prohibit “*all agreements between undertakings... which have as their object or effect the prevention, restriction or distortion of competition*” (article 101 of TFEU and article 420-1 of French *code de commerce*), with a sanction of nullity of the prohibited agreements (article 420-3 of French *code de commerce* and paragraph 2, article 101 of TFEU). Non-competition clauses, with their very purpose of restricting competing activities of their debtors, fall perfectly into the category of practices prohibited by the anti-anti-competition provisions and it seems that they can by no means be valid at all.

B. Exceptions to the general prohibitions

⁵⁴⁶ V. J.-B. BLAISE et R. DESGORCES, *op.cit.*, n° 573 ; A. DECOCQ et G. DECOCQ, *op. cit.*, n° 1 ; L. Arcelin, *Droit de la concurrence, Les pratiques anticoncurrentielles en droit interne et communautaire*, PUR, 2e éd 2014, n° 25 ; M.-A. FRISON-ROCHE et M.-S. PAYET, *Droit de la concurrence*, 1re éd., 2006, Dalloz, n° 540 ; M. MALAURIE-VIGNAL, *Logique économique et logique juridique*, Contrats, conc. consom. 2005. 20; L. DONNEDIEU DE VABRE-TRANIÉ ET C. MONTET, *Un droit de la concurrence – pour quoi faire?*, Contrats, conc. consom. 2006. 22.

721. However, in France, there are many valid non-competition clauses that have escaped the fate of invalidity. The rescue of their otherwise fate of invalidity should be attributable to the legal exceptions to the aforementioned provisions against anti-competition clauses: paragraph 3 of article 101 of TFEU and article 420-3 of *code de commerce*, both provide that a practice restricting competition, under the conditions that it does not eliminate competition at all and it is indispensable for some justified purposes like promoting economy, is not subject to the provisions against anti-competition clauses. A non-competition clause can thus be valid if its drafter has drafted it in such a way as to persuade the judge that such clause meets all the conditions.

C. Discussions of the exceptions

722. Therefore, in France, from the perspective of protecting the market, the discussion of the conditions of a valid non-competition clauses, equals to the discussion of the conditions to applying “the exceptions. For example, with the promulgation of *loi macron*⁵⁴⁷, the law actually invented a new safe harbour for post-term non-competition clauses attached to contracts “*pour but commun l'exploitation d'un magasin de commerce de detail*” (article L.341-1 of *code de commerce*), under certain conditions (article L.342-2 of *code de commerce*) (actually it is a duplication of EU regulation of 330/2010 which saves “vertical agreements and concerted practices” that meet certain conditions from the general prohibition of anti-competition practices). And French authors and jurists would accordingly discuss the justification of this safe harbour and the conditions of applying it.⁵⁴⁸

However, this discussion of the conditions of application of exceptions to a general prohibition of non-competition clauses is of little interest to this thesis because as we will explore latter, Chinese law does not even have the general probation at all. Therefore, the focus of comparison, should be the reason why France has a “prohibition of anti-competition practices generally applicable to non-competition clauses” whereas China does not, instead of being the “exceptions to such prohibition”. This is why we do not devote too much efforts in presenting in detail the conditions of validity of the clauses, the usual interesting topics in France.

⁵⁴⁷ La loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques.

⁵⁴⁸ V. M. MARCINKOWSKI, *La clause de non-concurrence post-contractuelle dans le contrat de franchise*, AJCA, 2016. 2; L. VOGEL, *Loi Macron : un nouveau régime des contrats de distribution inutile, coûteux et inadapté*, AJCA, 2015.12.

II. Restrictions in China

723. Actually, Chinese law does have provisions similar to the general prohibition of anti-competition practices in France (A) and some authors do believe that non-competition clauses may exert a certain negative impact on the market and their validity should be restricted (B). However, in positive law, the general prohibition does not apply to non-competition clauses (C).

A. General prohibition of “monopoly agreement”

724. Similar to the general prohibitions of anti-competition practices under French law, Chinese Anti-Monopoly Law, in its article 13, prohibits what is called “monopoly agreement”: *“Competing undertakings are prohibited from concluding the following monopoly agreements: ... (3) on splitting the sales market or the purchasing market for raw and semi-finished materials... For the purposes of this Law, monopoly agreements include agreements, decisions and other concerted conducts designed to eliminate or restrict competition.”* *A priori*, it seems that non-competition clauses are exactly for the purpose of “splitting sales market” and “designed to eliminate or restrict competition”. Thus, they should fall exactly into the category of monopoly agreements prohibited. However, the reality is to the contrary: we have not found any one judicial judgement that has find invalid a non-competition clause based upon this prohibition of “monopoly agreement”.

B. Scholarly concern of non-competition clauses

725. In discussing the validity of non-competition clauses, some authors pointed out that such clauses, aside from impacting individual liberty of employees, also concern “public interests” because to some extent they hinder “the evolutions and innovations of technologies” and impair “the order of the market”⁵⁴⁹, which has certain “external effects on

⁵⁴⁹ See Y. ZHAI, A study on legal issues related to non-competition obligations, Press of CUPL, 2013, p.68 (翟业虎: 《竞业禁止法律问题研究》, 中国政法大学出版社 2013 年版, 第 68 页).

the society”.⁵⁵⁰ And the prohibition on “monopoly agreements” in Chinese Anti-Monopoly law, should serve as the foundation to find non-competition clauses invalid.⁵⁵¹

C. Rare application of anti-trust law

726. Although Chinese law has a general prohibition of anti-competition practices and some Chinese scholars have realized that non-competition clauses should be supervised by judges for the benefits of the society; Chinese judges seldom apply this anti-anti-competition provision to non-competition clauses. Except in one case where the judge, in applying a “balancing of interests” method, mentioned that the interests of the society other than the parties of the clause should also be considered.⁵⁵² However, this is only an isolated case and even in this case, the judge did not cite the anti-anti-competition provision in Chinese Anti-Monopoly Law. Thus, we believe it is fairly safe to say, at least in most cases, Chinese judges do not impose special restrictions to non-competition clauses on the basis of the general prohibition of anti-competition practices.

III. Comparison

727. By exploring the reasons for the different requirements in the two countries (A), we believe in an eventual convergence of the laws in the two countries where non-competition clauses in China will be subject to special restrictions. But in the foreseeable future, this may not happen immediately (B).

A. Reasons for the differences

728. By the presentation of the situations in the two countries, we can see that both countries have the similar legal provisions aiming at protecting the market, which can serve as the foundations for the special restrictions to non-competition clauses. The real difference is that in China, such provision is not applied to non-competition clauses whereas it is applied in

⁵⁵⁰ See Y. LI, *Several issues on non-competition obligations*, Chinese Journal of Law, 5-2002 (李永明:“竞业禁止的若干问题”, 《法学研究》2002年第5期) .

⁵⁵¹ See Y.YAO, *An analysis from the perspective of anti-monopoly law of non-competition clauses in franchising*, Legal and economy, 5-2010, p. 29. (姚燕鸣, “商业特许经营竞业禁止的反垄断法分析”, 《法制与经济》, 2010年第5期)。

⁵⁵² See G. WANG et J. SHI, *On the effectiveness of non-competition clauses attached to sales of shares*, People’s judiciary, 22-2015. (王国侠, 施俊杰: “股权转让合同所附竞业禁止条款的效力”, 《人民司法》, 2015年第22期)。

France. The application of such provision is not at all surprising because the very purpose of it is to prohibit practices restricting competition, which naturally include those indicating in their names (“non-competition clauses”) that they are for the very purpose to restrict competitions. What needs to be explored is thus the reason why Chinese judges do not apply the prohibition to non-competition clauses. Generally speaking, the main reason is that most Chinese judges fail to even realize the existence of the problem that non-competition clauses may contradict with anti-trust law (1); on top of that, another reason is that some judges believe that non-competition clauses in general do not restrict competition (2).

1. Failure of the Chinese judges to realize the existence of the problem

729. We have consulted by telephone and remote video several judges of civil and commercial law in Chengdu, Sichuan, asking them the same questions: “In deciding the validity of non-competition clauses in sales of shares, we should apply what laws?” Most judges responded that no particular law other than the general provisions of Contract Law should apply. Some of them, without our asking, explicitly reminded us that they knew our concerns: “it must be the applicability of the special restrictions in employment law”, which indicates that they believe the only issue here is the protection of the debtors of the clauses. None of them mentioned that anti-trust law (Chinese Anti-Monopoly Law) may also possibly apply here. We then asked the judges: “whether you will apply the legal prohibition of monopoly agreements laid down in Anti-Monopoly Law”. Half of them told us they have never thought about that non-competition clauses may be regarded as a sort of “monopoly agreements” (corresponding to *entente* in French), and they need more time to contemplate this question.

2. Refusal of the Chinese judges to identify non-competition clauses as anti-competition practices

730. The other half of the judges, after musing over the question, mostly deny the identification of the non-competition clauses with the monopoly agreements prohibited by Chinese Anti-Monopoly Law. Although the reasons they have given varied, most of them mentioned that they do not believe “non-competition clauses” we were talking about here, although bearing the name of “non-competition”, actually would impair competition because they do not reduce the number of “competing undertakings” in the market. As one judge has

pointed out: “as far as the situations you are talking about (sales of shares), it is true that by a non-competition clause, we would lose a competitor in the market, yet the entry of the buyer of the shares into the same market, who beforehand did not participate in the competition, just offsets this loss of competitor. Thus, non-competition clauses, at least as far as those for the purpose of facilitating sales of shares, are different from those monopoly agreements that the law really aims at: mainly those between existing competing enterprises.” Basically, he means that debtors and creditors of non-competition clauses are not the “competing undertakings” in the sense of Chinese Anti-Monopoly Law.

B. Projections of the developments

731. We believe eventually the two countries will converge (1). But it may not happen immediately (2).

1. A possible convergence

732. We believe Chinese judges is sure to in the future apply the general prohibition of *ententes* in non-competition clauses because the prohibition is designed for such clauses. The reason the Chinese judge put forward that “buyers simply take place of sellers, thus not reducing the competitors in the market”, does not hold, because it really simplified the situations: 1. Without the clause, there would be two competitors in the market. 2. It is very possible that before the sales, both the sellers and the buyers have already participated in the trade, thus the clauses do reduce the number of competitors. And also, now scholars have realized the necessity of applying the anti-anti-competition provisions to non-competition clauses, whose opinions, we believe, will somehow influence the judiciary decisions in the futures.

After Chinese judges apply the prohibition of anti-competition practices to non-competition clauses, we believe they will learn from their French counterparts to apply also the exceptions to the prohibition, and in the long run a system of conditions for validity of non-competition clauses will be established.

2. A delayed convergence

733. However, we do not believe that the convergence will take place in the foreseeable future. This is for one thing because of the common reluctance of Chinese judges to intervene in purely private affairs, especially the commercial ones (Chinese judges hold high the principle of contractual liberty). But the most important reason, as we believe, is that the externality of non-competition clauses is not yet apparent enough as to draw attentions of the judges. We have consulted the Chinese Anti-Monopoly Bureau by telephone, asking them: “1. Do you believe that non-competition clauses attached to sales of shares should be qualified as monopoly agreements prohibited by Anti-Monopoly Law? 2. And if the answer is affirmative, why don’t the judges annul them on the basis of the prohibition and why don’t you intervene *ex officio*?” They replied that they believe such clauses should be considered as the ones prohibited by the law. However, they also believe that such clauses do not bring so much harm to the society to such an extent that the state should take actions. They added that there are already enough “real monopoly agreements” to which they need to respond and leaving such tiny and minor monopoly agreements untouched is entirely harmless. As for why judges do not bother to annul the clause on the basis of the prohibition, they believe it is because that ordinary Chinese judges do not have the required expertise to decide a case involving anti-trust law: without proper instructions from the supreme people’s court, no judge is willing to bear the risk of interpreting the law in a wrong way and thus get his bonus reduced.

As the harm of the non-competition clauses to the market in China would not become quite observable fairly soon, we believe for the time being we can expect that the requirements for validity of non-competition clauses, from the perspective of protecting the market, will remain divergent.

Conclusion of Subsection II

734. From the perspective of protecting the market, there is a reason to impose restrictions on non-competition clauses. The lack of restrictions thereon in China is thus *de lege ferenda* unreasonable and eventually China is sure to have similar restrictions as France does. However, as not all non-competition clauses are to impair competition in the market, the necessity to protect it is insufficient to establish a general necessity of restrictions on non-competition clauses.

Conclusion of Section II

735. In this section, we have compared the requirements for valid non-competition clauses in the two countries. We can see that due to the different legal history and different stage of development, the two countries differ completely in the requirements for non-competition clauses. To some extent, the conditions of non-competition clauses are worth discussion only in France because in China they are none other than any ordinary conventional clauses, and accordingly practitioners in China is subject to less “fetters” than their French counterparts. Generally speaking, we believe the absence of the restriction in China is more reasonable than its restriction in France.

Conclusion of Chapter II

736. A comparison of relevant Chinese provisions (or the absence thereof) shows that the legal restrictions in French law are not omnipresent in the world and might not be reasonable *de lege ferenda*.

Conclusion of Title I

737. The comparison of the relevant legal provisions shows that legal interventions in purchase of shares is *de lege ferenda* unnecessary. In particular, legal protections can be replaced by conventional ones and legal restrictions on the contractual liberty should be removed.

Title II Conventional arrangements

738. The two main problems confronted by the buyers of shares, i.e. the overpricing (Chapter I) and the competition by the sellers (Chapter II) are more suitable to be solved by conventional techniques.

Chapter I. Anti-overpricing techniques

739. If the special requirements of price in *contrat de vente* under French law (requirements of determinability, seriousness and being a monetary numerals) do not exist, a clause of price would be no more than an ordinary clause as far as the validity of sales of shares is concerned and seem not to need our special discussion. However, for the purpose of protecting the vulnerable buyer, who are concerned that the price may be over-evaluated, the topic of price is still an important one: only our focus will be now on the concrete contents of the arrangements to achieve a price properly reflecting the value of shares, instead of on the legal restrictions that such arrangements should abide by in order to be valid.

It should be noted that the term we used here, such as anti-overpricing techniques, price-adjusting techniques or other expressions with similar meanings, encompass all conventional arrangements whose purposes are to eventually indemnify buyers of shares. They are not limited to the *clauses de réduction de prix* as opposed to *garantie de passif stricto sensu*.

For our comparative study, we believe two aspects of the contents of the conventional arrangements are of enough interests to be present in this section: the objects based upon which the clauses fix or adjust the price (**Section I**) and the specific conditions and effects for enforcing such clauses (**Section II**).

Section I. Objects of anti-overpricing techniques

740. A comparison (III) would show that French practitioners (I) and their Chinese counterparts (II) have similar types of clauses of price-adjusting arrangements. Yet there are also differences and room for improvements for French practitioners.

I. Objects of anti-overpricing techniques in France

741. French authors generally agree that a company can be either seen as a collection of assets or as a resource of cash flows.⁵⁵³ The appropriate price of shares, accordingly, which should correspond to the value of the shares sold, should consist either of the aggregated value of every elements in the patrimony of the company (the aggregated value of all assets minus all the liabilities); or the discounted value of future profits that the company may bring. Accordingly, price-adjusting arrangements should either have events diminishing the value of the patrimony of the target company as their objects, or have those affecting the performance of the company as their objects. However, we can see that in reality, French practitioners have a preference of patrimony-based arrangements (A) over performance-based arrangements (B).

A. Preferred use of patrimony-based objects

742. When it comes to the term “price-adjusting”, the first thing that comes to the minds of French jurists are contractual techniques based upon the value of patrimony of the company instead of those based upon the value of performance of the company. To better illustrate this preference in France, we need to preliminarily mention a distinction that should have been discussed in the next section which concerns the enforcement of price-adjusting arrangements: the distinction between *garanties comptables* and *garanties extra-comptables*, as we believe the preference should be observed respectively in the contexts of *garantie comptables* (1) and in the contexts of *garanties extra-comptables* (2).

1. Preference of patrimony-based objects reflected in *garanties comptables*

743. - Definition of *garanties comptables*. *Garanties comptables* is a French

⁵⁵³ V. D. DANET, *Cessions de droits sociaux : information préalable ou garantie des vices?*, RTD com. 1992. 315

innovation which focus on the difference between figures reflected in the same account or accounts in financial statements on different dates.⁵⁵⁴ More specifically, by this kind of price-adjusting arrangements, sellers of shares assume the obligation of indemnifying either the buyers or the target companies against any differences in figures in financial accounts preliminarily chosen.

744. - Preference of patrimony-based arrangements as reflected in the preference of *garanties comptables* on balance sheets over *garanties comptables* on income statements. *Garanties comptables* are price-adjusting arrangements triggered by difference in figures in financial statements. Here, the financial statements subsume balance sheets (*bilan*) and income statements (*compte de résultat*). The two kinds of financial statements, respectively, correspond to the value of the patrimony of the target company and its financial performance. The French preference of patrimony-based arrangements over performance-based arrangements, is thus reflected in the fact that *garanties comptables* on accounts in balance sheets are overwhelmingly more frequently used than *garanties comptables* on accounts in income statements. The more frequent use of *garanties comptables* is demonstrated in two ways.

For one thing, it is demonstrated in the first thing that comes to mind of French practitioners when it comes to *garanties comptables*. We have observed a phenomenon: the expression “*garanties du passif*” is sometimes used as the collective designation for all *garanties comptables*.⁵⁵⁵ However, literally speaking, *garantie du passif* is just a kind of conventional arrangements focusing on the liabilities reflected in the balance sheet of the target company. It is drastically different from those focusing on accounts in the balance sheet, i.e. the *garantie de rentabilité*. Yet except when used in a very strict way, the *garantie de rentabilité* is often (wrongly) considered to be a kind of *garantie du passif*. It should be noted that when a hyponym is used as synonym for its hypernym, it means that the hyponym has the most important status among all the hyponyms of the hypernym. Thus, the fact that *garantie du passif*, a hypernym of *garanties comptables*, is used to collectively refer to all the *garanties comptables*, suggests that the patrimony-based *garanties comptables* are way more important than performance-based *garanties comptables*, and the former used way more

⁵⁵⁴ V. A. COURET, *L'articulation entre déclarations et clauses de garantie d'actif et de passif*, Dr. et Prat., 2008, n°175; V. P. MOUSSERON, *Les clauses de garantie d'actif et de passif*, Actes pratiques, septembre-octobre 2012, n° 38-45

⁵⁵⁵ V. A. COURET, *L'articulation entre déclarations et clauses de garantie d'actif et de passif*, Dr. et Prat., 2008, n°175.

frequently than the latter.

For another, it is demonstrated in the topics discussed in France when it comes to *garanties comptables*. We have found that under the topic of “*garanties comptables*”, the issues discussed in most cases concern those focusing on the balance sheet. In fact, the majority of issues in question are about whether a particular clause should be interpreted as affecting only the accounts of liberties, or the accounts of assets or both.⁵⁵⁶ We have failed to find many discussions about issues concerning the interpretation of a *garantie du rentabilité*, which reinforces the idea that the patrimony-based arrangements are preferred in France than the performance-based ones.

2. Preference of patrimony-based objects reflected in *garantie extra-comptables*

745. - Definition of *garantie extra-comptables*. Conventional clauses to protect buyers of shares, other than *garantie comptables*, can all be designated *garantie extra-comptables lato sensu*.⁵⁵⁷ They usually consist of two parts: triggering conditions and predetermined effects. And the preference of patrimony-based arrangements is reflected in the part of “triggering conditions”.

746. - Preference of patrimony-based arrangements as reflected in the preference of patrimony-based conditions over performance-based ones in *garantie extra-comptables*. The most typical triggering conditions are: competition by the seller after the purchase; the circumstances leading to litigations; the violation of regulation in force; the severance of certain contracts by the target company; the lack of certain policies of insurance, etc.⁵⁵⁸ We can see that most of the triggering conditions, if triggered, would have a negative impact on the value of the patrimony of the company; yet it is at least not a direct effect that the performance of the company, or its ability to generate future cash flow is to be impaired. This preference of patrimony-based conditions over performance-based ones is another demonstration that patrimony-based objects are more appreciated than the performance-based ones.

⁵⁵⁶ V. P. MOUSSERON, *Les clauses de garantie d'actif et de passif*, Actes pratiques, septembre-octobre 2012, n° 38-45.

⁵⁵⁷ P. MOUSSERON, *Les conventions de garantie dans les cessions de droits sociaux*, NEF, 1992, n°437s, p.292s; C. HAUSMANN et P. TORRE, *Les garanties de passif*, EFE, 2003, n°45, p.33.

⁵⁵⁸ The list is shown in P. MOUSSERON, *Conventions de garantie*, JCL. Sociétés, Fasc.165-35, 2018, n° 29.

B. Controversial use of performance-based objects

747. - Performance-based objects as somewhat widely-used in France. French practitioners have since long time ago begun to use performance-based arrangements. M. Mousseron has indicated that it is possible to fix the price of shares according to the discounted value of future profits made by the company, or more specifically by multiplying a financial performance indicators (FPI) with a *ratio*.⁵⁵⁹ The FPI may be either the net profits before or after tax (*bénéfice net avant ou après impôt*), gross profits (*marge brute*) or other more complicated ones.⁵⁶⁰ The method of fixing price based upon future profits, usually referred to by its English name of *clauses de earn-out* or by its French name *clauses de garantie de rentabilité* is now widely used in France,⁵⁶¹ although their absolute quantities have not surpassed that of patrimony-based ones. The arrangement goes like this: if within a certain period, the target company has failed its pre-determined FPI, the real value of the company would be considered as inferior to the price paid, and an obligation of indemnification on the part of the seller of shares would be accordingly triggered.

748. - Controversy as to the validity of the conventional arrangements with such objects. Albeit the seemingly wide use of patrimony-based arrangements in France, the regulatory restrictions upon clauses of price and leonine clauses as having been discussed in the precedent title, constitute non-ignorable compliance problems for French practitioners to overcome.

749. - Controversy as to the practicability of the conventional arrangement with such objects. On top of the problems with respect to validity of the arrangements, such arrangements are not totally accepted by everyone also for the concern about their practicability. M. Mousseron has pointed out an obstacle existent in this kind of arrangements that tend to prevent them from being widely-used: “*Cette clause de garantie est rarement utilisée dans la mesure où les cédant refusent en général d’accorder une telle garantie dès lors qu’ils ne maîtriseront pas la rentabilité future de la société dont ils auront cédé le*

⁵⁵⁹ V. P. MOUSSERON, *Conventions de garantie*, JCL. Sociétés, Fasc.165-35, 2018, n° 40.

⁵⁶⁰ V. P. MOUSSERON, *Les conventions de garantie dans les cessions de droits sociaux*, Nouvelles Editions Fiduciaires, 1997, n° 196, p.131s.

⁵⁶¹ V. J. SALES et D. LACAZE, *Clauses de earn-out: un avenir prometteur*, Dr. sociétés 2000. 13; F.-D. POITRINAL, *Cession d'entreprise: Les conventions de earn out*, JCP éd. E 1999, p.18; S. KANDE DE BEAUPUY, *Les clauses d'earn out*, Dr. et patr., janvier 1994, p. 26.

contrôle ou ne seront plus associés".⁵⁶² In essence, he is worried that the moral hazard would frighten off the seller of shares as they would fear that the current controller of the target company, i.e. the buyer of shares, would be incentivized to deliberately lower relevant figures so as to lower the expected value of shares.

II. Objects of anti-overpricing techniques in China

750. In Chinese practice, the distinction between patrimony-based objects and performance-based objects can also be observed in contractual techniques for protecting buyers of shares. We can see that the patrimony-based techniques are really rudimentary in China (A); whereas the performance-based techniques are much more carefully drafted (B). On top of the two kinds of techniques existent in France, there is another kind of techniques invented in practice by Chinese practitioners that we believe worthwhile to mention (C)

A. Perfunctory patrimony-based techniques

751. In Chinese contracts of purchases of shares, there is usually a section of articles denominated as "representations and warranties", whose main purpose is to protect the integrity of patrimony of the company and accordingly the interests of the buyers. The clauses of representations and warranties usually consist of only a vague description of triggering events and that of their effects, which makes the application of the clauses really difficult and troublesome. As for the detailed presentation of the perfunctoriness of the Chinese techniques, it will be conducted in the next section related to the methods of techniques.

B. Sophisticated performance-based techniques

752. Contrary to the perfunctory clauses of representations and warranties focusing on the integrity of the patrimony of the company, Chinese practitioners are quite careful in the drafting of a particular kind of clauses: the so called "bet-on clauses". Originally an arrangement used specially for capital investment (1), its usage has been extended to typical sales of shares for the purpose of acquiring control as well (2).

⁵⁶² P. MOUSSERON, *Les clauses de garantie d'actif et de passif*, Actes pratiques, septembre-octobre 2012, n° 47; V. aussi A. CHARVÉRIAT, *op cit.*, n°66070; C. HAUSMANN et P. TORRE, *Les garanties de passif*, EFE, 2003, n° 47, p. 34; P. MOUSSERON, *Les conventions de garantie dans les cessions de droits sociaux*, Nouvelles Editions Fiduciaires, 1997, n° 197, p. 134.

1. Originally special for capital investment

753. The term “bet-on clauses” is the colloquial name given by Chinese practitioners and jurists to the so called “valuation-adjustment mechanisms” widely used in capital investments (i). This kind of clauses are accompanied with triggering conditions indicating the ill-performance of the company (ii).

i. Presentation of “bet-on” clauses

754. The term “bet-on” clauses is used to refer to the clauses formally designated as “valuation-adjustment mechanisms” (a). The choice of the expression “bet-on” as the colloquial name for “valuation-adjustment mechanisms” reflects a misunderstanding of Chinese jurists when the mechanisms were firstly introduced into China (b).

a. “Valuation-adjustment mechanisms” as the signified

755. - **Origin of “valuation-adjustment mechanisms”.** Many Chinese jurists believe that the expression “valuation-adjustment mechanisms” comes from United States. For them, this is an imported jargon and they have gone so far as to even have assigned an English abbreviation to it: VAM.⁵⁶³ However, we have failed to find its presumed foreign origin: in searching the keyword “value-adjustment mechanisms” on google, all the results returned, with nearly no exception, are about China. This indicates that the jargon has been coined by Chinese practitioners themselves, and of a pure domestic nature.⁵⁶⁴

756. - **Definition of “valuation-adjustment mechanisms”.** Literally speaking, the jargon created by Chinese practitioners refers to all conventional techniques aiming at protecting buyers of shares against depreciation or overestimation of the value of shares bought, including both those focusing on the integrity of the patrimony of the company and

⁵⁶³ See X, YU, *On the legal effects of bet-on agreements*, South-West China political science and law, 2015 (于筱涵: “对赌协议的法律效力研究”, 西南政法大学硕士论文, 2015年); L. YAO, *A study on bet-on agreement in PE investment*, Eastern China political science and law, 2012 (姚磊: “私募股权投资中的对赌协议研究”, 华东政法大学硕士论文, 2012年).

⁵⁶⁴ Another author has also pointed out that the “valuation-adjustment mechanisms” does not exist in model contracts for capital investment in U.S. See L. PAN, A re-evaluation of “contract” and “company”, *Peking University Law Journal*, Jan. 2017. (潘林: “重新认识合同和公司”, 《中外法学》2017年第1期).

those focusing on its performance. However, in reality, the term is used in a way *sticto sensu*: it refers to only the conventional techniques focusing on the performance of the company. To some extent, the Chinese jargon can be roughly identified with the *garantie de rentabilité* in France.

b. “Bet-on clauses” as the signifier

757. The formal name “valuation-adjustment mechanisms”, albeit a pure domestic production, is not widely used. Instead, the clauses are usually colloquially referred to as “bet-on clauses”. Here, the attribute “bet-on” is to describe the fact that the ultimate arrangement of interests of the two parties depends upon events not yet having occurred when the “bet-on” clauses are concluded. This gives an impression that the buyer and the sellers of the shares are “gambling” or “betting-on” something.⁵⁶⁵ In this sense, the expression “betting-on” is just another way of saying *aléatoire*. In fact, the validity of the clauses, aside from the concern of prohibition of leonine clauses, used to be threatened by their uncertain (*aléatoire*) nature, as Chinese law is generally hostile to *contrat aléatoire*. However, this is no longer a problem nowadays.⁵⁶⁶

ii. Conditions of “bet-on clauses”

758. Generally speaking, bet-on clauses are to be triggered by conditions indicating that the performance of the target company is unsatisfactory, which usually consist of the failure of some pre-determined goals. These pre-determined goals can be categorized into two kinds.

759. - Financial goals. The first kind of goals consist of typical financial performance indicators (FPI) such as annual EBITA, Gross revenue, net profits *etc.*, which is similar to the *garantie de rentabilité* in France and thus nothing particular.⁵⁶⁷

⁵⁶⁵ See X, YU, *On the legal effects of bet-on agreements*, South-West China political science and law, 2015 (于筱涵: “对赌协议的法律效力研究”, 西南政法大学硕士论文, 2015年); L. YAO, *A study on bet-on agreement in PE investment*, Eastern China political science and law, 2012 (姚磊: “私募股权投资中的对赌协议研究”, 华东政法大学硕士论文, 2012年).

⁵⁶⁶ See Q. ZONG, *On the legal obstacles of “bet-on agreements” in the Chinese law and the solutions*, Eastern China political science and law, 2016 (宗庆庆: “论‘对赌’协议在我国面临的法律困境及其解决办法”, 华东政法大学硕士学位论文, 2016年).

⁵⁶⁷ J, MIU, *On the discussion of betting on performance in PE*, *New Accounting*, 1-2014 (缪洁, 关于股权投资并购过程中的业绩对赌的探讨, 《新会计》2014年第1期).

760. - IPO goals. The second kind, on the other hand, is special in China, which consists of successful IPOs (“the target company should be listed in a stock-market before a given future date”).⁵⁶⁸ Usually, the stock-market designated in this kind of “bet-on clauses” would be a Chinese market (Shanghai or Shenzhen), because for one thing, the Chinese Securities Regulatory Commission adopts a very strict standard and companies who can eventually manage to be listed are therefore automatically proved to be one with a bright future. And for the other, once the company is listed, the buyers can cash-in their investment by just selling them in the second-level market, as there are relatively less restrictions on this point in China.⁵⁶⁹

2. Gradually adopted in acquisition of business

761. - Expansion of “bet-on clauses” in acquisition of shares for controlling the target company. This arrangement is originally specially designed for capital investment, whereby the seller of shares (not necessarily a sale of shares *strico sensu* because the investment may be realized in the form of subscription of new shares, but for the purpose of this dissertation, we would treat them as the same) would continue to control the company and to some extent continue to control the events serving as the trigger of the arrangement. To sales of shares for the purpose of acquiring a company, because the seller would lose control of the company, this practice seems to be impracticable.

A noticeable difference between “bet-on clauses” in a context of capital investment and in a context of acquisition of company is that in the former, the buyer of shares would usually pay in full amount the price and the price-adjustment consists of a reimbursement by the buyer to the seller (if the indemnification is in the form of cash). By contrast, in an acquisition of company the seller would not pay in the full amount. The unpaid part would be gradually paid to the seller in the future depending upon the performance of the company. This difference is understandable because in a capital investment, the investee (seller) needs the cash the buyer pays to run the business whereas in an acquisition of business, the price is purely the *quid pro quo* of the shares and there is no compelling necessity to pay it at one

⁵⁶⁸ Q,YU et Q, XIA, *The legality of bet-on agreement conditioned on IPO, People’s judicature*, 21-2015 (俞秋玮,夏青:“以上市为条件的“对赌”协议的效力”,《人民司法》2015年第21期).

⁵⁶⁹ See L. PAN, A re-evaluation of “contract” and “company”, *Peking University Law Journal*, Jan. 2017. (潘林:“重新认识合同和公司”,《中外法学》2017年第1期).

go.⁵⁷⁰

This kind of arrangements are actually used more often in acquisition of small and medium sized enterprises whose outlook would be clear within a very short time. For example, in one of the counties of Chengdu, there is now a trend whereby when a self-employed cook would like to sell his humble restaurant, if he wants to charge a high premium, he should remain to cook in the restaurant (the small sized restaurants are usually under the charge of the chef), or to find some reliable person on his behalf to fulfil this duty, for three months. The premium would be calculated based upon a deliberately negotiated ratio (the ratio would not be too high because a separate fixed price would be paid that reflecting the material assets) multiplying the average net profits of the three months.

762. - Solution to the moral hazard usually existent in acquisition of shares for controlling the target company. In sale of shares as a sale of business, as the loss of control of the company by the seller necessarily leads to a risk of manipulating the outcome by the buyer, Chinese sellers of shares usually require to continually run the company for a while before the determining event occurs. For example, in an acquisition of a local department store by a multi-national company running a famous supermarket, the price is fixed at 3 million Chinese yuan plus “*the average EBITA of two consecutive years after the acquisition multiplying 15*”. On top of that, the two parties agree that to the article of association of the company running the department store (which would become a subsidiary of the buyer), a new clause should be added, which shall allow the seller to maintain the post of president of board of director for 2 consecutive years. In the two years, the seller would continue to run the company, aiming at “earning” the value of “goodwill” of the company. Meanwhile, during the two years, the buyer would act like a capital investor, who only supervises the president of board of director to ensure that he would not be too unduly irresponsible.

C. Seeming irrelevant-events-based techniques

763. The aforementioned two kinds of techniques are both based upon objects that *prima facie* have some bearing with the value of the target company: they either focus on events that would reduce the aggregated value of all the assets in the patrimony of the

⁵⁷⁰ See L. PAN, A re-evaluation of “contract” and “company”, Peking University Law Journal, Jan. 2017. (潘林: “重新认识合同和公司”, 《中外法学》2017年第1期).

company; or on events that indicate the possibility that the ability of the company to generate income is overestimated. However, in practice Chinese practitioners will also stipulate some events seemingly irrelevant to the value of the company as the triggering conditions of their anti-overpricing arrangements. The following are some examples.

764. - Firstly, the arrangements can be triggered by a change of policy. For example, we have found in a sale of a scooter dealership as early as in 1990s whereby the parties agree that “*the seller shall indemnify the buyer of 25,000 Chinese yuan in the case that Motorcycle is banned in the city of XX before or as of the year 1998.*” This clause was stipulated to persuade the buyer of the scooter dealership that the business would be able to continue in spite of the trend in many Chinese city to prohibit and restrict Motorcycles. Another similar clause exists in the contract of sale of majority of shares of a cement plant, under the background that such plant may be shut down by the government because of a more restrictive environment protection standard possibly being implemented. We have found similar clauses also in sales of chemical fertilizer plant and golden mine. The commonness of all these clauses is that the what is sold is a business, although legal at the moment of sale, has a risk of being illegal in a near future.

765. - Secondly, the arrangements can be triggered by the change of business environment. A typical example is when China joined WTO in 2001, which promised to open certain markets to foreign investors, many domestic buyers, in buying business in these market, may requires that the seller to share the risks of a more intensive competition because of foreign investment coming into the market. For example, in a sale of the majority of shares of a local department store, the parties agree that: “*the seller shall buy back 40 percent of the shares sold, at the price of 65 million Chinese yuan upon the demand of the buyer, if before or as of 2005, the retail market in China is opened to foreign investors.*” Such clauses are also found in sales of travel agencies and sales of plants of auto parts.

766. - Thirdly, the arrangements can be even triggered by climate changes. For example, we have found a case where a sale of an agriculture enterprise is accompanied with a clause whereby “*the seller shall give buyers 2 million Chinese yuan if the annual rainfall of the year 2005 is lower than XX mm.*”

The list goes on and on and we have only enumerated a few cases. In fact, nearly

anything can be used to trigger a price-adjusting mechanism in China.

III. Comparison

767. With respect to the objects of the anti-overpricing techniques in the two countries, two differences are especially worth to mention: firstly, the two countries differ in the preferences of the two kinds of techniques directly relevant to the value of the company (performance-based techniques and the patrimony-based ones) (A); secondly, Chinese practitioners use events seemingly irrelevant to the value of the company, which is not used in France (B).

A. Techniques with objects directly relevant to the value of the company

768. - Difference: the preference of the techniques in the events of purchases of shares for the acquisition of business. As for the patrimony-based techniques and performance-based ones, we can see that practitioners of the two countries differ greatly in their preferences: Chinese practitioners prefer to use events concerning the performance of the company as the triggering conditions for their anti-overpricing arrangements whereas their French counterparts prefer those patrimony-focused ones. This difference is reflected firstly in the different efforts dedicated to the two kinds of techniques in the two countries. It is also demonstrated in the different meanings that the jurists of the two countries attach to an expression: in France, *garantie de valeur* is one of the two kinds of patrimony-based anti-overpricing mechanisms, with the other being *garantie de reconstitution*. By contrast, in China, the similar expression “valuation-adjustment mechanisms” refers to conventional anti-overpricing mechanisms triggered by performance-related events.

We believe French practitioners can learn from their Chinese counterparts in more resorting to performance-based techniques, as in our opinion the performance-based techniques have their unique advantages and are thus highly desirable (1). We know that French jurists have some fret about its practicability. Yet, by taking the experience from China, the obstacles about their practicability can be easily overcome (2).

1. Desirability of the choice of performance-based techniques

769. - Performance-based arrangements suitable to protect the value of the goodwill of the target company. Even if the buyer buys shares for the sole purpose of running it himself, the price he paid also contains more than the mechanic value of net assets in the patrimony, as many other factors should also be taken into his consideration such as the nature and activities of the company, its economic potential, legal factors etc.⁵⁷¹ Technically speaking, these factors can be collectively considered as a particular kind of assets --- the goodwill, and sometimes the majority of the price for the shares of the target company is paid for the goodwill in the form of a “premium”. As the value of the goodwill is not directly detectable and calculable, it cannot be precisely fixed in advance. Rather, it can only be reflected in the performance of the company in the form of future revenues or profits that the company is to generate.

770. -The value of patrimony can also be indirectly protected by arrangements based upon performance. Even if there is no element of reference for value of shares difficult to be calculated or determined, such as goodwill, resorting to an arrangement based upon performance is also beneficial. When a buyer buys shares for the purpose of running the target company, what he most cares would be the integrity of the exploiting assets, which are essential for the smooth operation of the company, and the absence of liabilities unexpected. A clause of earn-out can easily protect him with respect to both the assets and the liabilities because it gives the seller an incentive not to reduce the value of the company⁵⁷²: for one thing, because the interests of the seller are conditioned upon the performance of the company and the performance of the company is in turn conditioned upon the integrity of the exploiting assets, the seller would have no incentive to usurp the assets; instead, he would actively protect its integrity. For another, the performance of the company is reflected in financial performance indicators, which would be negatively impacted by unexpected liabilities, which means the seller would not have the incentive to allow the company to assume liabilities either.

2. Practicability of the choice of performance-based techniques

771. - Moral hazard as the only discussable obstacle to the use of performance-based arrangements. In France, there are mainly two obstacles to the use of performance-

⁵⁷¹ V. P. MOUSSERON, *Les facteurs juridiques dans l'évaluation des droits sociaux*, RJDA mars 2006.

⁵⁷² V. S. KANDE DE BEAUPUY, *Les clauses d'earn out*, Dr. et patr., janvier 1994, p. 27.

based price-adjusting arrangements: for one thing, such arrangements are suspected to violate the prohibition on leonine clauses as provided in article 1844-1 of the French *code civil*; for another, such arrangements risk to cause a moral hazard to the detriment of sellers of shares. In the precedent Title, we have demonstrated that the prohibition is only endemic to France and not at all inherent; and if the *lex ferenda* is to eventually prevail, the prohibition would disappear. If the elimination of the prohibition in French law is to happen, the only obstacle would be the moral hazard concerned by sellers of shares.

772.- Presentation of the moral hazard. The advantages of the performance-based arrangements are to some extent recognized in France, as an author has pointed out the necessity of such arrangements when the continuous presence of the seller is essential for the operation of the company after the sale of the shares.⁵⁷³ However, when it comes to sales of shares where such a continuous presence of the seller of shares is not essential, the use of performance-based arrangements would be problematic as here it involves a moral hazard on the part of the new controller of the company – the buyer of shares, who has an incentive to lower the figures reflecting the performance of the company so as to eventually obtain a low price. And one of the reason that the arrangements are controversial in France is for the fear of this moral hazard, as has been mentioned *supra*.

773. - Chinese experience as a solution to the moral hazard. The empirical experience in China has shown that this moral hazard can be easily solved by a continuous presence of the seller in the company after the sale of shares, even if his presence is of no particular real utility for the purpose of the operation of the company, for example, he can continue to be present in the company as a supervisor: after all, sometimes compared to the interests of the performance-based arrangements, the time and energy the seller spends is well worth it.

B. Techniques with objects indirectly relevant to the value of the company

774. Another noticeable difference between China and France in terms of the objects of anti-overpricing techniques, is that Chinese practitioners sometimes use events seemingly having no particular bearing to the value of the company whereas the techniques do not exist

⁵⁷³ V. S. KANDE DE BEAUPUY, *Les clauses d'earn out*, Dr. et patr., janvier 1994, p. 27.

in France.

We estimate that some French practitioners would find the Chinese techniques too far-fetched. Yet, this concern should be abandoned. In fact, the complicatedness and complexity of commerce would make it possible for any events to affect the value of the company (in most cases through affecting the value of the goodwill instead of the tangible assets). The relevance of a seemingly irrelevant event with the business of the company may be thus more prevalent than expected. And practitioners should accordingly advise the parties to add any events they believe to be able to affect the value of the company into the list of events that are to trigger price-adjusting arrangements (only the parties, as sophisticated merchants, would have a full knowledge of what factors or events may affect the prospect and operation of the target company), no matter how ridiculous they may seem *prima facie*. Such a practice, besides facilitating the sale by ensuring the buyer of shares (usually more risk-averse than the seller because of the possession of less global information) against would-be risks that are usually unfamiliar to him, also allows the seller to charge a higher price for assuming the risks, thus being beneficial to both parties.

Conclusion of Section I

775. In this section, we can see that practitioners in both countries use patrimony-based or performance-based techniques. Yet they have different preference. We advocate that the performance-based techniques should prevail and should be used whenever possible. Plus, we can see that Chinese practitioners have invented a special kind of techniques with objects have no apparent bearing with the value of the company. This kind of techniques in our opinion should also be adopted in France.

Section II. Enforcements of anti-overpricing techniques

776. - Excluded from the scope of discussion of this section: techniques focusing on the performance of the company or on seemingly irrelevant events. We have mentioned in the precedent section that objects of anti-overpricing techniques can be either the integrity of the patrimony of the company; the future performance of the company, or even events that *prima facie* seems to be irrelevant to the value of the shares. When it comes to their enforcement, however, we will only discuss that of patrimony-based techniques. For the latter two kinds, their enforcements are simple: If their triggering conditions (*fait générateur*) are met, the sanctions, or more precisely the consequences, will always be an indemnification of the amount calculated with the help of a “*coefficient multiplicateur*”⁵⁷⁴. Although M. Danet describes this method as nothing but a “*formule cabalistique d'allure raffinée mais dont la parenté avec le rustique pifomètre n'est pas douteuse*”,⁵⁷⁵ we believe they are unreplaceable in the conventional techniques with the two kinds of objects, as in these situations the value of the shares or the supposed reduction of value caused by the events serving as triggering conditions, are inherently just a “*rustique pifomètre*”. By contrast, for patrimony-based techniques, as the value of shares calculated thereunder and the consequence of the triggering events thereunder are both relatively definite and certain, the enforcement does not need to rely purely on guesstimate and thus worth our discussion.

⁵⁷⁴ For performance-based techniques, v. P. MOUSSERON, *Conventions de garantie*, JCL. Sociétés, Fasc.165-35, 2018, n° 40.

⁵⁷⁵ V. D. DANET, *Cession de droits sociaux: information préalable ou garantie des vices?*, RTD Com. 1992. 315.

777. - Excluded from the scope of discussion of this section: beneficiaries and mode of indemnifications. When it comes to conventional anti-overpricing mechanisms, a heatedly discussed topic in France is a distinction based upon the mode of indemnification: when a mechanism is triggered, whether its beneficiary should be indemnified with a reduction of price, or by a direct indemnification *strico sensu* to the target company.⁵⁷⁶ This distinction, in our opinion, on top of concerns from the perspective of tax, is mainly to determine the beneficiary of the mechanism: the issue to solve here is whether it is the target company or the buyer himself that should directly receive the indemnification. Honestly speaking, we do not originally understand the interests of having the target company be the beneficiary except perhaps for some interests in terms of tax. Latter, as we have mentioned above, it turns out to us that at least an important reason for this arrangement is to avoid a negative price.⁵⁷⁷ As the problem of negative price is of interests only in French context, we shall ignore it in this thesis except in the paragraphs dedicated directly to the different provisions related to price in the two countries.⁵⁷⁸ For that reason, we will not spend too much effort on exploring this distinction in this section and for the purpose of this thesis, we will not either distinguish between reduction of price and direct indemnification to the patrimony of the company; or distinguish between a mechanism with the buyer as the beneficiary or with the target company as the beneficiary.

⁵⁷⁶ V. J. PAILLUSSEAU, *La garantie de conformité dans les cessions de contrôle*, JCP E 2007. 1238, n° 40. P. MOUSSERON, *Les clauses de garantie d'actif et de passif*, Actes prat. septembre-octobre 2012, n° 48; M. CAFFIN-MOI, op. cit., n° 350s.

⁵⁷⁷ V. J. PAILLUSSEAU, *La garantie de conformité dans les cessions de contrôle*, JCP E 2007. 1238, n° 40. P. MOUSSERON, *Les clauses de garantie d'actif et de passif*, Actes prat. septembre-octobre 2012, n° 48; M. CAFFIN-MOI, op. cit., n° 562s.

⁵⁷⁸ In fact, an author has pointed out that: “*Toutefois, une telle distinction - parfois discutée en doctrine - n'est pas nécessairement suffisante pour appréhender la variété des conventions de garanties consenties dans le cadre d'opération d'acquisition de droits sociaux, telles qu'elles se sont développées au cours des dernières décennies.*” (V. O. DEREN, *Les différents types de garanties contractuelles*, colloque *Les garanties dans les cessions de droits sociaux*, Gaz. Pal. 20 mai 2010. 9).

778. - **Excluded from the scope of discussion of this section: limitations on the anti-overpricing mechanisms.** Another topic usually discussed about the anti-overpricing techniques is the limitations thereon. The limitations can be either temporal, which exclude the application of a clause because of the occurring time or the revealing time of the triggering event; or be intentional, which exclude its application because of the subjective knowledges of the seller or the buyer. We must admit that these limitations are of significant interests in an abstract sense. Yet, as this thesis is of comparative sense, what we should address should be mainly about the differences between the two countries instead of the similarity. As the limitations also exist in China (we believe they exist in every countries of the world), as a topic it lacks interests in a comparative sense, which means they are out of the scope of our discussion in this section.⁵⁷⁹

779. - **Scope of discussion of this section: the existence or absence of *garanties comptables* in the two countries.** In this section, what we will focus on is the *garantie comptable*, an ingenious technique invented by French practitioners. A comparison (III) of the French (I) and Chinese (II) practices in terms of the existence or absence of such a technique will manifest the advantages of this brilliant French invention from a comparative perspective.

I. Enforcement in France

780. As has been already mentioned, based upon the triggering events, anti-overpricing clauses in France can be classified into two categories: *garantie comptable* (A) and *garantie extra-comptable* (B). If for the same purchase of shares, both of the two exist, there might be a problem of double coverage (C).

A. *Garantie comptable*

781. When it comes to a dispute arising from a *garantie comptable*, what are most concerned is usually the scope of events covered by the *garantie* (1). However, once this scope is determined, the realization of such a mechanism is quasi-automatic, which in our opinion is its main advantage (2).

⁵⁷⁹ The effects of the requirement of subject knowledge of the buyer on the applicability of the *garanties comptables* in France will be nevertheless discussed. As this requirement to some extent hinders their automatic application, which is the core argument for our stance that the *garanties comptables* are superior to the *garanties extra-comptables* when both of which can be applied.

1. Triggering events

782. As the *garantie comptable* is enforced by requiring the seller to indemnify the buyer the amount equalling to the difference between figures reflected in the same account or accounts in financial statements on different dates,⁵⁸⁰ what are mostly concerned and disputed are the scope of accounts covered.

783. - Types of *garanties comptables* based upon financial accounts covered. Basically, there are two types of *garanties comptables*: *garantie de passif* whereby “*le cédant s’engage à indemniser le Bénéficiaire de l’intégralité de toute augmentation du passif*”. And *garantie d’actif*, whereby “*le cédant s’engage à indemniser le Bénéficiaire de toute insuffisance ou diminution de valeur d’un actif*”. Here, the *augmentation du passif* or *toute insuffisance ou diminution de valeur d’un actif* would be defined as the difference in an account in the balance sheet (*compte de référence*) between a date of reference (*date de référence*) and the date on which the financial facts of the company is determined, usually the closing date (*date de réalisation*).⁵⁸¹

From the two kinds of basic *garantie*, other more complex ones are established. For example, *garantie d’actif net* whereby “*le cédant s’engage à indemniser le Bénéficiaire de toute diminution du montant des capitaux propres*”.⁵⁸² which are triggered only if the combined effects on both the accounts of *passif* and accounts of *actifs* will lead to a negative amount. Or *garantie d’actif exploités dans un but économique spécifique*⁵⁸³, which not only exclude *passif*, but also *actifs* having no bear with the exploitation of the company.

⁵⁸⁰ V. A. COURET et P. ROSENPICK, *L’articulation entre déclarations et clauses de garantie d’actif et de passif*, Dr. et patr. novembre 2008; V. P. MOUSSERON, *Les clauses de garantie d’actif et de passif*, Actes pratiques, septembre-octobre 2012, n° 38-45

⁵⁸¹ V. P. MOUSSERON, *Les clauses de garantie d’actif et de passif*, Actes pratiques, septembre-octobre 2012, n° 38-45.

⁵⁸² V. P. MOUSSERON, *Les clauses de garantie d’actif et de passif*, Actes pratiques, septembre-octobre 2012, n° 43.

⁵⁸³ V. M. STOCLET, *Le prix dans les cessions de droits sociaux*, thèse Lille II, 2008, n° 8, p.8.

784. - Issues arising from the types of accounts covered by the *garanties*. As *garanties comptables* mainly focus on an account or a series of accounts, disputes usually arise out of the scope of accounts covered by a *garantie* in question. For example, an issue arose as to whether the mere existence of a *garantie de passif* can be interpreted *strico sensu* to encompass also the depreciation of value of a main asset.⁵⁸⁴ Another typical issue is whether the coexistence of both a *garantie de passif* and a *garantie de actif* can be interpreted in a combined way as a *garantie de actif net*, so as to allow offset of the accounts of *passif* and the accounts of *actif*.⁵⁸⁵ Generally speaking, French judges take a rather restrictive stance in interpreting the meaning of the *garanties*, and the answers to both of the two issues just mentioned are negative.

2. Application modes

785. Thanks to the recourse to financial statements, the *garanties comptables* are generally automatically applied if the triggering conditions are met (i). However, the requirement of knowledge of the triggering events on the part of the seller may serve as an exception to the automatic application (ii).

i. Presentation of the automatic application

786. M. Danet has pointed out that the enforcement of the *garanties comptables* is “*de nature plus objective*” and “*quasi automatique*”.⁵⁸⁶ This opinion can be understood in two aspects. For one thing, the demonstration of damage suffered by the buyer or the target company is unnecessary,⁵⁸⁷ as long as a reduction of value is reflected in the financial statements, either in a form of increase of *passifs* or in the form of a decrease of *actifs*, depending on the types of *garanties* we have just mentioned. In other words, “*le passif comptable matérialise le préjudice*”.⁵⁸⁸ For another, the amount of indemnification is nearly automatically determined, as it often equals to “*montant du passif comptable apparu*”.⁵⁸⁹

⁵⁸⁴ V. CA Paris, 13 décembre 2011, Dr. Sociétés 2012. 82, note D. GALLOIS-COCHET.

⁵⁸⁵ V. Cass.com. 28 septembre 2004, n° 00-22872.

⁵⁸⁶ V. A. COURET et P. ROSENPICK, *L'articulation entre déclarations et clauses de garantie d'actif et de passif*, Dr. et patr. novembre 2008.

⁵⁸⁷ P. MOUSSERON, note sur Cass. com., 4 novembre 2008, n° 07-19195, Bull. Joly sociétés 2009. 454.

⁵⁸⁸ V. A. COURET et P. ROSENPICK, *L'articulation entre déclarations et clauses de garantie d'actif et de passif*, Dr. et patr. novembre 2008.

⁵⁸⁹ V. A. COURET et P. ROSENPICK, *L'articulation entre déclarations et clauses de garantie d'actif et de passif*, Dr. et patr. novembre 2008.

ii. Exception to the automatic application

787. - Judicial opinions. As the *garantie comptable* is supposed to apply automatically, whether the buyer of shares is aware of the events leading to the difference in the account of reference on different dates, should be irrelevant. This is in most times the judicial opinion.⁵⁹⁰ Yet, in other times, on the basis of good faith,⁵⁹¹ the opposing opinion is accepted and the applicability of the mechanism is excluded, if the buyer has some precedent knowledge of the triggering event.⁵⁹²

788. - Doctrinal opinions. French authors generally believe that “*le caractère objectif de la garantie...paraît écarter l’impact d’une connaissance réelle ou supposé du passif ou du défaut d’actif par le garanti.*”⁵⁹³ And even if the *connaissance par le garanti* is to be taken into consideration, its meaning should be defined in a rather restrictive way, so as to exclude all situations where the beneficiary has only a vague awareness of the uncertain occurrence of the triggering events.⁵⁹⁴ However, some author believe that when the beneficiary is not completely certain of the “*ampleur et des conséquences de ces problèmes*”, “*un minimum de diligence pour en prendre la réelle mesure*”⁵⁹⁵ is still necessary.

789. - Practical advises. We can see that in France, there is an uncertainty as to whether the knowledge of a buyer of shares may serve as the basis for judges to deny the applicability of a price-adjusting mechanism. Accordingly, for the interests of buyers of shares, in order to eliminate this uncertainty, practitioners advise to insert such a clause: “*Les parties reconnaissent que l’ensemble des éléments et évènement mentionnées en Annexes sont indiqués à titre purement informatif et ne constituent donc pas des éléments exonérateurs. Dès lors, l’ensemble des conséquences pouvant résulter des éléments visés dans lesdites annexes sera totalement couvert par la présente garantie.*”⁵⁹⁶

⁵⁹⁰ V. Cass. com., 18 novembre 1997, n° 95-15191; Cass. com., 10 juillet 2007, n°06-14768; Cass. com., 14 décembre 2010, n°09-68.868; Cass. com., 12 mai 2015, n° 14-13234, Bull. Joly Sociétés, septembre 2015.419 note. P. MOUSSERON.

⁵⁹¹ V. P. MOUSSERON, *Les clauses de garantie d’actif et de passif*, Actes pratiques, septembre-octobre 2012, n° 72-74.

⁵⁹² V. Cass. com., 11 octobre 2005, n° 03-11390; CA Paris, 20 septembre 2005, RJDA 2006. 32.

⁵⁹³ V. P. MOUSSERON, *Conventions de garantie*, JCL. Sociétés, Fasc.165-35, 2018, n° 25; V. P. MOUSSERON, *Les conventions de garantie dans les cessions de droits sociaux*, NEF, 1992, n° 190.

⁵⁹⁴ V. P. MOUSSERON, *Les conventions de garantie dans les cessions de droits sociaux*, NEF, 1992, n° 518.

⁵⁹⁵ V. J. PAILLUSSEAU, *La garantie de conformité dans les cessions de contrôle*, JCP E 2007. 1238, n° 39.

⁵⁹⁶ P. MOUSSERON, *Les clauses de garantie d’actif et de passif*, Actes pratiques, septembre-octobre 2012, n° 70.

B. Garantie extra-comptable

790. *Garanties extra-comptables* cover events not directly reflected in accounts in financial statements (1), which means that their application is not automatic (2).

1. Triggering events

791. - Enumeration of the triggering events. We have mentioned *supra* that *garanties comptables* only cover events that change the figures in accounts of financial statements whereas there are some kinds of events “*qui ne se traduisent pas nécessairement par un impact sur les comptes*”.⁵⁹⁷ However, a damage not figured in financial statements is still a damage. In order to cover these events, French practitioners have borrowed from Anglo-Saxon world conventional mechanisms not focused on accounts in financial statements.⁵⁹⁸ “*Ces garanties déclaratives se superposent le plus souvent avec les diverses garanties comptables distinguées ci-dessus tout en ayant un champ beaucoup plus large.*”⁵⁹⁹ The typical examples include the non-competition clauses (*clause de non-concurrence*) that is to be discussed separately in this thesis; the absence of insolvency (*cessation de paiement*); the absence of circumstances leading to litigation; the respect of regulation in force; the maintain of certain contracts by the target company; the absence of certain contracts; the possession of the policy of a given assurance, etc.⁶⁰⁰

2. Application modes

792. Generally speaking, the *garanties extra-comptables* are not automatically applied (i), unless accompanied by “*idemnisations forfaitaires*” (ii).

i. Non-automatic application in general

⁵⁹⁷ A. COURET et P. ROSENPICK, *L'articulation entre déclarations et clauses de garantie d'actif et de passif*, Dr. et patr. novembre 2008.

⁵⁹⁸ V. A. COURET et P. ROSENPICK, *L'articulation entre déclarations et clauses de garantie d'actif et de passif*, Dr. et patr. novembre 2008.

⁵⁹⁹ O. DEREN, *Les différents types de garanties contractuelles, colloque Les garanties dans les cessions de droits sociaux*, Gaz. Pal. 20 mai 2010. 9.

⁶⁰⁰ The list is shown in P. MOUSSERON, *Conventions de garantie*, JCL. Sociétés, Fasc.165-35, 2018, n° 29; v. aussi P. MOUSSERON, *Les conventions de garantie dans les cessions de droits sociaux*, NEF, 1992, n° 437s.

793. - Distinction between *déclarations* and *garanties extra-comptables*. Generally speaking, *garanties extra-comptables* take the form of “*déclarations dont l’inexactitude ou le non-respect peut donner lieu à une indemnisation de l’acquéreur*”.⁶⁰¹ Accordingly, the two expressions *déclarations* and *garanties extra-comptables* are to some extent a pair of synonyms.⁶⁰² However, a nuance can be made between the two expressions. The word “*garanties*” is understood to refer to conventional techniques that “*visent à permettre une réparation à leur bénéficiaire ...*”⁶⁰³ Yet for a long time, as “*ces déclarations sont parfois formulées par le cédant*”⁶⁰⁴, “*elles ne comportent en général aucune organisation contractuelle spécifique des modalités de leur mise en jeu ainsi que des sanctions applicables lorsqu’il apparaît que des déclarations sont inexactes ou délibérément mensongères.*”⁶⁰⁵ As, the *déclarations* have no autonomous sanctions, authors sometimes distinguish them from *garanties extra-comptables*, which are interpreted *strico sensu* to mean *d’autres conventions de garantie (extra-comptable) associent en revanche à ces déclarations du cédant une véritable garantie d’exactitude ayant une traduction indemnitaire contractualisée au profit du cessionnaire.*⁶⁰⁶ As M. Mousseron put it: “*déclarations ... visent à former le consentement; les garanties ... visent à permettre une réparation à leur bénéficiaire ...*”⁶⁰⁷

As the *déclarations* do not have their own conventional sanctions, it is understandable that they cannot be applied automatically even if they have been violated (a). However, it is not to say that *garanties extra-comptables*, equipped with their own conventional sanctions, can be automatically applied (b).

a. Non-automatic application of *déclarations*

⁶⁰¹ A. COURET et P. ROSENPICK, *L’articulation entre déclarations et clauses de garantie d’actif et de passif*, Dr. et patr. novembre 2008.

⁶⁰² A. COURET et P. ROSENPICK, *L’articulation entre déclarations et clauses de garantie d’actif et de passif*, Dr. et patr. novembre 2008.

⁶⁰³ P. MOUSSERON, *Les clauses de garantie d’actif et de passif*, Actes pratiques, septembre-octobre 2012, n° 27.

⁶⁰⁴ O. DEREN, *Les différents types de garanties contractuelles*, colloque *Les garanties dans les cessions de droits sociaux*, Gaz. Pal. 20 mai 2010. 9; v. aussi C. FREYRIA, *Réflexions sur la garantie conventionnelle dans les actes de cession de droits sociaux*, JCL G 1992. 3600, n° 3.

⁶⁰⁵ J. PAILLUSSEAU, *La garantie de conformité dans les cessions de contrôle*, JCP E 2007. 1238, n° 7; v. aussi C. FREYRIA, *Réflexions sur la garantie conventionnelle dans les actes de cession de droits sociaux*, JCL G 1992. 3600, n° 3; O. DEREN, *Les différents types de garanties contractuelles*, colloque *Les garanties dans les cessions de droits sociaux*, Gaz. Pal. 20 mai 2010. 9.

⁶⁰⁶ O. DEREN, *Les différents types de garanties contractuelles*, colloque *Les garanties dans les cessions de droits sociaux*, Gaz. Pal. 20 mai 2010. 9; v. aussi J. PAILLUSSEAU, *La garantie de conformité dans les cessions de contrôle*, JCP E 2007. 1238, n° 38.

⁶⁰⁷ P. MOUSSERON, *Les clauses de garantie d’actif et de passif*, Actes pratiques, septembre-octobre 2012, n° 27. For another example where the expressions *déclarations* and *garanties* are juxtaposed, v. P. MOUSSERON, note sur CA Paris, 19 février 2008, Bull. Joly sociétés 2008. 846.

794. As the *déclarations* have no autonomous sanctions stipulated conventionally, traditionally speaking, “*la portée de ces seules déclarations est alors perçue par les parties comme visant seulement à faciliter la caractérisation par le cessionnaire d'une manœuvre dolosive du cédant.*”⁶⁰⁸ Having to resort to legal mechanisms related to consents, it is more than normal that they cannot be applied automatically.

In fact, there is now a trend in French jurisprudence to treat a *déclaration* as a real *garantie*, by implicitly adding a sanction that the seller should be liable for damage caused by the inexactness and violation of the *déclarations*.⁶⁰⁹ However, we will see that a mere autonomous sanction added to the *déclaration* will not make its application in any way more automatic.

b. Non-automatic application of *garanties extra-comptables stricto sensu*

795. - Cause for the non-automatic application: the lack of identification of the triggering events and the amount of indemnification. If a *déclaration* is equipped with its own sanctions, no matter whether by conventional stipulation or by praetorian power, can it now be applied automatically? Unfortunately, the answer remains negative, as long as there is no stipulation of “*idemnisation forfaitaire*” which will be discussed *infra*.

⁶⁰⁸ O. DEREN, *Les différents types de garanties contractuelles, colloque Les garanties dans les cessions de droits sociaux*, Gaz. Pal. 20 mai 2010. 9; P. MOUSSERON, note sur CA Paris, 19 février 2008, Bull. Joly sociétés 2008. 846; J. J. ANSAULT, obs. sur CA Paris, 14 juin 2017, Bull. Joly sociétés. 96, n° 1; A. COURET, note sur Cass. com., 21 octobre 2014, n° 13-11805, Bull Joly sociétés 2014. 709, n° 12.

⁶⁰⁹ V. J. J. ANSAULT, obs. sur CA Paris, 14 juin 2017, Bull. Joly sociétés. 96, n° 1; A. COURET, note sur Cass. com., 21 octobre 2014, n° 13-11805, Bull Joly sociétés 2014. 709, n° 12.

The inability of automatic application of *garanties extra-comptables* can be attributed to the fact that the *garanties extra-comptables*, in most cases if not always, focus on the cause of a damage suffered or to be suffered by the target company instead of on the damage *per se*, and it is the amount of damage that determines the amount of indemnification, as contrasted to the *garanties comptables* where it is the amount of indemnification that is focused, in other words the triggering events (cause) are identified with the amount of indemnification, both of which being a difference in the figures on a financial account on different dates. This focus on the cause instead of result in the *garanties extra-comptables* means that there is always an onus on the part of the aggrieved buyer to prove the causal relation between the triggering events and the supposed damage, and if he has succeeded in this task of demonstration, he has to further prove the actual amount of damage.

If the burden of proof can be easily fulfilled, we can still say that the application is quasi-automatic. However, the task is somewhat arduous. Firstly, not rarely, it is difficult to prove the existence of a damage caused by the triggering events. For example, where the *garantie extra-comptable* is about that all major assets of the target company is insured, even if the supposed insurance is lacking, it is hard to say that the company has suffered from a damage which leads to a reduction of the value of the shares, unless an incident supposed to be covered by the insurance does take place.⁶¹⁰ Secondly, even if the aggrieved buyer has managed to prove the existence of a damage caused by the triggering events, it is still tiresome for him to prove its amount. For example, in the case where the *garantie extra-comptable* that a major client of the target company would not terminate his contract with the target company, “*il est vraisemblable que la perte de chiffre d’affaires entraînée par cette résiliation*”.⁶¹¹ However, the concrete amount of “*la perte de chiffre d’affaires*” is not obvious and can be obtained only through an arduous work of estimation, calculation and demonstration to be conducted by the poor buyer.

⁶¹⁰ V. A. COURET et P. ROSENPICK, *L’articulation entre déclarations et clauses de garantie d’actif et de passif*, Dr. et patr. novembre 2008.

⁶¹¹ A. COURET et P. ROSENPICK, *L’articulation entre déclarations et clauses de garantie d’actif et de passif*, Dr. et patr. novembre 2008.

796. - Dubious distinction between *déclarations* and *garanties extra-comptables strico sensu*. As mentioned *supra*, the distinction between the *déclarations* and the *garanties extra-comptables strico sensu* is made on the basis of the existence or not of autonomous sanctions attached thereto. However, as we have demonstrated, the “autonomous” sanctions of the *garanties extra-comptables strico sensu* are not so “autonomous” to the extent that the amount of indemnification should be proved through an arduous journey of demonstration. In this sense, the *garanties extra-comptables* are not so different from the *déclarations*. In fact, both the *garanties extra-comptables* and the *déclarations* concern only the conditions for the liability of the seller. As for the consequence or the sanction for the liability, in our opinion, they are both governed by the *obligation de délivrance*, or more specifically the *obligation de délivrance conforme*, as suggested by Mme. Caffin-moi.⁶¹²

ii. Automatic application by exception

797. - Automatic application by a predetermined “*indemnisation forfaitaire*”. The obstacle to the automatic application of *garanties extra-comptables* is the lack of auto-determined amount of indemnification. Technically speaking, this obstacle can be removed by adding a pre-determined amount of indemnification which will be triggered directly by a violation of the *garantie extra-comptable*, regardless of the amount of the actual damage suffered by the target company and the actual amount of reduction of the value of shares. However, besides the shortcoming that the indemnification of an indemnification *forfaitaire* is possible to be subject to a judicial reduction according to article 1235-1 of *code civil*,⁶¹³ this practice is of a non-negligible problem: it is in most cases nothing but a “*rustique pifomètre*”.⁶¹⁴ It is true that for some events, whose consequence is impossible to calculate, a “*rustique pifomètre*” is to some degree acceptable. Yet, for the majority of events covered by *garanties extra-comptables*, the “*rustique pifomètre*” is not acceptable as the actual damage is possible to be calculated and to diverge greatly from the estimated “*indemnisation forfaitaire*”. This may be the reason why the “*idenminisation forfaitaire*”, although permits an automatic application, is not widely used in *garanties extra-comptables*.

C. Double coverage by both *garanties comptables* and *garanties extra-*

⁶¹² V. M. CAFFIN-MOI, *Cession de droits sociaux et droit des contrats*, Economica 2009, n° 604s.

⁶¹³ V. A. COURET et D. LEDOUBLE, *La maîtrise des risques dans les cessions d'actions*, GLN Joly, 1994. n° 67, p. 36; B. L LECOURT, *Clauses de garantie dans les cessions de droits sociaux*, Rép. dr. sociétés 2006, n° 110.

⁶¹⁴ V. D. DANET, *Cession de droits sociaux: information préalable ou garantie des vices?*, RTD Com. 1992. 315.

comptables

798. If for the same purchase of shares, there are both a *garantie comptable* and a *garantie extra-comptable*, there might be a problem of *double couverture*, if the damage caused by the triggering events of the *garantie extra-comptable* and thus indemnified on this account overlaps with that covered by the *garantie comptable*.⁶¹⁵ For example, if the seller agree to guarantee any expected litigation, the occurrence of such litigation would be indemnified *per se*; and if there are also accounting mechanisms, the effect of such litigation, the increase of liabilities and reduction of profits, would be indemnified again.⁶¹⁶

II. Enforcement in China

799. The Chinese method to implement an anti-overpricing mechanism is in essence *extra-comptable* (A). The only existence of the *garanties extra-comptables* (in China they are generally called “warranties and representations”) and the absence of *garanties comptables*, in our opinion, should be responsible for the overall impotent enforcement of the anti-overpricing techniques focusing on the integrity of the patrimony of the target company (B).

A. Drafting of warranties and representations

⁶¹⁵ V. P. MOUSSERON, *Conventions de garantie*, JCL. Sociétés, Fasc.165-35, 2018, n° 28.

⁶¹⁶ V. A. COURET et P. ROSENPICK, *L'articulation entre déclarations et clauses de garantie d'actif et de passif*, Dr. et patr. novembre 2008.

800. In nearly every Chinese contract of sales of shares, like a standard form, there would be a chapter or a section of articles denominated as “representations and warranties”, whose main purpose is to protect the integrity of patrimony of the company. In essence, the Chinese “representations and warranties” are not so different from the French *garanties extra-comptables*, which means a detailed presentation of the Chinese techniques will be unnecessary as far as this thesis is concerned. For the purpose of information, we would like to nevertheless present here a typical example of the Chinese clauses, which reads as this: ““*if any situations, as indicated in annex 2, incur any economic damage to the buyer and/or the target company, the seller shall indemnify them with the amount of such damage.*” We have found that in the clauses of other contracts for the purchase and sale of shares, the phrase “*any economic damage*” are sometimes replaced by “*any direct or indirect loss*” or some other ones with similar meaning.

B. Operation of warranties and representations

801. In spite of the ubiquity of the clauses of “representations and warranties” in China, generally speaking, they fail to provide the expected protections, as is demonstrated in the very fact that aggrieved buyers of shares seldom resort to the judicial system to defend their interests (1). This rarity, in our opinion, is mainly caused by the difficulty in proving the existence of damage and the amount of indemnification (2).

1. Inefficiency of the warranties and representations

802. In China, purchases of shares take place on a daily basis. Common sense tells us that out of the numerous purchases, there must be many cases where the buyers are not satisfied because of either the unexpected liability assumed by the target company or the depreciated value of assets thereof. If the warranties and representations are effective, we should have seen many successful claims by the aggrieved buyers.

As we have mentioned *supra*, it is true that the conventional warranties and representations have helped the aggrieved buyers in winning a large portion of the cases: to some extent, the very existence of the conventional warranties and representations is a must for a successful claim by an aggrieved buyer of shares. However, it is also true that the absolute number of cases where an aggrieved buyer of shares would like to resort to judicial system to defend his interests is still small even in the presence of the conventional warranties and representations. In other words, the existence of the conventional warranties and representations has only a very limited effect in facilitating the acquisition of remedy. In this sense, it is fair to say that the conventional warranties and representations in China is not so effective.

2. Difficulties in the warranties and representations

803. We have consulted an attorney friend about why the warranties and representations are not so effective. He has enumerated several reasons, one of which is the difficulties in proving the damage incurred by the target companies and the buyers. He further added that although it seems that the wording like “any economic damage” “any direct or indirect loss” in the clauses of representations and warranties is panacea, they are actually not that efficient as there is always a necessity to prove the existence of a loss on the part of the company, to prove the fact that the loss has been caused by an event covered by the clauses, and to prove the amount of the loss. Due to the costs associated with the demonstration of all the elements, it is sometimes not worthwhile to claim indemnifications. By contrast, in order to annul a contract on the basis of *dol*, what needs to be demonstrated is only the violation or inexactness of the warranties and representations, which is much easier to conduct.

III. Comparison

804. The *garantie comptable*, in our eyes as foreigners, is an extraordinary invention by the brilliant French practitioners. However, there is now a trend in France that the Anglo-Saxon derived *garanties extra-comptables* are used more and more often, although many authors insist on their complementary nature.⁶¹⁷ This trend, coupled with the problem of double coverage that seems to deny the possibility of the co-existence of *garanties comptables* and *garanties extra-comptables*, makes us worried that this ingenious technique, before spreading to China and other corners of the world, might fall into disuse eventually in its homeland France. Luckily, a comparison of the enforcement methods of anti-overpricing mechanisms in China (equivalent to the *garanties extra-comptables* in France) and in France (both the *garanties comptables* and *extra-comptables*) will reveal that the *garanties extra-comptables* are insufficient for protecting the buyers of shares who care about the integrity of the patrimony of the target companies (A), and therefore cannot replace the *garanties comptables* (B).

A. Insufficiency of *garanties extra-comptables*

805. Compared to *garanties comptables*, it is undeniable that *garanties extra-comptables* have their own advantages: they have a wider scope of application and thus are able to protect the buyers of shares against more risks related to the patrimony of the target companies. However, it is also undeniable that the *garanties comptables* have their disadvantages: their application is not automatic and entails hard labour of the buyers in proving damage incurred by the violation or inexactness of the *garanties extra-comptables* that are not necessary in *garanties comptables*.

⁶¹⁷ V. A. COURET et P. ROSENPICK, *L'articulation entre déclarations et clauses de garantie d'actif et de passif*, Dr. et patr. novembre 2008.

806. This onus of demonstrating the damage is not ignorable, as to some extent it may turn the *garanties* into *déclarations*, the latter being quite impotent in protecting the buyers as the remedies available therein are very limited. French authors generally believe whether a *déclaration* should qualify as a *garantie* depends upon whether it is equipped, or can be interpreted judicially to be equipped, with an autonomous sanction. However, the Chinese experience reveals that the risk of identification of *déclarations* and *garanteis extra-comptables* is in fact inherent, as the presumed autonomous sanction of *garanties extra-comptables* may be difficult enough that to apply the sanction may become unattractive. In other words, the mere existence of a promise by a seller of shares that he shall be liable for such and such events is insufficient, what is needed is actually a mechanism by which the content of the said liability, if to occur, can be automatically determined.

B. Indispensability of *garantie comptables*

807. The brilliant French invention --- the *garantie comptable* --- as a technique providing automatically determined and directly enforceable indemnification, is a perfect tool to protect buyers of shares, and to some extent indispensable if the buyers would not like to be haunted by the arduous task of demonstrating the amount of indemnification. The indispensability of this mechanism, can be demonstrated by comparing the destinies of the French buyers of shares and their Chinese counterparts: the large number of litigations arising from disputes about *garanties comptables* in France indicates the willingness of buyers to rely on this kind of mechanisms, and in turn indicates its efficiency; whereas the small quantity of litigations in China arising from disputes on the patrimony of the target company serve as a good example illustrating what it would look like in a world without *garanties comptables*.

Conclusion of Section II

808. The most noticeable difference between the practices of the two countries in terms of enforcing the anti-overpricing techniques is the existence or not of *garantie comptable*. The Chinese experience serves as a very good example illustrating the consequence of its absence, which helps to manifest the utility and indispensability of this brilliant French invention whose importance is to some extent in peril in its homeland.

Conclusion of Chapter I

809. In this chapter, we have demonstrated that French practitioners can learn from their Chinese counterparts in expanding the scope of objects of the anti-overpricing mechanisms. In addition, French practitioners should dedicate to maintain a brilliant French invention: the *garanties comptables*.

Chapter II. Anti-competition techniques

810. Traditionally, the most used techniques against competition by the seller of shares after the purchase of shares is *clauses de non-concurrence*. However, we can see that this technique is riddled with shortcomings (Section I) and should be replaced by more advanced ones (Section II).

Section I. Shortcomings of the traditional non-competition clauses

811. A comparison (C) of the French (A) and Chinese situations (B) shows that applying traditional non-competition clauses to protect the interests of their creditors -- the buyers of shares – faces some inherent problems that are not particular to any one country.

I. Problems in France

812. The efficacy of a non-competition clause depends upon whether the creditors can be properly and swiftly remedied if a breach of such clause occurs. Unfortunately, traditional non-competition clause may not be efficient enough in providing the necessary remedies because of two problems: the problem in establishing the breach (1); and the problem in applying remedies to the breach (2)

A. Problems in establishing a breach

813. To successfully establish a case against the seller of shares for breaching non-competition obligation, the buyer should establish several facts.⁶¹⁸ Unfortunately, because of the the same reasons for the special conditions for validity of non-competition clauses (to protect the individual liberties and the competition in the market⁶¹⁹); and for the reason of “interpretation in favour of debtors” (article 1190 of *code civil*), French courts adopt a restrictive method in interpreting the terms of the clause, which makes it somewhat difficult for creditor to establish the facts.⁶²⁰ the seller of shares has to firstly prove that the seller is actually the debtor of the clause (1). After that, the creditor has to further establish that the debtor has works (3) or owns (4) a competing enterprise (2).

1. Difficulty in establishing that the seller of shares is the debtor of the clause

814. Normally speaking, in purchase shares, if the buyer wants to impose a conventional non-competition obligation upon the seller, he would usually do so thus

⁶¹⁸ V. Cass. soc., 25 mars 2009, n° 07-41894; JCP S 2009, 1241, obs. I. BEYNEIX; Cass. soc., 22 mars 2006, n° 04-45546; Cass. soc., 13 mai 2003, n° 01-41646.

⁶¹⁹ V. Cass. soc. 26 mai 2010, n° 08-43105; Cass. soc., 20 nov. 2013, n° 12-20074; JCP S 2014, n° 1122, note I. BEYNEIX; D. 2014, p. 319, note S. Le GAC-PECH; RDC 2014, p. 203, obs. O. DESHAYES; Cass. 1re civ., 4 février 2015, n° 13-26452; RTD civ. 2015, p. 409, obs. P.-Y. GAUTIER.

⁶²⁰ V. Y. SERRA, La non-concurrence en matière commerciale sociale et civile, Dalloz, 1991, n° 342.

identifying the seller of shares with debtor of non-competition obligation. However, due to some reasons, for example where the seller is a minority shareholder and has sold the shares through a *porte-forte*, the seller may not necessarily have signed the non-competition clause, in which case the buyer of shares (the creditor) would probably fail his case because French judges held explicitly that the other sellers who have not signed the clause are not bound by it.⁶²¹

2. Difficulty in establishing the existence of a competing enterprise

815. If the seller of shares is identified as the debtor of the non-competition clause, the buyer has to prove that the seller works for or owns the competing enterprise. Due to the restrictive interpreting method adopted by French judges, for an enterprise to be considered to be competing, it has to engage in activities explicitly stipulated “*dans les prévisions de la clause*”.⁶²² In other words, even if an enterprise provides service or goods similar to that of the company whose shares have been sold (the target company) --i.e the enterprise objectively competes with the target company – it is not considered to be competing for the purpose of applying non-competition clauses. This makes it necessary for buyer of shares to define in details the scope of competing activities prohibited by the clause.

3. Difficulty in establishing the function the debtor plays in the competing enterprise

816. Once the buyer has proved that an enterprise is competing with the target company, if the seller works for the competing enterprise instead of owing it, French judges require that he should further prove that the role he plays in this enterprise is “*de même nature et correspondaient à*” one that helps the enterprise to compete with the target company.⁶²³ The mere establishment of the fact that the debtor has worked for a competing enterprise is insufficient to establish a case.⁶²⁴ This requirement actually imposes a heavy burden of proof upon the buyer of shares because here he is faced with a task of proving an internal affair of another company.

⁶²¹ V. CA Toulouse, 19 avr. 2007, D. 2008, pan. 249, obs. M. COMY.

⁶²² V. Cass. com., 25 juin 2013, n° 12-23811 : D. 2013, p. 2812, obs. M. GOMY.

⁶²³ V. Cass. soc., 20 nov. 2013, n° 12-20074; Cass. soc., 18 déc. 1997, n° 95-42201.

⁶²⁴ V. Cass. soc., 12 mai 2004, n° 02-40490.

4. Difficulty in establishing the fact that the debtor actually owns the competing enterprise

817. The non-competition clauses usually prohibit the debtors from establishing a new competing enterprise. To circumvent this prohibition, the debtors may resort to a “puppet” – he may ask someone he trusts to establish a company for him, and run the company and benefit the profits himself: normally a non-competition clause does not bind the he espouse or the relatives of the nominal debtor due to the privity of contract (article 1199 of *code civil*).⁶²⁵ However, if the buyer of shares can prove a special relation between the debtor and the nominal owner of the competing enterprise, he may still establish a breach of the clause.⁶²⁶ The problem is that the buyer should prove this special relation, which may not be an easy task.

B. Problems in applying remedies to the breach

818. When there remains a large portion of price unpaid, an efficient sanction the aggrieved creditor (buyer of shares) may resort to is the refusal to pay the price. He may either evoke *exception d'inexécution* which only temporarily suspends his obligation of payment⁶²⁷ and constitutes a pressure on the debtor; or evoke the unilateral reduction of price, which allows him to permanently be released from paying certain amount that equals to his damage.

However, such measures of refusal to pay are not effective if the creditor has already paid most of the price. In this situation, he should bring an action before a court, either demanding that the court issue an injunction to the debtor (1) or claiming damages against him (2).

1. Specific performance.

819. -In France, there is little legal obstacle in applying this sanction. Even before the reform of *code civil* in 2016 when *obligation de ne pas faire*, to which non-

⁶²⁵ V. Cass. soc., 4 juin 1998, n° 95-43133.

⁶²⁶ V. Cass. com., 10 mars 1982, n° 80-14579.

⁶²⁷ V. Cass. soc., 22 oct. 1997, n° 94-45186; Cass. soc., 5 mai 2004, n° 01-46261.

competition clauses certainly belong to, was unable to be remedied by specific performance (former article 1142 of *code civil*), French judges have ordered a defaulting debtor of a non-competition clause to shut down his competing business. In fact, the creditor may demand such sanction even if the clause has made it clear that the breach shall be remedied by damages.⁶²⁸ And the judges have little discretion in deciding whether to grant such sanction – as long as the creditor demand it, the judge has to satisfy such a demand.⁶²⁹ After the reform of October 2016 whereby the *code civil* eliminates the distinction between *obligation de faire* and *obligation de ne pas faire* and excludes the specific performance to only those obligations whose “*exécution est impossible ou s’il existe une disproportion manifeste entre son coût pour le débiteur et son intérêt pour le créancier.*” The applicability of specific performance to non-competition clauses has been even more confirmed.

820. -Besides the applicability, another advantage of specific performance is its efficiency. French judges usually use *astriente* to pressure the defaulting debtor to shut down the competing business by ordering him to pay *astreinte*,⁶³⁰ which constitutes a heavy pressure on the part of the debtor and usually may effectively oblige the debtor to closing the competing business.

2. Damages

821. The aggrieved buyer can also demand damages (new article 1231 of *code civil*) for the breach. The problem is that the buyer should prove the amount of his damage in order to claim damages (i). To save the problem related to evaluation of damage, the buyer may resort to clause of liquidated damages, although having the risk of being reduced in the amount (ii). One advantage of French law is that it allows damages to coexist with termination (iii).

⁶²⁸ V. CA Bordeaux, 1re ch. B, 11 déc. 2007, n° 06/05356: dr. soc. 2008, comm. 115, obs. M.-L. COQUELT.

⁶²⁹ V. Cass. com., 20 janv. 1981, n° 79-16.521

⁶³⁰ V. Cass. com., 12 mars 1991, n° 89-13734; Cass. soc., 13 nov. 1990, n° 87-40890. – CA Paris, 8 juin 1989 : D. 1990, somm. p. 80, 2e esp., obs. Y. SERRA.

i. Evaluation of damages⁶³¹

822. Article 1231-2 of *code civil* (former article 1149) provides for the measure of calculating damage: “*Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé.*” We believe in sales of shares, this is inherently difficult to prove. The French judges generally identify *la perte qu'il a faite et gain dont il a été privé* in this case with the profits gained by the defaulting debtor.⁶³² We believe this is unsatisfactory because of two reasons: firstly, it is difficult for the creditor to prove how much has the defaulting debtor made; and secondly, without the competition by the debtor, he may have earned much more than what the debtor has gained.

ii. Predetermination of damages

823. To solve the problem of proving the amount of damage suffered, creditor of the clause may insert a clause of liquidated damages (*clause pénale*) in the contract, which fixes in advance the damages that the defaulting debtor has to pay.⁶³³ Here, the problem is that the judge has the discretion to reduce the amount if he finds it too excessive (article 1231-5) and French judges did reduce the amount set in clauses of liquidated damages.⁶³⁴ This authority of judges makes the enforceability of the clause of liquidated damages somewhat unpredictable and unsatisfactory.

iii. Accumulability of damages

824. If the breach of non-competition obligation is “*suffisamment grave*” (new article 1224 of *code civil*), the buyer may demand to terminate the main contract,⁶³⁵ - the sale of

⁶³¹ Before the reform some believe that it is unnecessary to prove damage in non-competition clauses (V. CA Chambéry, 11 avril 2006 : D. 2006, p. 2923, obs. M. GOMY; Cass. com., 18 décembre 2007: Contrats, conc. consom. 2008, comm. 86, obs. M. Malaurie-Vignal; the dissenting opinions: C.-E. Bucher, *L'inexécution du contrat de droit privé et du contrat administratif*, Étude de droit comparé interne, préf. L. Leveneur, Nouv. bibl. thèse, Dalloz, vol. 102, 2011, n° 261, p. 221; Ph. Rémy, *La responsabilité contractuelle : histoire d'un faux concept*: RTD civ. 1997, p. 323). Since the reform of *code civil* in October 2016, we believe there is no necessity of discussing it now: proof of damage is undoubtedly necessary. (V. H. Lécuyer, *L'inexécution du contrat* : Contrats, conc. consom. 2016, Dossier 7, n° 21).

⁶³² V. Cass. soc., 10 oct. 1984 : D. 1985, inf. rap. p. 389, obs. Y. Serra.

⁶³³ V. Cass. soc., 27 novembre 2013, n° 12-20.537; Cass. 1re civ., 17 décembre 2015, n° 14-18.378: Resp. civ. et assur. 2016, comm. 88, note H. Groutel.

⁶³⁴ V. Cass. com., 27 septembre 2011, n° 07-10.113; Cass. soc., 5 juin 1996, n° 92-42.298: D. 1997, somm. p. 101, obs. Y. Serra; the reduction is not necessary (V. Cass. com., 21 septembre 2011, n° 00-18.265; Cass. soc., 13 décembre 2000, n° 98-46.384.)

⁶³⁵ V. Cass. 1re civ., 6 mars 1996 : D. 1997, somm. p. 97, obs. Y. Serra.

shares in this dissertation. Thanks to new article 1217 of *code civil*, even if the sale has been terminated, the seller still has the possibility of claiming damages.

II. Problems in China

825. Chinese buyers of shares face problems similar to that in France: to establish a breach has occurred (A) and once it has been done, to find a proper sanction to remedy the breach (B).

A. Problems in establishing a breach

826. Chinese judges generally adopt a lenient method in interpreting the meaning of the clause (1), except for the question of whether the buyer is a debtor of the clause (2). However, the lenient interpretation does not guarantee an easy establishment of the breach (3).

1. Lenient interpretation methods adopted by the courts

827. Usually, for a debtor to commit a competing activity, he should either own his proper competing enterprise or work for a competing enterprise of someone else. Chinese judges interpret broadly the two conditions – the existence of a competing enterprise (i) and the holding or working relation that the seller has with the competing enterprise (ii).

i. Chinese judges interpret broadly the scope of competing enterprise.

828. In China, in order to be qualified as an enterprise competing with the creditor, it is not necessary for it to trade in a field specifically stipulated in the clause. In fact, it does not even have to fit the ordinary definition of “competition”—providing similar goods or service. Chinese courts, by explicitly holding that “competition” in this sense includes both direct and indirect competition, are willing to consider an enterprise to be competing with the creditor as long as the operation of the enterprise is in some sense to the detriment of the creditor.⁶³⁶ To some extent, if the buyer wants to find some clues of competition in the company which the

⁶³⁶ See (2015) Beijing IP court final instance, n° 00318 ((2015) 京知民终字第 00318 号).

seller owns or works for, as long as it is not too far-fetched, usually it would not be too difficult to find them.

ii. Chinese judges interpret broadly the scope of the debtor's competing activities.

829. If the seller implicitly establishes and owns a competing enterprise by resorting to someone who has a special bounding with him, as long as such special bounding can be proved, Chinese judges will consider the enterprise to be owned by the debtor and thus hold him liable for a breach. The special bounding is presumed in the case of spouse or close relatives.⁶³⁷

On the other hand, if instead of owning the competing enterprise, he works for it, in most cases, all the creditor has to prove is the employment relation between the debtor and the enterprise. Generally, the fact that the seller has worked for a competing enterprise presumes that he is competing with the creditor. Unless he can prove that his function in the competing enterprise serves absolutely no harm to the creditor.⁶³⁸

2. Difficulty in establishing that the seller of shares is the debtor of the clause

830. Because of the principle of interpretation to the benefit of the debtor, Chinese courts take a restrictive method in determining whether a seller is also the debtor of the non-competition clause.⁶³⁹ For example in a 2011 case where a share purchase agreement contains an article 5 which provides that: “*since then, all relatives and friends of the seller shall forbear from operating business of napkin and hotel toiletry.*” Normally we would expect that this article should be interpreted to bind not only the “relatives and friends” of the seller, but also the seller himself. Yet the final instance court denied such interpretation, and instead, held that the article only tends to bind someone other than the parties of the contract.⁶⁴⁰

⁶³⁷ See (2006) Changzhou 2nd civ. final instance n° 375 ((2006) 常民二终字第 375 号判决书) ; (2015) Beijing IP court final instance, n° 00318 ((2015) 京知民终字第 00318 号) .

⁶³⁸ See X. ZHANG, On non-competition obligations, Journal of Renmin University, 1-1997 (张晓明: “论竞业禁止”, 《人民大学学报》1997年第1期)。

⁶³⁹ See X. GUO, *A study on legal issues related to transfer of business*, Eastern China University of political science and law (郭珣: “营业转让法律问题研究”, 华东政法大学硕士论文 2016 年); H.CHU, *A study on legal issues related to non-competition obligations in transfer of business*, Inner Mongolian University 2016 (褚红娜: “营业转让中的竞业禁止义务研究”, 内蒙古大学硕士学位论文, 2016 年) .

⁶⁴⁰ See (2011) Chongqing 1st intermediary court civ. 2nd instance n° 1072 ((2011) 渝一中法民终字第 1072 号).

3. Difficulty in proving the facts required to establish a case

831. Although normally Chinese courts interpret broadly the clause, the buyer still has to prove that the seller has worked for a competing enterprise; or that he has some special relations with a nominal shareholder of a competing enterprise. The failure to prove such facts will necessarily entail a failure of the case.⁶⁴¹

Due to the special culture of “acquaintance society” in China, this task may not be very easy. To hide the relations, the debtor may choose not to sign the employment contract with the competing enterprise; or to use a “puppet” to nominally hold the shares of the competing enterprise. In other societies, this may be dangerous because the debtor may lose protection of labour law or lose his shares, and thus the debtor can only resort to his spouse or relatives, who are usually trustworthy, to achieve this end, and his secrets would be easily discovered by courts because of the apparent kindred between the puppet and the defaulting debtor. But in China, owing to the culture of “acquaintance society”, a person always has several non-blood-related “sword friends” whom he believes are trustworthy (although it may not be true). Thus, it is very common for debtor of non-competition clauses, in order to hide his special relation with a competing enterprise, to have a “brother” to hold the shares for him, or to not sign any employment contract with him, making it difficult for the creditor to either discover the special relation, or to prove it.

For example, a senior lawyer from Sichuan province told us, that in 1980s, it used to be a common “fraud” for scooter dealers to sell their profitable business at a high premium to an ambitious layman who was eager to make a fortune, promising that he would retire and indicting that he want the layman to be his “disciple” to “inherit his glorious cause”. Yet in reality the seller would immediately establish a new scooter-selling business in the name of his other “disciple” or “blood-brother” and continue to deal with his old clients, making the sold business nearly worthless. The buyer of the business, even knowing that the seller has reopened a business and usurped the clientele he has bought at a high price, was able to do nothing because he did not know which scooter-dealing company belonged to the seller, letting alone proving the implicit holding relation.

⁶⁴¹ See (2012) Shanghai 1st intermediary court 4nd civ. 2nd instance n° 1408 ((2012)沪一中民四(商)终字第1408号).

B. Problems in applying remedies to the breach

832. Overall, the sanctions to breach of non-competition clauses provided in Chinese law is not very satisfactory. The most nature remedy that an aggrieved buyer of shares may seek would be refusal to pay the price. But sometimes Chinese courts may even deny this right of refusing to pay (1). Furthermore, Chinese courts generally refuse to order specific performance (2). The only plausible sanction – the damages --- also raises some problems.

1. Refusal to pay the price

833. If an aggrieved buyer of shares would like to temporarily stop paying the price in order to impose upon the defaulting seller a pressure, he should evoke “*exception d'inexécution*” (article 66, 67 and 68 of Chinese Contract Law). However, Chinese courts may refuse to allow the application of this sanction for the reason that “the non-competition obligation is not the reciprocal obligation of payment of price”.⁶⁴² If By contrast, the buyer would like to permanently be released from the obligation of payment, under Chinese law he can only demand a termination of the sale. However, in this way he would lose the right to claim contractual damages because under Chinese law termination of contract is not accumulated with damages.

2. Specific performance

834. Chinese courts normally believe that any obligation involving the person of the debtor falls into the category of obligations “not suitable or too costly for forced execution” (article 110 of Chinese Contract Law), and non-competition obligation is just “obviously not suitable for forced execution”⁶⁴³, thus denying any application of specific performance in non-competition obligations. Besides, even if specific performance is allowed, because of lack of *astreint*, it is imaginable that its effects will not be satisfactory.

3. Damages

⁶⁴² See (2014) Jiaying com. Final instance n° 580 ((2014) 浙嘉商终字第 580 号) ; another judgement of opposite opinion: (2008) Shanghai 1st intermediary court 3rd civ. Final instance n° 68((2008)沪一中民三(商)终字第 68 号).

⁶⁴³ See (2008) Shanghai 1st intermediary court 3rd civ. (com.) final instance n° 68 ((2008)沪一中民三(商)终字第 68 号).

835. Generally, damages are accorded according to the damage suffered by the creditor, which requires him to prove the amount of damage incurred to him (i); to save the trouble of having to prove damage, he may choose to add a clause of liquidated damages (ii). Both methods are not without problems.

i. Evaluation of damage

836. We do not know the criteria that Chinese judges use to evaluate damage and to grant damages. In fact, what we do know is what standard would be rejected. For example, Chinese courts have explicitly refused a claim of damages based upon the expected revenue reduced by the breach, holding that the seller is unable to prove a causal relation between the breach and the expected lost revenue.⁶⁴⁴

What we do know is generally speaking the amount that Chinese judges will grant is generally way lower than what creditors would claim. Some authors believe this has something to do with the low income of Chinese judges, which disable them to properly appreciate the amount of damage in commerce.⁶⁴⁵

ii. Predetermination of damages

837. To avoid the trouble of proving the amount of damage and that of intervention of judges in determining the amount of damages, Chinese practitioners usually would insert a clause of liquidated damages in the contract. The problem is according to article 114 of Chinese Contract Law, the judges have the discretion of reducing the amount set in the clause of liquidated damages, and in cases involving non-competition clauses, they will almost always reduce the amount to a level they believe to be justified and way lower than what the aggrieved creditor have expected.⁶⁴⁶ It is foreseeable that although Chinese practitioners usually insert a clause of liquidated damages, they may not expect to be able to completely implement it.

⁶⁴⁴ See (2015) Beijing IP court final instance, n° 00318 ((2015) 京知民终字第 00318 号) .

⁶⁴⁵ See *Poor judges cannot grant fair damages* (“贫穷的法官判不出公正的赔偿”) <http://chuansong.me/n/396756434039>.

⁶⁴⁶ See (2015) Beijing IP court final instance, n° 00318 (2015) 京知民终字第 00318 号; (2006) Changzhou 2nd civ. Final instance n° 375 ((2006) 常民二终字第 375 号判决书) .

III. Comparison

838. A traditional non-competition clause stipulates that seller of shares should refrain from engaging in certain activities competing with the creditor and the company whose shares have been sold. Comparing what we have presented *supra*, we can see that this kind of clause is difficult to apply because of two kinds problems existing in both countries: the problem in establishing a breach (A) and that in having the breach remedied (B). The two problems haunted traditional non-competition clauses, constituting the main shortcomings of such clauses (C)

A. Difficulty in establishing a breach

839. Comparing the situations in the two countries, we can see that in order to prove a breach, the creditor faces several problems. Among these problems, some are non-inherent ones and usually are able to be solved by better drafting of the clause in advance (1); yet there are some difficulties that are inherent to such clauses and cannot be easily solved if the creditor insists on using this traditional mechanism (2).

1. Non-inherent problems

840. The non-inherent problems are mostly caused by the restrictive interpretation methods adopted by the courts. If the courts adopt a restrictive method, the creditor will have to prove more facts than if the courts adopt a more lenient method in interpreting the clause. For example, both countries are strict in determining whether the seller to be held liable is the debtor of a non-competition clause. Thus, a buyer of shares has to prove that the seller has signed the clause and the wording of the clause conveys that the seller promises to refrain from certain activities competing with the creditor and the sold company. And Chinese judges take a lenient position in interpreting whether the debtor has committed a prohibited competing activity whereas their French counterparts are somewhat more restrictive in this regard. Thus, French creditors have to prove more facts to establish a breach (the debtor plays an important role in a company whose business overlaps with those prohibited by the clause) than their Chinese counterparts (who has to prove only that the debtor works for a company whose business may have a negative impact on that of the creditor).

We believe this kind of problems have little significance because they can be easily solved by a better drafting of the clause by specifying in details the identification of the debtor and the definition of competition in a way more advantageous to the creditor. Although doing so may undergo risks associated with validity of the clause in France, which imposes special restrictions to the clause (see section I).

2. Inherent problems

841. Compared to the breach of other conventional obligations, the breach of a non-competition clause is particularly difficult due to two problems inherent to non-competition clauses. For one thing, the breach of the clause is difficult to even be discovered by the creditor (i). For another, even if the creditor somehow does find their occurrence, it is still inherently difficult to prove it (ii).

i. Difficulty to discover the breach

842. The breach of non-competition clause is inherently difficult to find because of two reasons: the obligation is an *obligation de ne pas faire*; and such an *obligation de ne pas faire* is a particular one of its kind.

843. -The non-competition obligation is an *obligation de ne pas faire*. As the creditor of an *obligation de ne pas faire*, the creditor of a non-competition clause can not immediately get aware of the breach, in contrast to the case of an *obligation de faire* where the breach is presumed until the debtor has actively performed it.

844. -The non-competition obligation is a special *obligation de ne pas faire*. Among *obligation de ne pas faire*, non-competition obligation is also special. The specialty here is that the effect of the breach usually not very apparent. In an ordinary *obligation de ne pas faire*, for example, an obligation of refraining from constructing any building on a given land lot has a direct consequence immediately perceivable: on the land now stands a new building. By contrast, the effect of non-competition obligation, except for something like directly establishing a competing restaurant just adjoining that of the creditor where the

debtor works as chef himself, is usually not immediately perceivable. It can be only later indirectly detected by some signs like loss of clientele or a constant reduction of revenue.

ii. Difficulty to prove the breach

845. If the creditor has found the trace of a breach, he is now faced with the task of proving it. The facts that need to be proved may vary from one country to another – for example in France the creditor should prove that the debtor has play an important role in a competing enterprise whereas in China, all the creditor has to prove is that the debtor has worked for a competing enterprise – Yet, there is always one universal fact that are needed to be proved in every country: the debtor has established a competing enterprise for his own benefits or works for a competing enterprise, in other words, the debtor has a special relation with a competing enterprise, to prove which would be inherently difficult for two reasons:

846. **-For one thing, the debtor may resort to a puppet to conceal this special relation.** In China where the personal bondage is highly appreciated, this practice is prevalent. But we believe this practice of concealing the special relation is not particular in China: if the gain the debtor can obtain from competing with the creditor outweigh the loss he will suffer if he is betrayed by his puppet, a rational person will choose to do it.

847. **-For another, the creditor has to always be ready to investigate again for evidence of breach.** Unlike breach of other obligations, to which a remedy at one go is able to completely compensate the loss that the creditor has suffered; the risk of breach of non-competition clause will not be eliminated even if one breach has been sanctioned: it is entirely possible for the debtor to take on a competing business again. This makes it necessary for the creditor of the clause to always be vigilant on the debtor, which consumes both time and money.

B. Difficulty in remedying the breach

848. In the event of a breach, the creditor may choose to demand an order of specific performance from the court, to claim damages, or to withhold the price that is supposed to pay. However, there is one problem inherent to all these sanctions (1). If the creditor wants

monetary compensation, the problem is to prove the amount (2). If instead, he wants just that the debtor stops the breaching activities, it is less a problem in France than in China (3).

1. Problems common to all sanctions

849. As we have presented, one specialty of breach of non-competition obligation is that it can constantly occur even after the defaulting debtor has been sanctioned. Yet all of the sanctions can only remedy the damage that has already occurred: An order of specific performance may shut down a competing enterprise, but it does not prevent the debtor from re-establishing another after the shutdown. Also, claiming damages may remedy the damage caused by a breach already happened, but the creditor has no ground to claim damages for a future breach which hang over the creditor like a sword of Damocles.

2. Problems in claiming monetary compensation

850. Whether an aggrieved creditor chooses to claim damages or to withhold the price supposed to pay (either on the basis of *exécution d'inexécution* or unilateral reduction of price), he would bear the burden of proof of the damage caused to him if the debtor contests. The solution to this problem – a clause of liquidated damage, however, is restricted in both countries by the possible judicial intervention.

Also, in China there may be some special problems related to applicability of certain sanctions, which needs the heed of French practitioners if they face a case involving Chinese law.

3. Problem in demanding specific performance

851. Specific performance is an efficient and effective sanction if implemented. But in China, both its applicability and its method of application may be problematic. This sanction is less a problem in France than in China. But even if in France, it should be noted that it is still not satisfactory because it cannot remedy future breaches which may constantly happen.

C. Difficulties constituting the main shortcomings of non-competition clauses

852. Here, we would like to summarize all the shortcomings of traditional non-competition clauses. We believe the problems lie in three aspects: 1. Creditors of such clauses have to detect and prove an easily concealed breach of an obligation to abstain (*obligation de ne pas faire*). 2. The breach of the clauses may easily occur again after the debtor has been sanctioned. The creditors thus have to be always ready to be involved again in another lawsuit. 3. If the creditors choose to claim damages, they have to prove the damage caused to them, which is not apparent in most cases. And this problem cannot be easily solved by resorting to a clause of liquidated damages because the amount fixed in such clause may be reduced by judges.

Conclusion of Section I

853. Traditional non-competition clauses, which are widely used both countries and consist of an obligation to abstain are inherently problematic.

Section II. Improvement of the traditional non-competition clauses

854. Previously we have presented the shortcomings of a traditional non-competition clause. Here, a comparison (III) of the solutions to the problems in France (I) and China (II) will inspire suggestions to the improvement of such clauses.

I. Solutions in France

855. In France, most clauses with the purpose of protecting the clientele or other secrets of enterprises, as we believe, can be qualified as traditional non-competition clauses (A), with the exception of *clauses de non-sollicitation* (B). Also, a British invention of “Garden leave clause” should be mentioned, as France and Britain have such a close bonding (C).

A. Traditional non-competition clauses

856. In France, there are several conventional clauses with different names yet with similar functions as a traditional non-competition clause. For example, a *clause de non-rétablissement* or *clause de non-installation* prohibits its debtor from establishing a new competing enterprise within certain distance from the sold business.⁶⁴⁷ A *clause de non-réembauchage* prohibits its debtor from being employed by another employer. A *clause de non-divulgarion* or *clause de secret* or *clause de confidentialité* prohibits its holder from disclosing any secrets of the creditor.⁶⁴⁸ But in essence, they are all traditional non-competition clauses in the sense that they all impose upon the debtors an *obligation de ne pas faire*, and in most case, need judicial intervention to remedy the breach. Their only difference is the scope of obligation of non-competition imposed upon their debtors.

B. *Clause de non-sollicitation*

857. *Clause de non-sollicitation* is different from traditional non-competition clauses in the debtor of the clause. The obligation stipulated in a traditional non-competition clause is

⁶⁴⁷ V. R. LIBCHABER, *Clause de non-concurrence consentie par le cédant d'un fonds de commerce lors de sa cession, est-elle transmise aux sous-acquéreur en cas de nouvelle cession après partage?*, D. 1998. p. 111.

⁶⁴⁸ V. M.-A. MOREAU, *La protection de l'entreprise par les clauses de non-concurrence et de confidentialité*, Dr. et patrimoine 2002, n° 102, p. 81 s.

imposed upon a person whom the creditor do not want to participate in competing activities with him whereas the obligation is imposed upon potential employers in a *clause de non-sollicitation*, whereby these employers are forborne from hiring certain persons stipulated in the clause.⁶⁴⁹ This clause, by getting the help of other competing enterprises, makes it difficult, if not completely impossible, for key employees to work for a competing enterprise, thus reducing the risks of undesirable competition.

C. Clauses of “garden leave”

858. The British invention of “clause of garden leave” constitutes a practice whereby an employee who is going to leave his employer and has terminated his work, remains in the payroll of the employer and continue to receive salaries, in exchange for be continually subjected to the management and authority of the employer, which necessarily mean that the employee would continue to bear all the legal non-competition obligations for incumbent employees and managers.⁶⁵⁰ In sales of shares, the value of clientele and other intangible assets can be paid to the seller as salaries for a garden leave, as the company continue to hire him and allow him to do nothing.

II. Solutions in China

859. Since long time ago Chinese practitioners have realized the indispensable inefficiency and sometimes ineffectiveness of traditional non-competition clauses. In practice, Chinese merchants and practitioners have invented a series of mechanisms to achieve this end, other than simply imposing an obligation to abstain upon the person of the debtors. In generally, these mechanisms function in two ways: they may either somehow stymie or even deprive the sellers of the possibility of continuing to compete in the same trade (A); or impose upon the sellers an obligation to actually “deliver the clientele” (B).

A. Depriving the sellers of the possibility of continuing to trade

⁶⁴⁹ V. V. A.-S. LUCAS-PUGET, *Clause de non-sollicitation de collaborateurs*, Contrats, conc. consom. 2016, 4 ; S. BENILSI, *La clause de non-sollicitation*, JCP S 2007, p. 1976 ; J. BECKHARD-CARDOSO et M. DESPLATS, *Non-concurrence : trois clauses, deux clauses, une question*, JCP E 2010, p. 1157.

⁶⁵⁰ See C. A. SULLIVAN, *Tending the Garden: Restricting Competition via “Garden Leave”*, 37 Berkeley J. Emp. & Lab. L. 293 (2016).

860. Since dynasty era, a sale of business may entail a non-regrettable retirement of the seller and an irredeemable transfer of all the clientele and other incorporeal assets of the business to the buyer (1). After the readoption of capitalism in 1979, such a practices resurged for a while before it was finally prohibited by the government (2).

1. The practice in ancient time

861. At least as early as in the Qing dynasty, non-competition obligations had started to appear in sales of business, in order for the sellers to get a higher price. Usually, to make the promise of non-competition public, “a ceremony of retirement” for the seller would be held and representatives of upstream and downstream industries, representatives of the guild of his industry, local officials in charge of commerce, retired officials well learnt in Confucius teachings, and even local mafias would participate in the ceremony to witness the “retirement press”. In the ceremony, the seller would publicly announce that he would “completely retire from all the bothering business, abandon all the mundane and vulgar affairs, spend the rest of my life in studying and learning the literatures of the sages (Confucius and other scholars)” and let the buyers “inherit all the humble glories acquired during the operation of the business”. If the seller was a renowned businessman, the buyer may demand to be his “disciple” or “apprentice” and if the seller accepted the deal, the price the buyer has to pay may be significantly reduced. But the buyer would then assume the obligation of disciples to “support his master for the rest of his life and treat him in a manner as revered as to his own father”.

This retirement ceremony was tantamount to a death penalty to the career of the seller in the industry. Since then, he would be deprived of all the rights to establish a new business in the same trade. Normally, he would observe perfectly this non-competition obligation (or retirement obligation) especially if he accepted to become the “master” of the buyer of the business. But if he ever dared to breach the obligation, other dealers of the same trade and those of the upstream and downstream would come to boycott him under the command of the guild. Sometimes even the local officials would intervene and go so far as to find him criminal liable for being “treacherous and disobedient to the teaching of the sage”. If some suppliers or clients would collude with him, they would receive similar punishments from the government and the guild. In a case where a boss of a silk shop in the city of Suzhou has promised to retire from the business and sold it to one of his apprentices in exchange for

the support for the rest of his life, unsatisfied with the alimony (which is not fixed in paper but rather determined by the social norm and the conscience of the buyer), the master (seller of business) secretly contacted a textile mill whose boss was one of his best friend, and the two established a new silk shop in a nearby city of Wuxi. Eventually this collusion was discovered and the guild of silk commanded that since on no silk shop in Jiangsu province shall ever purchase silks made by the colluding textile mill and no sericulture farmer shall ever sell their silkworm to it. Deprived of all the means to make a living, the boss of the textile mill eventually committed suicide and the retired boss of silk shop, feeling ashamed, left the city and disappeared.

2. The practice in modern time

862. Private enterprises were confiscated and private economy eliminated with the success of the Communist revolution in 1949, along with all the practices related to non-competition obligations. However, the adoption of open-up policy in 1979 has seen a brief revival of the ancient practice presented *supra*. For example, the prevalent fraud of “selling scooter shops to laymen” in Sichuan province in 1980s were finally inhibited with the emergence of an NGO called “association of motor vehicles” which is said to “be established on behalf of all the dealers of motor vehicles in Sichuan province”, to “autonomously regulate the affairs thereof” and to “aid the government to maintain the order and justice in the trade”. All scooter dealers were obligated to join the association, with threats of boycotting, vandalizing and harassing. If a scooter dealer has promised to retire and transfer his business to another, such promise will be “broadcasted” to other scooter dealers, the suppliers and the clientele (distributors at a lower level), who would be required in turn to forbear from dealing with him. If the seller of business or any of these suppliers, clientele or other scooter dealers dared to trade with him, they would be tormented the same way with the breaching seller, usually by a province-wide boycott. The association actually functioned so well that the fraud completely disappeared within several months.

However, by the end of 1980s, the association was cracked down by local government for “being suspected to be a mafia-like organization”, when the Chinese government began to purge all those spontaneous organizations that may challenge the normal authorities.

B. Giving the seller an incentive to ensure the actual “deliverance” of the intangible assets

863. If the breach of non-competition obligation cannot be dealt with by forming an organization, practitioners began to resort to conventional clauses binding only the parties. Realizing the inefficiency of traditional non-competition clauses, Chinese practitioners have made some modifications to them. Traditional non-competition clauses consist of obligations to abstain whereby the debtors are forborne from engaging in competing activities. Yet what the buyer of shares really want is the acquisition of the clientele and other intangible assets, rather than the abstention of the debtor *per se*. Therefore, the Chinese practitioners and merchants, out of this practical need, have invented mechanisms whereby the final payment for the value of these intangible assets, are conditioned upon an actual “deliverance” of them, or in other words by the actual control of them by the buyers: in this way, the price of sales of shares excludes the value of the clientele or any intangible assets that may be usurped by the sellers. The value of the clientele and other intangible assets is reflected in a separate contract.

The “actual control” here may be either represented by some financial indicators (1) or be realized by an active obligation of the sellers (2).

1. Deliverance represented by financial indicators

864. The deliverance of clientele and other intangible assets of the company can be represented by a good performance of the company, which is in turn indicated by financial indicators: if the revenue or the profits of the company attains what is expected by the buyers, they may well believe that intangible assets of the company (the most important being clientele) are integrated and in the full control of him. Accordingly, the buyers of shares may demand that the price of share only reflect the value of tangible assets of the company; whereas the value of the clientele and other intangible assets should be paid according to the performance of the company. Thus, what we get would be a normal clause of earn-out as has been presented *supra*, which saves the need of a separate non-competition clause. Buyers of shares, also, do not have to concern about whether the sellers have ever participated in competing activities.

2. Deliverance realized by an active obligation of the sellers

865. If the buyers of shares do want to make sure that the clientele would be completely controlled by them, they would impose upon the sellers an active obligation to help the company to achieve this end. Depending upon the degree of intervention of the sellers, it can be either to appoint the sellers as agencies (i); or to continue to hire them (ii).

i. Sellers serving as agencies of the company

866. If in a sale of shares, what the buyer wants to acquire is mainly the clientele of the company, he or the company may sign an “Intermediary Agreement” with the seller, stipulating that within a certain period, the seller has a right to refer clients to the company, and receive an “intermediary fee” substantially higher than usual, which in total roughly equals to the value of the clientele as is agreed upon by the parties. Meanwhile, the seller usually bears no obligation of non-competition, yet the high profits that he may obtain from the referral fees would give him an incentive strong enough not to do so.

Such a practice is usually found in sales of business relying on regular high-end clients. For example, in a sale of a high-end club located in Chengdu, whose clients are mainly high ranked officials, successful entrepreneurs and famous actors and actress, the seller of the club, who was also its Chief Client Officer, and the buyer signed such a “clause of referral”: “*Within one year pursuing the closing day, the company shall grant the seller a right to sell pre-paid card for the Club (with a nominal value of 10000 Chinese yuan) to any client, whether having patronized the club or not, at any price higher than 5000 yuan as he sees fits and he has the rights to retain the difference between the price he sold and the 5000 yuan that he shall return to the company.*” In this case, the seller has sold around 2000 pre-paid cards to about 400 clients at an average discount of 15 percent (the normal discount for the card is 10 percent), and has obtained about 7 million yuan from the sales of those pre-paid cards, which is considered to be the referral fees, slightly higher than the value of the clientele he has expected. The duration of one year permits the new owner of the club to build a strong bonding with the clients, and the seller told us that within the duration, he had no incentive to usurp the clientele of the sold club because he was unable to make so high a profit by doing so. After the expiration of the duration, his contact with the old clients waned and constituted no threat to the sold club.

ii. Sellers serving as employees of the company

867. If in a sale of shares, what the seller want is more than the mere clientele, but the complete control of the whole distribution system and supply chain of the company, a mere intermediary agreement is not sufficient. Rather, the buyer would continue to hire the seller and sometimes even give him a position as important as chief sales officer/ sales director/ or vice president. And the monetary *quid pro quo* for the intangible assets would be realized in the form of a high salaries and bonus paid to the seller.

It should be noted that this practice is different from the British garden leave clause by which an employee would remain in the payroll after he has actually terminated his job, in that the Chinese seller actually assumes an active obligation and his payment is conditioned upon the achievement of that obligation. Usually, the total payment to the seller is divided into basic salaries, which is a little bit higher than the legal minimum, and the bonus, which reflects the value of the intangible assets. For example, the boss of a local pharmaceutical factory has sold the majority of shares of the factory to a wholly foreign-owned enterprise (WFOE). In order to facilitate the takeover of the factory, the buyer and the seller signed an employment contract, whose main clauses read as follows:

“Mr X, as the former controlling shareholder and the chairman of the board of the Y pharmaceutical company, Ltd. (hereinafter referred as the company), hereby continues to be employed by the company as Vice president of “the transitional committee” (hereinafter referred as “the committee”) which shall consist of such persons as following... and which serves to facilitate the complete takeover of the company by the Z company. Mr X shall preside over the affairs as following: ... The duration of the employment of Mr X shall last for 2 years, starting from... The annual salary for Mr X shall be 20,000 Chinese yuan. On ... (date) of each year, the performance of the committee shall be evaluated by a third-party supervising board, which shall consist of such 5 persons as are appointed by the two parties (Mr X shall appoint 2 members and Company Z shall appoint 2 members; the two parties shall choose together an uninterested person as the last member of the board), and be given a grade in a scale of 5 grades. The bonus of Mr X shall be given according to the grade that the committee has received...” With this employment, the interests of the seller were completely bound with that of the buyer because the monetary value of the intangible assets (clientele and

supply chains) can be cashed out (in the form of bonus paid to the seller) only by the final successful control of the company by the buyer, which was assessed by the supervising board. One of the staff who used to work in the transitional committee told us that throughout the duration of the employment, the seller works in an extremely diligent way to ensure that the transition goes well, and the seller had also admitted that he would have usurped the clients and the sales team for a would-be new company if there was no such an employment contract and it was the generous bonus that dissuaded him from committing this dishonest act.

III. Comparison

868. A traditional non-competition clause protects the interests of the creditor by imposing upon the debtor an obligation to abstain from certain competing activities. The shortcoming of such clause is actually those of obligation to abstain. Comparing the solutions in the two countries, we can see that in order to improve the clause, we have two options: we may either reinforce the enforceability of such an obligation to abstain (A); or to replace it with something else whose breach is easier to detect, prove and remedy (B).

A. Reinforcement of the enforceability of the clause

869. A non-competition clauses is difficult to enforce by the creditor. So, in order to improve it, the method we can naturally think about is to reinforce its enforceability. We may either pose external obstacles to the competing activities of the debtor (1) or to control the person of the debtor (2). Unfortunately, neither of them is satisfactory in modern society.

1. External obstacles to competing activities of the debtor

870. To compete with the creditor, it is necessary for the debtor to contact and deal with some third parties which are precious to the creditor, like clients or suppliers. If we can cut-off the connection between the debtor and the third parties, we can prevent any competing activity committed by the debtor. In doing so, we would impose a non-dealing or no-contacting obligation upon the upstream or downstream dealers with whom the breaching debtor has to deal or contact in order to do his competing business. We may either resort to an organization to implement the ban of dealing upon the third parties (i); or we may negotiate with the third parties by mutual agreements (ii).

i. Imposing the ban by an external organization

871. The method some Chinese merchants used in ancient time and in the 1980s is to resort to a quasi-guild which exerted its control over all the participants in the market. In essence, it serves as a supplement to the impotent judiciary system provided by the state and if properly implemented, would be particularly effective and efficient. However, this method is absolutely not plausible and feasible nowadays as it contradicts with the very foundations of free-competition. Especially in France, where the *décret d'Allarde* was promulgated for the very purpose of anti-corporatism. And also, even if we set aside the problem of legality, it depends upon the existence of an organization that can implement the obligation, which in most cases, is lacking.

ii. Imposing the ban by mutual agreements

872. The *clause de non-sollicitation* used in France achieves the end of restricting the competing activities of former key employees, by collaborating with competing enterprises who promise not to hire those employees. This mutual agreement upon not soliciting employees of the other is realized by mutual agreement instead of by an organization. Unlike the practice resorting to external organization, the legality of such a practice is not the main problem. Instead, what we concern is its practicability in sales of shares: to stop a seller from competing, it requires more than the cooperation of existing enterprise, but also that of upstream and downstream industries. And to achieve mutual agreements with all these enterprises is nearly impossible.

2. Tight controls over the person of the debtor

873. Another way to impose obstacles to competing activity of the debtor is to continue to put him under the control of the company, like what the British do with Garden leave clause. However, we do not believe it has much use in purchases of shares because in essence, it aims at controlling the activities of the debtor, which functions only if the competing activities require the personal labour of the debtor in working hours (for example, if he works as a cook in a nearby restaurant). It is useless if the competing activities does not involve much personal labour. For example, the seller of shares can solicit the clients of the

sold company for his new enterprise in weekend or in off-hours, or in any time without supervision of the creditor.

B. Rearrangement of the contents of the clause

874. In fact, we believe that any efforts to reinforce the enforceability of the obligation of non-competition is doomed to no avail. The only effective improvement, should be to replace the non-competition obligation – an obligation to abstain in nature—with something easier to detect, to prove and to remedy. The Chinese practices of using financial indicators as the condition to pay for the value of the clientele, and of replacing the non-competition obligation with an “obligation to actively ensure the control of the clientele by the buyer” are good examples of the improvement.

We have mentioned that the problems in applying a traditional non-competition clauses are threefold: 1. The difficulty in discovering and proving a breach; 2. The impotence with respect to future breach 3. The difficulty in proving damages. Replacing the obligation of non-competition with the one Chinese practitioners use perfectly solves these difficulties: now instead of having to discover and prove the breaching activities of the debtor, the creditor can stay passively waiting for the events stipulated in the contract (the annual revenue or the performance of the obligation to act) to come. And if the debtor fails to attain the requirement in the contract, the creditor do not have to prove the amount of damages; instead, it is now the debtor who has to prove that the conditions to pay for the intangible assets have been met. Such a practice, by shifting the burden of proof, reduces the incentive of the debtor to compete and relieves the buyer of shares from the “mission impossible” to discover the breach and to prove the damage.

On top of the advantages with respect to application, we believe the Chinese practices have one advantage particularly interesting to French practitioners. By replacing the obligation to abstain with an obligation to act or with a financial indicator, all the restrictions related to non-competition clauses under French law would be successfully avoided: now the personal liberty of the seller of shares and the competition in the market have been in no way compromised because no one requires him to refrain from any competing activities; but rather, he would be rewarded if certain acts or certain goals are fulfilled. By rewarding instead of restricting, all the restrictions would thus be circumvented.

Therefore, thanks to all the advantages we have presented, we believe that we would see in the future a convergence of evolutions of the anti-competition mechanisms in the two countries: the price in the sales of shares would certainly exclude the value of clients or other intangible assets that may be damaged by competition by the seller. And a separate contract would be signed whereby the seller, if fulfilled certain active obligations or if certain financial indicators have been attained, would receive his compensation for these intangible assets, either in the form of salaries and bonus, or in the form of dividends, or in other forms.

Conclusion of Section II

875. Comparing the practical mechanisms in the two countries, we believe the best solutions to the shortcomings of the traditional non-competition clause is to replace it with one providing an incentive and reward to the seller of shares not to compete with the target company, as is widely used in China.

Conclusion of Chapter II

876. In this chapter, by comparing the situations in both countries, we have presented that traditional non-competition clauses, which are widely used both countries and consist of an obligation to abstain are inherently problematic. A possible improvement to such clauses, as has already commenced in China, would be to replace the mechanism whereby “the seller should observe a non-competition obligation the breach of which leads to certain sanctions”, with one whereby “the seller has a right to receive certain benefits under the conditions that either he fulfils some active obligations; or that the performance of the company, indicated by some indicators, proves to achieve certain goals.”

Conclusion of Title II

877. The conventional techniques to protect buyers of shares in the two countries have their respective pros and cons. In particular, with regard to anti-overpricing techniques, both countries have their own advantages whereas with regard to anti-competition techniques, it is rather the French practitioners who should learn from their Chinese counterparts.

Conclusion of Part II

878. This part has been dedicated both to establishing that regulatory interventions are undesirable and to comparing the pros and cons of conventional practices in the two countries safeguarding the interests of buyers of shares.

879. - Undesirable regulatory interventions. By comparing the legal provisions for purchases in the context of purchases of shares, we have demonstrated that *de lege ferenda*, in purchases of shares, neither regulatory protections (*protections de plein droit*) nor regulatory restrictions are reasonable, and therefore the legal provisions in French law justifying the regulatory interventions should be removed. The two aspects of the undesirable regulatory interventions correspond to the epigraphs in the beginning: the undesirable regulatory protections to “*caveat emptor*” and the undesirable regulatory restrictions to “*il est interdit d’interdire*”.

880. - Desirable conventional arrangements. Existent French literatures have put too much effort in discussing issues generated by regulatory interventions. However, we believe the real worthy topics should be the conventional means invented by practitioners of the two countries to solve the inherent risks faced by buyers of shares. A comparison of conventional practices in the two countries, excluding those aiming at solving country-specific issues, indicates that practitioners of both countries are intelligent and have invented useful and efficient tools in this domain, and practitioners of both countries should learn from the each other. In particular, for anti-overpricing mechanisms, Chinese practitioners should learn from their French counterparts the efficient *garanties comptables* whereas French practitioners could learn from their Chinese counterparts the wide use of *bet-on clauses*. As for anti-competition mechanisms, the Chinese mentality of changing the nature of obligations of sellers from *obligation de ne pas faire* to *obligations de faire* may be somewhat insightful for French practitioners.

General conclusion

881. So far, we have demonstrated our thesis and discussed some relevant topics (I), yet our work is not complete and there is some room for a further development on the same theme (II).

I. What has already been developed

882. From the development of our thesis, we have managed to achieve two goals: firstly, we have elaborated the background of our thesis by analysing the two components of the expression “purchases of shares” in French and Chinese law. Secondly, we have demonstrated our thesis by completing an implementation of the analysis of the components.

A. Elaboration of the background

883. Firstly, by comparing the legal regimes for purchases in the countries, we have demonstrated that there is a high risk of regulatory intervention in the process of purchase under French law whereas such a risk is nearly non-existent in a Chinese context.

Secondly, by analysing the features of shares, we have demonstrated that purchases of shares are inherently risky for buyers of shares and call for special protections free of any regulatory interventions.

Combining the analysis of “purchases” and “shares”, we can see that the main concern in this thesis is the contradiction between the special necessity of protections calling for less regulatory interventions and the unfortunate fact of the existence of legal provisions supporting such interventions under French law.

B. Demonstration of our thesis

884. By implementing the different legal provisions for purchases in the two countries in a context of purchases of shares, we have demonstrated that the French regulatory interventions are not at all necessary and thus the contradiction aforementioned can be solved by removing the legal provisions involved. That being the case, the focus of research on this theme should be changed from the compliance with legal restrictions and the recourse to legal protections, to the composition of well-drafted conventional mechanisms safeguarding the interests of buyers of shares.

Here comes the auxiliary task of this thesis beside to advocate the elimination of regulatory interventions: to compare the pros and cons of conventional mechanisms in the two countries, presuming that all regulatory interventions are absent. After having accomplished this task, we have demonstrated that practices of both countries have their unique advantages and the practitioners of the two countries should learn from each other.

II. What is yet to be developed

885. Albeit our efforts dedicated to well solving problems found in purchases of shares, our research is far from complete satisfactory, both from a French perspective (A) and from a Chinese perspective (B).

A. Insufficiency from a French perspective

886. Our tasks are firstly to demonstrate the undesirability of French regulatory interventions by comparing the legal provisions in the two countries (1) and secondly to compare the pros and cons of conventional practices in the two countries (2). In neither task, are we entirely satisfied.

1. Insufficiency in our comparison of legal provisions of the two countries

887. Our comparative research of the legal provisions of the two countries are not entirely satisfactory because of three reasons: firstly, the legal provisions we have compared are not at all exhaustive (i); secondly, the presumption upon which our main argument is laid is rather simplified (ii); lastly, our proposal seems to be unrealistic given the long history of the French legal system (iii).

i. Insufficiency due to incompleteness

888. We have limited our research to some legal provisions, which means many possible relevant legal provisions have been skipped. For one thing, for legal protections, we have only limited our research to *garantie d'éviction* for the problem of competition by the seller of shares and a thorough discussion of the foundation upon *concurrency déloyale* has been omitted. For another, for legal restrictions, we have only limited our research to the legal restrictions on clauses of price and leonine clauses, without trying to find other legal restrictions and discussing their reasonableness, for example those from the anti-trust perspective and those from the perspective of restrictions on *clause pénale*. The limited scope of legal provisions discussed would thus make our argument that “the legal interventions is entirely useless” less cogent to the extent that there is possible to be some legal provision non-discussed that has a compelling *raison d'être*.

ii. Insufficiency due to simplification

889. Our main point that in purchases of shares the principle “buyers beware” should hold, is based upon a simplified presumption that the parties have full autonomy in determining whether and on how much to buy or sell; and that the value of shares are impossible to be fully determined. However, this presumption, albeit sound in most cases, is sometimes problematic.

890. - The situation where the liberty to buy and sell is lacking. Sometimes, purchases and sales of shares are compulsory, where it is difficult to get a conventionally price reflecting the subjective value of buyers. Thus, in this case legal interventions to determine the price is a must. If we have more time, we should have mentioned about the compulsory trade of shares and how it constitutes an exception to our common view of absence of legal interventions.

891. - The situation where the value of shares can be preliminarily determined. We believe that the value of shares is difficult to be determined because of the difficulty to determine the purposes of acquisition of shares. However, in some cases, the purchases of shares are nothing more than purchases of some other objects in disguise. For example, it is

very possible that for tax-evasion purpose, the purchase of a building is conducted in a form of purchases of the 100 percent shares of the company having the building. In this case, the legal protections normally available to buyers of a building should obviously also be available to the buyers of shares. If we have more time, we would spend some pages discussing the situations where the purchases of shares are actually another form of purchases of other ordinary things.

iii. Insufficiency due to unrealisticity

892. If our proposal is to be accepted in France, it is required that legal provisions to be rewritten, jurisprudence to be altered and doctrines to be changed. This seems to be rather difficult and unrealistic, if not entirely impossible, given the “path dependency” associated with the long history of French law. What we have developed focuses mainly on the *lex ferenda*, and thus has covered little the conditions for the reform to take place, an insufficiency that makes our argument less cogent.

2. Insufficiency in our comparison of conventional practices of the two countries

893. Our comparative study of the conventional practices of the two countries are not entirely satisfactory either, as we have failed to mention measures other than conventional stipulations (i) and other factors important for the purpose of purchasing shares in the two countries (ii).

i. Failure to mention non-clauses measures

894. In our thesis, we have presumably identified conventional practices with the stipulation of conventional clauses. However, there are much more conventional practices than that. Here are two examples:

Firstly, we have failed to address issues concerning due diligence. In our thesis, we are mostly concerned about the vulnerability of the buyer mainly caused by lack of information and information asymmetry. However, this vulnerability is sometimes possible be solved by a thorough due-diligence and in some extent a thorough due-diligence is more important than

a well drafted set of clauses, especially given that the judicial enforcement of contracts in China is not entirely satisfactory.

Secondly, we have failed to address issues concerning international private law. According to what we have developed *supra*, if a contract of purchase of shares is subject to French law, the buyer will enjoy more sophisticated legal protections yet subject to more restraint on conventional protections; it is to the contrary if the contract is subject to Chinese law. Thus, the choice of applicable law would have been a topic worth our discussion.

The list of interesting topics concerning measures other than conventional clauses is non-exhaustive. And it is really a pity that we have not been able to address all of them.

ii. Failure to mention non-judicial factors

895. On top of a reliable legal system to enforce well-stipulated contracts, satisfactory purchases of shares also rely upon other factors. For example, in China, the so-called networking, or in other words, the recognition of an important person, may be much more important than a well-drafted contract. The failure to mention all the cultural, political, or economic factors necessarily to be taken into consideration in purchases of shares, thus constitutes another insufficiency of our thesis.

B. Insufficiency from a Chinese perspective

896. In our thesis, we have omitted topics interesting to Chinese readers. In fact, the sophisticated French provisions are in many aspects beneficial to the simple and rudimentary Chinese provisions, as China is still in the stage of establishing its basic legal system, where the principal method is the comparative one. For example, to one of the most controversial topic in China, the procedure of *agrément*, which faces mainly three problems --- the conflict between the legally prescribed *pre-emptive rights* and the procedure of *agrément*, the validity of contracts of purchases of shares when the procedure of *agrément* is not fulfilled; and the determination of price in a compulsory purchase by the target company when *agrément* is not accorded --- the French legal provisions in this regard is really insightful and should be carefully studied by Chinese authors. Due to our limited energies, discussion of all the French experiences have been thus avoided.

The theme of “purchase of shares” is vast, especially discussed in a comparative way. Thinking about this, we are less disheartened by the insufficiencies aforementioned. We wish that our humble work may be in the tiniest way beneficial to our readers and our readers, with the humble help of our work, can advance the research on this topic, probably solving some of the insufficiencies that we have left unsolved.

Bibliographie

1. Traités et ouvrages généraux

Langue française

- P. H. ANTONMATTEI et J. RAYNARD, Droit civil, contrats spéciaux, LexisNexis, 7e éd., 2013.
- J. B. BLAISE et R. DESGORCES, Droit des affaires, commerçants, concurrence distribution, LGDJ, 8e éd. 2015.
- T. CANFIN, Conformité et vices cachés dans le droit de la vente, Publibook, 2010.
- P. le CANNU et B. DONDERO, Droit des sociétés, Montchrestien, 4e éd., 2012.
- J. CARBONNIER, Droit civil, Les biens, Dalloz, 19e éd, 2005.
- F. CHABAS et al. Leçons de droit civil, T. II, vol II, Bien, droit de propriété et ses démembrement, Montchrestien, 8^e éd., 1994.
- G. CHANTEPIE et M. LATINA, La réforme du droit des obligations: commentaire théorique et pratique dans l'ordre du Code civil, Dalloz, 2016.
- F. COLLART-DUTILLEUL et P. DELEBECQUE, Contrats civils et commerciaux, Dalloz, 10e éd., 2015.
- G. CORNU, Vocabulaire juridique, PUF, 11^e éd, 2016.
- A. DECOCQ et G. DECOCQ, Droit de la concurrence, Droit interne et droit de l'Union européenne, LGDJ, 6e éd. 2014.
- F. C. DUTILLEUL et P. DELEBECQUE, Contrats civils et commerciaux, Dalloz, 10e éd., 2015.
- J. L. FLOUR et al.,
- Droit civil, Les obligations, T. I, L'acte juridique, Sirey, 11e éd., 2014.
- Droit civil, Les obligations, T. II, Le rapport d'obligation, Sirey, 9e éd., 2015.
- J. GHESTIN,
- La formation du contrat, LGDJ, 3e éd., 1993.
- Cause de l'engagement et validité du contrat, LGDJ, 2006.
- J. GHESTIN et B. DESCHE, La vente, *in* Traité des contrats, dir. J. GHESTIN, LGDJ, 1990.
- J. GHESTIN et al., La formation du contrat, T II, l'objet et la cause, LGDJ, 4e éd. 2013.
- I. GROSSI et al, Droit commercial, T I, Contrats ... Fonds de commerce..., LGDJ, 30e éd. 2018.
- F. LAURENT, Principes de droit civil, T24, 3e éd. 1877. Disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k5808776z/f217.item.r=220>.
- J. P. LEVY et A. CASTALDO, Histoire du droit civil, 2e éd., Dalloz, 2010.
- C. LYON-CAEN et L. RENAULT, Traité de droit commercial, T II, Librairie Cotillon, 2^e éd., 1892.

(Disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k504274n/f108.vertical>).

V. MAGNIER, Droits des sociétés, Dalloz, 8 éd., 2017.

P. MALAURIE et L. AYNES, Les biens, Defrénois, 3^e éd., 2007.

M. PLANIOL, Traité élémentaire de droit civil, T II, LGDJ, 11e éd. 1931. Disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k1159982j/f416.vertical>.

R. J. POTHIER,

- Traité des obligations, vol. 1. disponible à <https://books.google.fr/books?id=MY1EAAAACAAJ&printsec=frontcover&hl=fr#v=onepage&q&f=false>

- Traité du contrat de société. disponible à <https://play.google.com/books/reader?id=3qZEAAAACAAJ&printsec=frontcover&pg=GBS.PA3>.

M. A. FRISON-ROCHE et M.-S. PAYET, Droit de la concurrence, Dalloz, 1re éd., 2006

Y. SERRA, Le droit français de la concurrence, 1993, Dalloz.

F, TERRE, Les obligations, Dalloz, 11e éd. 2013.

F. TERRE et al., Droit civil, Les obligations, Dalloz, 11e éd., 2013.

E. THALLER, Traité élémentaire de droit commercial, Rousseau, 3^e éd., 1904. Disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k5463941k/f458.image>.

R. T. TROPLONG, De la vente, Ch. Hingray, 4e éd., 1844. available at: <https://archive.org/stream/delaventeoucomme01trop#page/196>

Langue chinoise

H. CHEN, Theory of real rights law, National School of Administration Press, 1998 (陈华彬, 《物权法原理》, 国家行政学院出版社, 1998 年版, 第 49 页).

dir. J. CUI, Contract law, China law press, 2003 (崔建远主编: 《合同法》, 法律出版社 2003 年版).

M. GUO et Y. WANG, A new discussion of contract law: specific contracts, CUPL press 1998 (郭明瑞、王轶: 《合同法新论·分则》, 中国政法大学出版社 1997 年版).

S. HAN, General introduction to contract law, China law press, 2011, p.201 (韩世远: 《合同法总论》, 法律出版社 2011 年版, 第 201 页).

S. SHI, Specific contracts, CUPL press 2000, p.137 (史尚宽: 《债法各论》, 中国政法大学出版社 2000 年, 第 137 页)

K. LI, Study on general provisions of civil law, Law Press China, 2003. (李开国 《民法总则研究》, 法律出版社 2003 年版, 第 71 页).

Y. LI, Contract law, China law press, 2005, p.3 (李永军: 《合同法》, 法律出版社, 2005 年版, 第 3 页).

H. LIANG, General provisions for civil law, China law press, 2011, p. 202 (梁慧星: 《民法总则》, 法律出版社 2011 年版, 第 202 页).

dir. L. WANG, Civil law, Ren Min University Press, 5ed., 2010. (王利明主编: 《民法》, 中国人民大学出版社(第五版)2010 年版)

dir. Z. WEI, Civil Law, Beijing University Press, 2007. (魏振瀛主编 《民法》, 北京大学出版社 2007 年版).

C. ZHANG et X. WANG, Contract Law, Press of Tsinghua university, 2006 (张长青, 王霞, 《合同法》, 清华大学出版社 2006 年版).

dir. J. ZHANG, Principle of civil law, CUPL Press, 2000. (张俊浩主编：《民法学原理》，中国政法大学出版社 2000 年版)

Langue anglaise

E. MCKENDRICK, Contract Law, Palgrave, 2017.

T. G. WATKIN, An historical introduction to modern civil law, Routledge, 1999.

2. Ouvrages non juridique

Langue chinoise

K. MARX,

- Das Kapital, vol. I, People's publishing house, 2004 (卡尔·马克思,《资本论第一卷》,人民出版社 2004 年,第 47 至第 101 页).

- Das Kapital, vol. III, People's publishing house, 2004 (卡尔·马克思,《资本论第一卷》,人民出版社 2004 年).

Langue anglaise

R. DAWKINS, The selfish gene, Oxford University Press, 2006.

D. -N. DWIVEDI, Microeconomics: theory and applications, 12 ed., Wiley, 2014.

G. -W. F. HEGEL, Grundlinien der Philosophie des Rechts (Hegel's philosophy of rights), trans. S.-W. DYDE, George bell and sons, 1896. Available at:
<https://archive.org/details/cu31924014578979>.

C. Merger, Grundsätze der Volkswirtschaftslehre (Principles of economics), trans. J. DINGWALL et B. F. HOSLITE, Ludwig von Mises Institute, 2007.

K. -R. Miller, Only a theory, Viking Penguin 2008.

3. Ouvrages spéciaux, thèse et monographies

Langue française

L. ARCELIN, Droit de la concurrence, Les pratiques anticoncurrentielles en droit interne et communautaire, PUR, 2e éd 2014.

C. -A. AUDIBERT, *Nullité des actes de disposition entre vifs qui ont pour objet la chose d'autrui*, thèse Lyon, 1877, disponible à
<http://gallica.bnf.fr/ark:/12148/bpt6k54010075?rk=42918;4>

Y. AUGUET, Concurrence et clientèle --- contribution à l'étude critique du rôle des limitations de concurrence pour la protection de la clientèle, LGDJ, 2000.

L. AYNES, La cession de contrat et les opérations juridique à trois personnes, Economica, 1984.

- P. BERLIOZ, *La notion de biens*, LGDJ, 2007.
- L. BOYER, *La notion de transaction: contribution à l'étude du concept de cause et d'acte déclaratif*, thèse Toulouse, 1947.
- M. BUCHBERGER, *Le contrat d'apport - Essai sur la relation entre la société et son associé*, Panthéon-Assas, 2011.
- C. -E. BUCHER, *L'inexécution du contrat de droit privé et du contrat administratif*, Dalloz, 2011.
- M. CAFFIN-MOI, *Cession de droits sociaux et droit des contrats*, Economica, 2009.
- T. CANFIN, *Conformité et vices cachés dans le droit de la vente*, Publibook 2010.
- H. CASTILLARD, *De la vente de la chose d'autrui en droit romain et droit français*, thèse Nancy, 1879, disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k5493766j?rk=21459;2>
- A. CHABALLIER, *La patrimonialité de la position contractuelle*, thèse Montpellier I, 2000.
- F. CHABAS et al. *Leçons de droit civil, T.II, vol II, Bien, droit de propriété et ses démembrement*, Montchrestien, 8^e éd., 1994.
- G CHANTEPIE et M LATINA, *La réforme du droit des obligations: commentaire théorique et pratique dans l'ordre du Code civil*, Dalloz, 2016.
- A. CHARVÉRIAT, *Mémento Cession de parts et actions*, EDITIONS FRANCIS LEFEBVRE, 2015-2016.
- F. CHENEDE, *Les commutations en droit privé, Contribution à la théorie générale des obligations*, Economica, 2008.
- J. DOCLOS, *L'opposabilité --- essai d'une théorie générale*, LGDJ, 1984.
- D. de FOLLEVILLE, *Essai sur la vente de la chose d'autrui*, thèse Paris, 1872, disponible à <http://gallica.bnf.fr/ark:/12148/bpt6k5702493b?rk=107296;4>.
- G. FARNIE, *De la garantie pour éviction en matière de vente*, thèse Paris, 1893, disponible sur <http://gallica.bnf.fr/ark:/12148/bpt6k6461315m/f7.image>.
- B. GROSS et P. BIHR, *Contrats: Ventes civiles et commerciales, baux d'habitation, baux commerciaux*, PUF, 2002.
- E. GOUNOT, *Le principe de l'autonomie de la volonté en droit privé: contribution à l'étude critique de l'individualisme juridique*, thèse Dijon
- J.-F. HAMELIN, *Le contrat-alliance*, Economica, 2012.
- C. HAUSMANN et P. TORRE, *Les garanties de passif*, EFE, 2003.
- P. HOANG, *La protection des tiers face aux associations: contribution à la notion de contrat-organisation*, LGDJ, 2000.
- C. HOCHART, *La garantie d'éviction dans la vente*, LGDJ, 1993.
- D. HOUTCIEFF, *Le principe de cohérence en matière contractuelle*, PUAM, 2001.
- J. HUET et al., *Les principaux contrats spéciaux*, LGDJ, 3e éd., 2012.
- S. LACROIX-DE SOUSA, *La cession de droits sociaux à la lumière de la cession de contrat*, LGDJ, 2009.
- E. LAMAZEROLLES, *Les apports de la Convention de Vienne au droit interne de la vente*, LGDJ, 2003.
- R. LIBCHABER, *Recherches sur la monnaie en droit privé*, LGDJ, 1992.
- T. LAMBERT, *Le prix de cession des actions et parts sociales*, thèse Nancy, 1991.
- B. LECOURT, *Cession de droits sociaux*, Rép. dr. sociétés, 2014.

- S. LEQUETTE, *Le contrat coopération: contribution à la théorie générale du contrat*, Economica, 2012.
- F. -X. LUCAS, *Les transferts temporaires de valeurs mobilières --- pour une fiducie des valeurs mobilières*, LGDJ, 1997.
- D. MAINGUY, *La revente*, Litec 1996.
- P. MALAURIE et al., *Les contrats spéciaux*, Defrénois, 7e éd., 2014.
- J. MESTRE et D. VELARDOCCHIO, *Lamy sociétés commerciales*, Lamy, 2016.
- R. MORTIER, *Le rachat par la société de ses droits sociaux*, Dalloz, 2003.
- J. MOURY, *Des ventes et des cessions de droits sociaux à dire de tiers (étude des articles 1592 et 1843-4 du Code civil)*, Dalloz, 2011.
- P. MOUSSERON, *Les conventions de garantie dans les cession de droits sociaux*, NEF, 1992.
- F. NIZARD, *Les titre négociables*, Economica, 2003.
- K. PEGLOW, *Le contrat de société en droit allemand et en droit français comparés*, LGDJ, 2003.
- J. ROCHFELD, *Cause et type de contrat*, LGDJ 1999.
- Y. SERRA, *La non-concurrence en matière commerciale sociale et civile*, Dalloz, 1991.
- E. SCHLUMBERGER, *Les contrats préparatoires à l'acquisition de droits sociaux*, Dalloz, 2011.
- V. SIMONART, *La personnalité morale en droit privé comparé*, Bruylant, 1995.
- F. -G. TREBULLE, *L'émission de valeurs mobilières*, Economica, 2002.
- G. WICKER, *Les fictions juridiques: contribution à l'analyse de l'acte juridique*, LGDJ 1997.
- G. VINEY et al., *Les conditions de la responsabilité*, in *Traité de droit civil*, dir. J. GHESTIN, LGDJ, 4e éd. 2013

Langue chinoise

- L. CHENG, *The liability of hidden defects of the quality of the assets of the company in sale of shares*, Eastern China University of Political Science and Law, 2016 (程丽娅, “股权转让中的公司财产质量瑕疵担保责任”, 华东政法大学硕士论文, 2016).
- H. CHU, *A study on legal issues related to non-competition obligations in transfer of business*, Inner Mongolian University 2016 (褚红娜: “营业转让中的竞业禁止义务研究”, 内蒙古大学硕士学位论文, 2016年).
- X. FU, *A study on the publicity of the change of ownerships of shares of Joint-Stock companies – focusing on the registration in the shareholder's register*, Law Press China, 2010. (傅曦林: 《股份有限公司股权变动公示制度研究: 以股东名册登记为中心》, 法律出版社 2010 年).
- X. GUO, *A study on legal issues related to transfer of business*, Eastern China University of political science and law (郭珣: “营业转让法律问题研究”, 华东政法大学硕士论文 2016 年).
- H. LIANG, *Proposals for the compilation of Chinese civil code*, Law press China, 2003 (梁慧星, 《中国民法典草案建议稿》, 法律出版社 2003 年版).
- K. LARENZ, *Methodenlehre der Rechtswissenschaft*, (translated into Chinese by A. CHEN), Commercial Press China 2005, p. 142 (卡尔·拉伦茨著, 《法学方法论》, 陈爱娥译, 商务印书馆 2005 年, 第 142 页).
- X. LIU, *The study of the system of business transfer--- centering on Japanese law*, Press of Renmin University, 2014. (刘小勇: 《营业转让制度研究---以日本法为中心展开》, 中国人民大学出版社 2014 年版)

A PENG, *An analysis of the constituting elements of bona fide acquisitions of shares*, Jilin University Master thesis, 2017 (王啊鹏, 股权善意取得的构成要件分析, 吉林大学硕士论文, 2017年).

L.WANG, *Proposals of scholars for the compilation of Chinese civil code and their reasons --- General Provisions*, Law press China, 2005, p. 241 (王利明, 《中国民法典草案学者建议稿---总则编》, 法律出版社 2005 年版, 第 241 页).

dir. X. XI, *The understanding and application of the Judicial Interpretations about sales and purchase contracts by SPC*, People's court press, 2012. (奚晓明主编: 《最高人民法院关于买卖合同司法解释理解与适用》, 人民法院出版社 2012 年版).

G. XU, *A proposal to a green civil code*, Social science academic press, 2004. (徐国栋, 绿色民法典草案, 社会科学文献出版社 2004 年版).

L. YAO, *A study on bet-on agreement in PE investment*, Eastern China political science and law, 2012 (姚磊: “私募股权投资中的对赌协议研究”, 华东政法大学硕士论文, 2012 年).

X. YU, *On the legal effects of bet-on agreements*, South-West China political science and law, 2015 (于筱涵: “对赌协议的法律效力研究”, 西南政法大学硕士论文, 2015 年).

Y. YU, *On the issues related to tax on accommodation in China, dissertation South-west China university of political science and law*, 2012, p. 23 (于洋: 《中国住房税收问题研究》, 西南政法大学硕士学位论文, 2012).

Y. ZHAI, *A study on legal issues related to non-competition obligations*, Press of CUPL, 2013 (翟业虎: 《竞业禁止法律问题研究》, 中国政法大学出版社 2013 年版).

B. ZHANG, *The effects of transferring of shares of limited liabilities companies*, Jilin University doctoral thesis, 2010 (张彬: “有限责任公司股权转让效力研究”, 吉林大学博士论文, 2010 年).

L. ZHANG, *A research on the legal issues on defective shares*, China University of Political Science and Law master thesis, 2011 (张丽红: “瑕疵股权法律问题研究”, 中国政法大学硕士论文, 2011 年).

H. ZHOU, *On the transfer of shares*, Jilin University doctoral thesis, 2009 (周海博: “股权转让论”, 吉林大学博士论文, 2009 年).

Q. ZONG, *On the legal obstacles of “bet-on agreements” in the Chinese law and the solutions*, Eastern China political science and law, 2016 (宗庆庆: “论‘对赌’协议在我国面临的法律困境及其解决办法”, 华东政法大学硕士学位论文, 2016 年).

Langue anglaise

O. Hart, *Firms Contracts and Financial Structure*, Clarendon press, 1995.

4. Articles, chroniques et fascicules

Langue française

V. ALLEGARET, *De la propriété des valeurs mobilières*, Bull. Joly sociétés 2005.

C. AUBERT DE VINCELLES, *Pour une généralisation, encadrée, de l'abus dans la fixation du prix*, D. 2006. 2629.

H. AUBRY, *Les obligations de non-concurrence du cédant de droits sociaux en l'absence de clause contractuelle*, in *Mél.* Michel Germain, LGDJ, 2015. p. 28.

Y. AUGUET, *Au nom de la cause- Vive la généralisation du critère de proportionnalité!*, Dr. et patr., mars 2001.

L. AYNES, *La cause, inutile et dangereuse*, Dr. et patr. octobre 2014.

- J. BECKHARD-CARDOSO et M. DESPLATS, *Non-concurrence : trois clauses, deux clauses, une question*, JCP E 2010. 1157.
- S. BENILSI, *La clause de non-sollicitation*, JCP S 2007. 1976.
- J. L. BERGEL, *différence de nature différence de régime*, RTD civ. 1984. 255.
- J. P. BERTREL,
- *Liberté contractuelle et société, Essai d'une théorie du juste milieu en droit des sociétés*, RTD com., 1996. 611.
- *Portage de droits sociaux*, Rép sociétés. 2014.
- M. BERTREL, *La société, contrat d'investissement?*, RTD com. 2013. 403.
- C.-E. BUCHER, *Clause de non-concurrence. – Validité*, JCL, Fasc. 122.
- L. CADIET, *Arbiter, arbitrator, Gloses et post-gloses sous l'article 1843-4 du Code civil*, in *Aspects actuels du droit des affaires*, Mél. Yves Guyon, Dalloz, 2003, p. 153.
- P. Le CANNU, *Qu'est-ce qu'un actionnaire*, *Rev. sociétés* 1999. 519.
- N. CATALA, *Liberté d'entreprendre et droit à un emploi : entrepreneurs et salariés face à nos principes fondamentaux*, in *Études à la mémoire du professeur Bruno Oppetit*, Litec 2009.
- J. CARBONNIER, *Introduction*, in *L'évolution contemporaine du droit des contrat : Journée René SAVATIER*, PUF, 1986.
- J.-J. CAUSSAIN ET M. GERMAIN, *Pratique des cessions de contrôle dans les sociétés anonymes non cotées*, JCP E 1987. 210.
- M. CHAGNY, *L'essor jurisprudentiel de la règle sur le déséquilibre significatif cinq ans après?*, RTD com. 2013.
- C. CHAMPAUD,
- *Le contrat de société existe-t-il encore?*, in *Le droit contemporain des contrats : bilan et perspectives*, *Economica*, 1987.
- *Les fondements sociétaux de la doctrine de l'entreprise*, in *Aspects organisationnels du droit des affaires*, Mél. Jean Paillusseau, Dalloz, 2003, p.119.
- E. CHEVREAU, *La cause dans le contrat en droit français: une interprétation erronée des sources du droit romain*, RDC 2013.
- A. COURET, *L'articulation entre déclarations et clauses de garantie d'actif et de passif*, *Dr. et Prat.*, 2008.
- A. COURET et al., *Les contestations portant sur la valeur des droits sociaux*, *Bull. Joly sociétés* 2001. 1045.
- A. COURET et A. REYGROBELLET, *Le projet de réforme du droit des obligations: incidences sur le régime des cessions de droits sociaux*, *Bull. Joly sociétés* 2015. 247.
- J.-J. DAIGRE, *Le juge et l'arbitre face aux dispositions de l'article 1843-4 du Code civil*, *Bull. Joly sociétés* 1996. 789.
- D. DANET, *Cessions de droits sociaux : information préalable ou garantie des vices?*, RTD com. 1992. 315.
- J. DERRUPPE, *Fonds de commerce*, Rép. dr. com. 2016.
- P. DIDIER, *Brèves notes sur le contrat-organisation*, in *l'avenir du droit*, Mél. François Terré, Dalloz-PUF-Litec, 1999, p.635.
- L. DONNEDIEU de VABRE-TRANIÉ et C. MONTET, *Un droit de la concurrence – pour quoi faire?*, *Contrats, conc. consom.* 2006. 22.
- M. FABRE-MAGNAN, *Propriété, patrimoniale et lien social*, RTD civ. 1997. 583.
- E. FAMA, *Efficient capital markets: a review of theory and empirical work*, *Journal of Finance*, vol. 25, 1970. 383.

- D. FENOUILLET, *Les bonnes mœurs sont mortes! Vive l'ordre public philanthropique!*, in Études P. CATALA, Litec, 2001.
- D. FERRIER, *Les apports au droit commun des obligations*, RTD com. 1997. 49.
- C. FREYRIA, *Le prix de vente symbolique*, D. 1997. 51
- V. FORTI,
 - *L'absorption de l'objet par le contenu du contrat*, LPA 31 octobre 2014.
 - *Le fondement de l'obligation de non-concurrence dans les contrats relatifs à une clientèle: pour le remplacement de la garantie d'éviction par le droit commun des contrats*, RDC 2016. 556.
- M. A. FRISON-ROCHE,
 - *L'indétermination du prix*, RTD civ. 1992. 269.
 - *Va-t-on vers une conception unitaire de l'abus dans la fixation du prix*, Rev. conc. cons., juillet-août 1996. 13.
- J. P. GARCON, *Fixation d'un prix de cession de titres et référence aux éléments comptables*, JCP E 2000. 496.
- B. GARRIGUES, *La contre-prestation du franc symbolique*, RTD civ. 1991.459.
- M. GERMAIN, *L'ordonnance n° 2004-604 du 24 juin 2004, portant réforme du régime des valeurs mobilières émises par les sociétés commerciales*, JCP G 2004. 440.
- J. GHESTIN, *La notion de contrat --- droits*, revue de théorie juridique, 1993. 7.
- P. M. de GIRARD et C. A. PASCAUD, *Les promesses d'achat de droits sociaux à prix plancher à l'épreuve de l'interdiction des clauses léonines*, RDC 2006. 955.
- P. GOUTAY,
 - *Titres au porteur et incorporation : réfutation d'une théorie*, Bull. Joly. sociétés 200. 475.
 - *La dématérialisation des valeurs mobilières*, Bull. Joly. sociétés 1999. 417.
- P. GOUTAY et D. DANOS, *De l'abus de la notion d'intérêt social*, D. 1997. 877.
- G. GRETTON, *Ownership and its objects*, Rabel J. Com. Int. Pr. L., October 2007. 806.
- J.-P. GRIDEL, *Les droits fondamentaux du contractant au quotidien sont l'objet d'une attention prétorienne renouvelée*, in Liber amicorum Ch. LARROUMET, Economica 2010, p. 195.
- C. GRIMALDI, *Les maux de la cause ne sont pas qu'une affaire de mots*, D. 2015. 814.
- M. GUIBAL, *Commerce et industrie*, Rép. dr. com., 2015.
- Y. GUYON et A. MAIROT, *L'affectio societatis*, JCl. Sociétés, Fasc. 20-10, 2013.
- P. HEEBRAUD, *Rôle respectif de la volonté et des éléments objectifs dans les actes juridiques*, in Mél. J. MAURY, t 2, Dalloz et Sirey, 1960.
- J. HONORAT, *La prime de contrôle ou quand deux et deux ne font plus quatre*, Propos impertinents du droit des affaires, in Mél. C. GAVALDA, Dalloz, 2001, p. 147.
- J. P. LANGLAIS et E. OZDEMIR, *Quelques obstacles à surmonter pour la mise en oeuvre d'une garantie de passif*, Actes pratiques, novembre-décembre 2006.24.
- T. LAMBERT, *L'exigence d'un prix sérieux dans les cessions de droits sociaux*, Rev. sociétés 1993.11.
- R. LIBCHABER,
 - *La société, contrat special*, in Prospectives du droit économique in Mél. Michel Jeantin, Dalloz 1999, p. 281.
 - *Pour un renouvellement de l'analyse des droits sociaux*, in Aspects actuels du droit des affaires, Mél. Yves Guyon, Dalloz, 2003, p. 717
- L. IDOT, *La liberté de la concurrence en France*, LPA 2000. 8.
- C. JAMIN, *Une brève histoire politique des interprétations de l'article 1134 du Code civil*, D. 2002. 901.

- P. JESTAZ, *L'obligation et la sanction: à la recherche de l'obligation fondamentale*, in m.él. P. RAYNAUD, Dalloz et Sirey 1985, p. 294.
- S. KANDE DE BEAUPUY, *Les clauses d'earn out*, Dr. et patr., janvier 1994. 26.
- G. KESSLER, *La validité des promesses unilatérales d'achat à prix plancher*, D. 2005. 973.
- X. LAGARDE, *Sur l'utilité de la théorie de la cause*, D. 2007. 740.
- A. LAUDE, *L'exigence de détermination du prix*, JCP E 1997. 29.
- F. LEDUC, *La détermination du prix: une exigence exceptionnelle?*, JCP G 1992. 3631.
- R. LIBCHABER, *Clause de non-concurrence consentie par le cédant d'un fonds de commerce lors de sa cession, est-elle transmise aux sous-acquéreur en cas de nouvelle cession après partage?*, D. 1998. 111.
- A. S. LUCAS-PUGET, *Clause de non-sollicitation de collaborateurs*, Contrats, conc. consom. 2016. 4.
- F. X. LUCAS,
 - *Retour sur la notion de valeur mobilière*, Bull. joly. société 2000. 775.
 - *Promesses d'achat de droits sociaux à prix garanti et prohibition des clauses léonines. À la recherche de la cohérence perdue*, JCP E 2000. 168
 - *Théorie des bénéfiques et des pertes-clauses léonines*, JCl. sociétés Fasc. 15-30, 2013.
- M. MALAURIE-VIGNAL, *Logique économique et logique juridique*, Contrats, conc. consom. 2005.20
- D. MARCHETEAU, *Capital risque-Création*, JCl. sociétés, Fasc.2003, 2008.
- M. MARCINKOWSKI, *La clause de non-concurrence post-contractuelle dans le contrat de franchise*, AJCA, 2016.
- D. R. MARTIN,
 - *Du titre et de la négociabilité, à propos des pseudo-titres de créance négociables*, D. 1993. 20.
 - *De la nature corporelle des valeurs mobilières (et autres droits scripturaux)*, D. 1996. 47.
 - *Du corporel*, D. 2004. 2285.
- D. MAZEAUD, *Réforme du droit des contrats: haro, en Hérault, sur le projet!*, D. 2008. 2675
- M. MEKKI,
 - *La réforme au milieu du gué. Les notions absentes? Les principes généraux du droit des contrats – aspects substantiels*, RDC 2015. 651.
 - *Les incidences de la réforme du droit des obligations sur le droit des sociétés: rupture ou continuité?*, Rev. sociétés 2016. 483.
- P. MINARD, *Le métier sans institution: les lois d'Allarde-Le Chapelier et leur impact au début du XIXe siècle*, in S. Kaplan et P. MINARD (dir.), *La France: malade du corporatisme? XVIIIe-XXe siècles*, Belin, 2004, p.560.
- N. MOLFESSIS, *Les exigences relatives au prix en droit des contrats*, LPA, 5 mai 2000. 42.
- M. A. MOREAU, *La protection de l'entreprise par les clauses des non-concurrence et de confidentialité*, Dr. et patrimoine 2002. 81
- J. M. MOUSSERON, *Valeur biens droits*, in Mel. A. BRETON et F. DERRIDA, 1991, p. 278.
- P. MOUSSERON
 - *Les facteurs juridiques dans l'évaluation des droits sociaux*, RJDA mars 2006.
 - *Les clauses de garantie d'actif et de passif*, Actes pratiques, septembre-octobre 2012.
 - *Conventions de garantie*, JCl. Sociétés, Fasc.165-35, 2018.
- J. MOURY,
 - *Jeux d'ombres sur la détermination du prix par les tiers estimateurs des articles 1592 et 1843-4 du Code civil*, Rev. sociétés 2005.513
 - *La détermination du prix dans le « nouveau » droit commun des contrats*, D. 2016. 1013.
 - *La fixation unilatérale du prix dans le contrat cadre*, AJCA 2016. 123.

- H. Le NABASQUE,
- *Les actions sont des droits de créances négociables*, in *Aspects actuels du droit des affaires*, Mél. Yves Guyon, Dalloz, 2003, p.673.
- *Clause de prix insérées dans les promesses d'achat de droits sociaux: l'interrogation continue*, Rev. sociétés 2005. 593.
- H. Le NABASQUE et M. BARBIER, *Les clauses léonines*, in *Droit des sociétés*, Actes pratiques. 1996. 1.
- J. PAILLUSSEAU,
- *La cession de contrôle et la situation financière de la société cédée (de la nature juridique du contrôle et de la cession de contrôle)*, JCP 1992. 185.
- *La garantie de conformité dans les cessions de contrôle*, JCP E 2007. 1238.
- M. PEDAMON, *Les apports du droit comparé : les solutions allemandes en matière de détermination du prix*, RTD com. 1997.67.
- J. PÉLISSIER, *La liberté du travail*, Rev. dr. sociétés 1990.
- C. PERES, *Règles impératives et supplétives dans le nouveau droit des contrats*, JCP G 2016. 454.
- B. PETIT et S. ROUXEL, *Contrat— classification des contrats*, JCL civ., art. 1105.
- Y. PICOD,
- *L'obligation de non-concurrence de plein droit et les contrats n'emportant pas transfert de clientèle*, JCP E. 1994. 349.
- *Concurrence (Obligation de non-)*, Rép. dr. com.
- A. PIETRANCOSTA, *Promesses d'achat de droits sociaux et clauses léonines: critique d'une sollicitation excessive et hasardeuse de l'article 1844-1 du Code civil*, Rev. Lamy dr. contrats 2006. 67.
- F. D. POITRINAL, *Cession d'entreprise: Les conventions de earn out*, JCP éd. E 1999.18
- J.-B. RACINE, *L'ordre concurrentiel et les droits de l'homme*, Mél. A. PIROVANO, 2003, p. 419.
- T. REVET
- *La détermination unilatérale de l'objet du contrat*, in *L'unilatéralisme et le droit des obligations*, Dir. C. JAMIN et D. MAZEAUD, Economica, 1999.
- *Rapport français sur les nouveaux biens*, in *la propriété*, Travaux de l'association H. Capitant, Journées vietnamiennes 2003, t.58, Société de législation comparée, 2006.
- G. ROUHETTE, *La force obligatoire du contrat, Rapport français*, in *Le contrat aujourd'hui: comparaisons franco-anglaises*, dir. D. TALLON et D. HARRIS, LGDJ, 1987.
- J. SALES et D. LACAZE, *Clauses de earn-out: un avenir prometteur*, Dr. sociétés juin 2000. 13
- P. Le TOURNEAU, *Quelques remarques terminologiques autour de la vente*, In *Le droit privé français à la fin du XXe siècle --- Mél. Pierre Catala*, Litec, 2001, p. 471.
- F. VIOLET, *Quels rapports entre obligation de garantie et obligation de non-concurrence dans la vente d'un fonds de commerce?*, Defrénois 2006. 467.
- L. VOGEL, *Loi Macron : un nouveau régime des contrats de distribution inutile, coûteux et inadapté*, AJCA, 2015.12.
- G. WICKER, *La suppression de la cause par le projet d'ordonnance: la chose sans le mot?*, D. 2015. 1557.
- F. ZENATI, *Pour une rénovation de la théorie de la propriété*, RTD civ. 1993. 307.

Langue chinoise

- J. CHEN, *The nature of shares --- a new theory of identifying shares as credits*, Commercial Research, Jun. 2006 (陈建松, “股权性质---新债权论”, 《商业研究》, 2006年第6期, 第24页).

J. CHEN, *On the liabilities of directors of a company towards third parties*, Journal of Comparative Law, May 2013. (陈景善, “论董事对第三人责任的认定与适用中的问题点”, 《比较法研究》, 2013年第5期).

N. CHEN, *On the principle of good faith in Contract Law – from a normative perspective*, Legal science, Jun. 2003 (陈年冰, “试论合同法中的诚实信用原则——从规范的角度进行分析”, 《法律科学》2003年第6期).

S. CHEN, *On the issues related to price in contract of sales in Chinese Contract Law*, Present day science, Jan. 2012. (陈思: “论我国合同法中买卖合同的价格问题”, 《时代法学》2012年第1期).

L. CHENG, *The liability of hidden defects of the quality of the assets of the company in sale of shares*, Eastern China University of Political Science and Law, 2016 (程丽娅, “股权转让中的公司财产质量瑕疵担保责任”, 华东政法大学硕士论文, 2016).

X. CHENG, *A legal thought on the nature of shares*, Shandong Legal Science, Jun. 1998, p. 7 (程晓峰, “关于股权性质的法律思考”, 《山东法学》1998年第6期).

Z. CHENG, *On the nature of shares*, Journal of Anhui Electric Power College for Staff, June 2001 (程宗章, “股权性质刍议”, 安徽电力职工大学学报 2001年第6期)

N. CHEUNG, *The contractual nature of enterprises, in the institution of enterprises and organizations of market*, Shanghai people's press, 1996, p. 240 (张五常, “企业的契约性质”, 载《企业制度与市场组织》, 上海人民出版社1996年版, 第240页).

X. FANG, *The construction and disintegration of gaius' conception of things incorporeal*, Chinese Journal of Law, Apr. 2006, (方新军, “盖尤斯无体物概念的建构与分解”, 《法学研究》2006年第4期).

L. GENG, *Imperative rules and social interests*, Private Law Review, Feb. 2012 (耿林: “强制性规定和社会公共利益”, 《私法研究》, 2012年第2期).

F. GUO, *A discussion on the ownerships of enterprises by shares*, Chinese legal science, Mars 1988 (郭峰, “股份制企业所有权问题的探析”, 《中国法学》1988年第3期).

J. HONG, *The typical contracts and the improvement of legal provisions for specific contracts*, first appeared in <http://www.iolaw.org.cn/showNews.aspx?id=58892>. (周江洪, “典型合同与合同法分则的完善”, 首发于: <http://www.iolaw.org.cn/showNews.aspx?id=58892>).

A. HUANG, *On the nature of shares --- a remark on paragraph 1 of article 68 of Chinese Real Rights Law*, Journal of Yinbin University, May 2009 (黄奥, “论股权的性质---兼评<物权法>第68条第一款”, 《宜宾学院学报》2009年第5期页).

H. HUANG, *Rethinking the Contractarian Theory of Corporate Law*, Law science, Apr. 2017 (黄辉, “对公司法合同路径的反思”, 《法学》2017年第4期).

L. HUANG, *The distinction and its adoption in practice of Verpflichtungsgeschaeft and Veruegungsgeschdhaeft --as exemplified by the judicial interpretations and judgments made by the supreme court*, Hebei law science, may 2015 (黄泷一: “负担行为与处分行为区分的实务继受——以最高人民法院的司法解释和裁判文书为分析对象”, 《河北法学》, 2015年第5期).

Z. HUANG et L. YANG, *On the validity of promises of repurchase used as bet-on agreements*, People's Judicature, Oct. 2004 (黄占山、杨力: “附“对赌协议”时股东承诺回购约定的效力”, 载《人民司法(案例)》2014年第10期).

D. JIANG,
- *The mechanism of determination of price where other shareholders have exercised their peremptory rights*, Law science, June, 2012 (蒋大兴: “股东优先购买权行使中被忽略的价格形成机制”, 《法学》2012年第6期).
- *The contractual space in company law: from the logic of contract law to institutional law*, Law science, Apr. 2017 (蒋大兴, “公司法中的合同空间: 从契约法到组织法的逻辑”, 《法学》2017年第4期).

P. JIANG et X. KONG, *On shares*, Chinese legal science, Jan. 1994. (参见江平孔祥俊, “论股权”, 《中国法学》1994年第1期)

P. JIANG et al., *On the principle of contractual liberty and on the principle of good faith in the new Contract Law*, Tribune of political science and law, Jan. 1999 (江平等: “论新合同法中的合同自由原则与诚实信用原则”, 《政法论坛》1999年第1期).

F. JIAO, *The reconstruction of the principle of good faith and the modern contract laws in China*, Hebei law science, Apr. 2002. (焦富民, “诚实信用原则与我国现代合同法的重构”, 《河北法学》2002年第4期).

K. JIN et X. HE, *A study on warranty of defects in rights under Chinese law*, Journal of Jiangsu Administration Institute, Jun. 2016. (金可可, 贺馨宇: “我国买卖合同权利瑕疵担保制度研究”, 《江苏行政学院学报》2016年第6期).

J. JING, *On the correction of mistakes about “bet-on” agreement and its application*, People’s Judicature, Oct. 2004 (季境: “‘对赌协议’的认识误区修正与法律适用”, 载《人民司法(案例)》2014年第10期).

D. KANG, *A discussion on the nature of shares*, Tribune of Political Science and Law, Jan. 1994. (康德瑄, “股权性质论辩”, 《政法论坛》1994年第1期).

Y. LI, *Several issues related to non-competition*, Chinese journal of law, May 2002 (李永明: “竞业禁止的若干问题”, 《法学研究》, 2002年第5期).

H. LIANG,

- *Three ways of thinking on the compilation of civil code*, first appeared in

<http://www.iolaw.org.cn/showArticle.aspx?id=223> (梁慧星, “当前关于民法典编纂的三条思路”, 首发于 <http://www.iolaw.org.cn/showArticle.aspx?id=223>).

- *Principle of good faith and loophole closing*, China journal of law, Feb. 1994 (梁慧星, “诚实信用原则与漏洞补充”, 《法学研究》1994年第2期).

Z. LIN, *How to determine the nature of a contract with incongruent name and content*, People’s court daily, 9 April 2007 (林振通, “合同名称与合同内容不一致时合同性质如何认定”, 《人民法院报》2007年4月9日).

F. LIU, *The Chinese meaning of “everything which is not forbidden is allowed”*, Shandong social science, 8-2014 (刘风景, “法无禁止即自由”的中国意义, 《山东社会科学》2014年第8期).

X. LIU, *Interpretation on the taxonomy of norms in article 143 of GPCL*, Journal of Dalian University of Technology (Social Sciences), Apr. 2018 (刘小砚: “民法总则第143条法规范类型的解释论”, 大连理工大学学报(社会科学版), 2018年第4期).

P. LUO, *The Contractarian theory of corporate law and the justification of rules of company law*, Chinese journal of law, Feb. 2004 (罗培新, “公司法的合同路径与公司法规则的正当性”, 《法学研究》2004年第2期).

F. MA, *On constitutum possessorum*, Shandong University Law Review, 2003 (马凤玲: “论占有改定”, 《山东大学法律评论》, 2003年).

J. MIU, *On the discussion of betting on performance in PE*, New Accounting, 1-2014 (缪洁, “关于股权投资并购过程中的业绩对赌的探讨”, 《新会计》2014年第1期).

H. NING, *A reflection on the system of contracts of donation in Chinese law*, Zhejiang social science, Feb. 2007 (宁红丽: “我国赠与合同制度若干问题的反思”, 《浙江社会科学》2007年第2期).

L. PAN,

- *A re-evaluation of “contract” and “company”*, Peking University Law Journal, Jan. 2017. 250 (潘林: “重新认识合同和公司”, 《中外法学》2017年第1期).

- *Renovation of finance and Judicial judgements: focusing on the cases doctrines and practices related to bet-on agreements in China*, Journal of Nanjing Normal University, May 2013 (潘林: “金融创新与司法裁判: 以我国‘对赌协议’的案例、学说、实践为样本”, 《南京师大学报(社会科学版)》2013年第5期).

Q. LU, *the effects for the termination of contracts and the liability for breach of contracts*, Northern legal science, 6- 2012 (陆青, “合同解除效果与违约责任”, 《北方法学》, 2012年第6期).

T. TAN, *A distinction between “rights of managements” and properties of enterprises having the statues of legal person*, Chinese legal science, Feb. 1992 (覃天云, “经营权与企业法人产权辨析”, 《中国法学》, 1991年第2期).

G. WANG et J. SHI, *On the effectiveness of non-competition clauses attached to sales of shares*, People's judiciary, 22-2015 (王国侠, 施俊杰: “股权转让合同所附竞业禁止条款的效力”, 《人民司法》, 2015年第22期).

L. WANG, *The internal system of the principle of obvious unfairness*, Science of law, Feb. 2018 (王磊, “论显失公平规则的内在体系”, 《法律科学》2018年第2期).

L. WANG,

- *On the double-layer structure of enterprises by shares --- a debate with Comrade Guo Freng*, Chinese legal science, Jan. 1989 (王利明, “论股份制企业所有权的二重结构—与郭锋同志商榷”, 《中国法学》, 1989年第1期).

- *On the contractual liberty*, in *The research on the modernization of legal system*, Nanjing Normal University press, 1996, p. 359 (王利明: “论合同自由”, 《法制现代化研究》, 南京师范大学出版社 1996年, 第359页).

- *The Chinese Real Rights Law and dematerialization of securities*, Securities Law Review, vol. 4, 2011, p. 22. (王利明, “<物权法>和证券无纸化”, 《证券法苑》2011年第四卷, 第22页).

L. WANG, *A comparison of non-competition obligations from the perspective between labour law and company law*, Tribunal of political science and law, Jan. 2013. (王林清, “公司法与劳动法语境下竞业禁止之比较”, 《政法论坛》, 2013年第1期).

W. WANG, *On the right of repent in contract of donation*, Legal forum, Jun. 2010 (王文军: “论赠与合同的任意撤销权”, 《法学论坛》, 2010年第6期).

Z. WANG, *Sales of things of others and unauthorized dispositions*, in *Doctrines of civil law and study of jurisprudence vol.4*, China University of Political Science and Law Press, 1998, p.144-145 (王泽鉴: “出卖他人之物与无权处分”, 载《民法学说与判例研究》第4册, 中国政法大学出版社 1998年版, 第144-145页).

H. XIAO, *The legal effects of transfer of shares whose contribution is defective*, Tribunal of Political Science and Law, March 2013 (肖海军: “瑕疵出资股权转让的法律效力”, 《政法论坛》2013年第3期).

Q. XU, *The effects of restrictions on transfer of shares --- an analysis of the function of article 71 of Chinese Company Law*, Global Law Review, January 2015 (徐强胜: “股权转让限制规定的效力——<公司法>第71条的功能分析”, 《环球法律评论》2015年第1期)).

G. YAN, *The application of legal rules on the donation made by a husband to a mistress*, Journal of Tongji University, Jun. 2014 (严桂珍: “丈夫赠与‘第三者’财产纠纷的法律适用”, 同济大学学报(社会科学版), 2014年06期).

H. YANG, “*Shopping without charge*”, a sale or a donation, Beijing daily, 20 Jul. 2016 (杨海超: “‘裸购’: 买卖还是赠与”, 《北京日报》2016年7月20日).

M. YANG, *On the meaning of article 15 of the Chinese Law of Things and the distinction between Verpflichtungsgeschaeft and Veruegungsgeschdhaeft --- comments on article 3 of the judicial interpretations on contracts of purchases and sales by the Supreme People's Court*, Jinan Journal (Philosophy & Social Science Edition), September 2013 (杨明宇: “<物权法>第15条的涵义与负担行为、处分行为的区分——兼评最高人民法院买卖合同司法解释第3条”, 《暨南学报》2013年第9期).

Y. YAO, *An analysis from the perspective of anti-monopoly law of non-competition clauses in franchising*, Legal and economy, May 2010, p. 29. (姚燕鸣, “商业特许经营竞业禁止的反垄断法分析”, 《法制与经济》, 2010年第5期).

J. YI, *The application by analogy of the provisions for purchase and sale contracts in the context of other contracts*, Chinese journal of law, Jan. 2016 (易军, “买卖合同之规定准用于其他有偿合同”, 《法学研究》2016年第1期).

Q. YU et Q. XIA,

- *On the validity of “bet-on” agreements conditioned upon a successful IPO*, People's court daily, 25 mar. 2015 (俞秋玮、夏青: “以上市为条件的‘对赌协议’的效力评价”, 载《人民法院报》2015年3月25日).

- *The legality of bet-on agreement conditioned on IPO*, People's judiciary, 21-2015 (俞秋玮、夏青: “以上市为条件的‘对赌’协议的效力”, 《人民司法》2015年第21期).

Y. YU, *On the issues related to tax on accommodation in China*, dissertation South-west China university of political science and law, 2012, p. 23 (于洋: 《中国住房税收问题研究》, 西南政法大学硕士学位论文, 2012).

C. ZHANG, On the defects and reconstruction of “obvious unfairness” in Chinese law, Journal of Graduate School of Chinese Academy of Social Sciences Feb. 2017 (张初霞, “我国显失公平的立法瑕疵及重构”, 中国社会科学院研究生院学报, 2017年第2期).

S. ZHANG, *A challenge to the bona fide acquisitions of shares*, the Jurists, Jan. 2016. (张双根, “股权善意取得之质疑”, 《法学家》, 2016年第1期, 第131页).

X. ZHANG, On non-competition obligations, Journal of Renmin University, 1-1997 (张晓军: “论竞业禁止”, 《人民大学学报》1997年第1期).

X. ZHANG, *The revision of bona fide acquisitions of shares --- illustrated by the third judicial interpretations on Chinese Company Law*, Tribune of Political Science and Law, June 2013 (张笑滔: “股权善意取得之修正——以《公司法》司法解释(三)为例”, 《政法论坛》2013年第6期).

Y. ZHANG, *A remark on the “obvious unfairness” in the General Provisions of Civil Law*, Journal of Shantou University (Humanities & Social Sciences Edition) Aug. 2017. (张燕璇: “<民法总则>显失公平制度评述”, 《汕头大学学报(人文社会科学版)》2017年第8期).

X. ZHAO, *The transfer and actual delivery of shares*, People’s courts daily, 5 December 2002 (赵旭东: “股权转让与实际交付”, 《人民法院报》, 2002年12月5日).

J. ZHOU, *Typical contracts and the perfection of the provisions for specific contracts in contract law*, SJTU Law Review, Jan. 2017 (周江洪: “典型合同与合同法分则的完善”, 《交大法学》2017年第1期).

P. ZHOU, *the insignificance of the name of a contract in determining its nature*, People’s court daily, 13 April 2017 (周平江, “合同名称不影响对合同性质的认定”, 《人民法院报》2017年4月13日).

Sans auteur,

- “Poor judges cannot grant fair damages” (“贫穷的法官判不出公正的赔偿”), at <http://chuansong.me/n/396756434039>.

- “Types of stock sales in M&A and its application” (股权并购类型及应用), at: http://www.sohu.com/a/61375522_270543.

- “The most severe ban on scooters in Shenzhen in history has severely jeopardized the industry of express delivery” (“深圳启动‘史上最严’禁摩限电令 快递企业受重创”) at: <http://www.chinanews.com/business/2016/04-02/7821250.shtml>.

Langue anglaise

R. COASE, *Nature of the firm*, *Economica* (journal, not the French press), Nov. 1937. 386, available at <https://www.colorado.edu/ibs/es/alston/econ4504/readings/The%20Nature%20of%20the%20Firm%20by%20Coase.pdf>.

J. HENNING, *Perspectives on the influence of the Societas leoninas on the law of partnership*, vol. 76, *J. contemporary Roman-Dutch L.* 2013.167.

K. MARX et F. ENGELS, *Manifesto of the Communist Party*.

K. LIPARTITO et Y. MORII, *Rethinking the Separation of Ownership from Management in American History*, vol. 33, *Seattle L Rev.* 2010. 1025.

G. -J. STIGLER, *The Development of Utility Theory. I*, vol. 58, *J. Political Economy* 1950. 307.

A. SULLIVAN, *Tending the Garden: Restricting Competition via “Garden Leave”*, vol. 37 *Berkeley J. Emp. & Lab. L.* 2016. 293.

5. Notes de jurisprudence, observations et conclusions

L. AYNES, note sous Cass. AP., 1er décembre 1995, *D.* 1996. 13.

Y. AUGUET, obs. sous Cass. com., 4 juin 2002, n° 00-15.790, *D.* 2003. 902.

- I. BEYNEIX, obs. sous Cass. soc., 25 mars 2009, n° 07-41894: JCP S 2009. 1241.
- M. CAFFIN-MOI,
 - obs. sous Cass. com. 12 mai 2015, n° 14-11.699, JCP E 2015. 1577.
 - obs. sous Cass. com. 22 novembre 2016, no 15-18.664, JCP E 2017. 1214.
- P. Le CANNU, obs. sous Cass. com., 19 décembre 2006, n°05-10.198, *RTD com* 2007. 169.
- C. CHAMPAUD, note sous Cass. com. 20 février 2007, n° 04-19.932, *RTD com*. 2007. 752.
- C. CHAMPAUD et D. DANET,
 - obs. sous Cass. com. 10 juin 1997, *RTD com*. 1998. 157.
 - obs. sous Cass. civ.1re, 25 janvier 2005, n°01-10395, *RTD com*. 2005. 539
- D. COHEN, note sous Cass com. 6 juin 2001, *JCP G*. 372.
- M.-L. COQUELT, obs. sous CA Bordeaux, 1re ch. B, 11 déc. 2007, n° 06/05356, *dr. sociétés* 2008. 115.
- A. COURET,
 - note sous Cass. com., 24 mai 1994, n° 92-14.379, *D*. 1994. 503.
 - note sous Cass. com., 18 juin 1996, n°94-17327, *Bull. Joly sociétés* 1996. 1013.
 - note sous Cass. civ. 2ème, 8 avril 1999, n°96-18.516, *Bull. Joly sociétés* 1999. 1177.
 - obs. sous Cass. civ. 1re, 25 novembre 2003, n° 00-22.086, *Bull. Joly sociétés* 2004, p. 787.
 - note sous Cass. com. 27 septembre 2005, n° 02-14.009, *Bull. Joly société* 2006. 92.
- D. FERRIER, obs. sous Cass. com., 4 juill. 1995, *D*. 1997. 59.
- S. Le GAC-PECH, note sous Cass. soc., 20 nov. 2013, n° 12-20074, *D*. 2014, p. 319.
- R. -Y. GAUTIER,
 -obs. sous Cass. civ. 3e, 8 janvier 1992, n°90-12.141, *RTD civ.* 1992.777.
 - obs. sous Cass. com., 14 avril 1992, n° 89-21.182, *RTD civ.* 1993. 150.
 - obs. sous Cass. 1re civ., 4 février 2015, n° 13-26452, *RTD civ.* 2015. 409.
- M. GERMAINE, note sous Cass. com., 20 mai 1986, n° 85-15.716, *JCP N* 1987. 221.
- J. GHESTIN, note sous Cass. AP., 1er décembre. 1995, n° 91-15.578, n° 91-19.653 et n° 91-15.999, *JCP* 1996. 34.
- M. GOMY,
 - obs. sous CA Chambéry, 11 avril 2006, *D*. 2006. 2923.
 - obs. sous Cass. com. 4 juill. 2006, no 03-19.900, *D*. 2006. 2924.
 - obs. sous Cass. com., 3 oct. 2006, n° 04-16.679, *D*. 2008. 248.
 - obs. sous CA Toulouse, 19 avr. 2007, *D*. 2008. 249.
 - obs. sous Cass. com., 25 juin 2013, n° 12-23811, *D*. 2013. 2812.
- D. GRILLET-PONTON, note sous Cass. com.,15 juin 1982, n° 79-13.367, *JCP N* 1985. 66.
- H. GROUDEL, note sous Cass. 1re civ., 17 décembre 2015, n° 14-18.378. *Resp. civ. et assur.* 2016. 88.
- Y. GUYON,
 - note sous Cass.com. 15 juin 1982, *Rev. société* 1983. 329.
 -note sous Cass. com. 23 janvier 1990, *Rev. sociétés* 1990. 248.
- J. C. HALLOUIN et E. LAMAZEROLLES, obs. sous Com., 30 novembre 2004, Cass. civ.1re, 25 janvier 2005, et Cass. com., 19 avril 2005, *D*. 2005. 2950.
- J. HONORAT et H. HOVASSE, obs. sous Com. 10 mars 1998, 95-21329, *Defrénois* 1998, p. 679.
- H. HOVASSE, note sous Cass. com., 22 février 2005, n° 02-14392; *JCP E* 2005. 938.
- H. LECUYER, note sous CA. Lyon, 8 décembre 2005, *Dr. sociétés* avril 2006. 14.

- M. MALAURIE-VIGNAL,
 - note sous CA Paris, 17 décembre 1999, LPA 19 juillet 2000.10.
 - obs. sous Cass. com., 18 décembre 2007, Contrats, conc. consom. 2008. 86.
 - note sous Cass. com. 6 octobre 2015, n° 13-27.419, Contrats, conc. consom. 2015. 282.
- T. MASSART,
 -obs. sous CA Paris, 21 décembre 2001, Bull. Joly sociétés 2002. 109.
 - obs. sous Cass. com., 9 juin 2004, n°03-11.600, Bull. Joly sociétés 2004. 1383.
- D MAZEAUD,
 - obs. sous Cass. Civ. 1re, 12 mai 2004, n° 03-13847, RDC 2004, 925.
 - note sous Cass. civ., 1re, 30 nov. 2004, D. 2005. 1828.
- J. MESTRE et B, FAGES, obs. sous Cass. civ., 1re, 30 juin 2004, RTD civ. 2005. 126.
- J. MESTRE, obs. sous Cass. com., 23 janvier 1990, n° 88-11644, RTD civ. 1990, p. 470.
- N. MOLFESSIS, note sous Cass. AP., 1er décembre. 1995, n° 91-15.578, n° 91-19.653 et n° 91-15.999, LPA, 27 décembre 1995.11.
- R. MORTIER,
 - note sous CA Paris, 14 novembre 2007, *Dr. sociétés* mars 2008.16.
 - note sous Cass. com., 5 mai 2009, n°07-17468, *JCP E* 2009. 1632.
- H. LECUYER,
 - note sous Cass. civ. 1re. 24 janvier 2006, 03-12.736, Bull. Joly sociétés 2006. 965.
 - obs. sous Cass. com., 27 octobre 2003, n° 06-13.979, *JCP E* 2008.1281.
- L. LEVENEUR., note sous Cass. com., 15 décembre 2009, n° 08-20.522, CCC. mars 2010. 66.
- H. Le NABASQUE, obs. sous Cass. com., 30 novembre 2004, n° 03-13.756, Bull. Joly sociétés 2005. 400.
- F. X. LUCAS,
 - note sous Cass. com., 27 septembre 2005, n° 02-14009, *RDC* 2005. 443.
 - note sous CA. Paris, 7 février 2013, Bull. Joly sociétés 2013. 394.
- J. PENNEAU, obs. sous Cass. 1re civ., 11 mai 1999, D. 1999, D. 2000. 312.
- B. PETIT et Y. HEINHARD, obs. sous Cass. Com., 21 janvier 1997, n° 94-15.207, RTD com. 1997. 469.
- F. PETIT, note sous Cass. soc., 10 juill. 2002, *JCP G* 2002. 10162.
- D. PORACCHIA, obs. sous Cass. com., 16 novembre 2004, n° 00-22.713 *Dr et patr.* février 2005. 133.
- D. RANDOUX, sous Com., 20 mai 1986, *Rev. sociétés* 1986. 587
- M. -A. RAKOTOVAHINY, note sous Cass. com., 28 septembre 2004, n°02-11.210, D. 2005.302.
- Y. SERRA,
 - obs. sous Cass. com. 19 oct. 1981, D. 1982. 202.
 - obs. sous Cass. soc., 10 oct. 1984, D. 1985. 389.
 - obs. sous CA Paris, 8 juin 1989, D. 1990. 80.
 - obs. sous Cass. com., 4 janvier 1994 D. 1994. 205.
 - obs. sous Cass. 1re civ., 6 mars 1996, D. 1997. 97.
 - obs. sous Cass. soc., 5 juin 1996, n° 92-42.298, D. 1997. 101.
 - obs. sous Cass. soc., 18 décembre 1997, D. 1998. 214.
 - obs. sous Cass. 1re civ., 11 mai 1999, D. 1999.
 - note sous Cass. com., 16 janvier 2001, n° 98-21.145, D. 2001. 1312.
- A. VIANDIER, note sous CA Paris, 21 mai 1996, et CA Paris, 25 juin 1996, *Rev. arbitrage* 1996.625.
- A. VIANDIER et J.-J CAUSSAIN, obs. sous Cass com. 6 juin 2001, *JCP E* 2002.1433.

Index Alphanbetique

- A -

Abus dans la fixation du prix 196 – 200

Affectio societatis 652, 658

Agrément 302, 322

Application of *erreur* and *garanties des vices cachés* in purchase of shares 482 – 490, 503 – 518

Application of *garanties du fait personnel* 542, 545 – 557, 559

Application of *réticence dolosive* in purchase of shares 491 – 497, 503 – 508

Artificial disputes related to price 602

Astreinte 800

- B -

Bailleur de fonds 365, 652

Bet-on clauses 666, 753 – 762

Bouquet de droits 365

- C -

Carrefour de droits 365

Cause 93, 95, 96 – 130

- *Cause finale et cause efficiente* 98

- *Cause objective et cause subjective* 99

- *Cause catégorique* 101- 106, 145 – 151

- *Cause licite* 115 – 116

Cession de contrat 308, 318, 326, 366 – 379, 388 – 392, 394

Cession de fonds de commerce 542 – 544, 558

Choses appropriables 354 – 355, 384

Choses incorporelles 311, 316

Chose corporelles 311, 315, 345 – 355, 381 – 384, 396 – 400

Clause de confidentialité 856

Clauses de non-concurrence 668 – 733, 801 – 852

Clause de non-divulgence 856

Clause de non-installation 856

Clause de non-réembauchage 856

Clause de non-rétablissement 856

Clause de non-sollicitation 857

Contrat du portage 652

Clauses de révision de prix 499

Clause de secret 856

Clause of earn-out 601, 747 – 749

Clause of “garden leave” 838

Clause pénale 797, 823, 837

Consideration 202

Contenu 85 – 178

- *Contenu licite* 108 – 116, 136- 137
- *Contenu commutatif* 117 – 130, 138
– 144

Contrat-organisation 375

Contractarian theory of company law
389 – 392

Créance 312, 317, 356 – 365, 385 – 387,
395

- D -

Damages 821 – 824, 835 – 837

Déclarations 793 – 794, 796

**Declared necessity of the legal
protections** 498 – 502

Décret d'Allarde 793

Defects of shares as understood in China
509

Dématérialisation française des titres 349

Déséquilibre significatif 699

Dol 46, 69 - 80

- *Réticence dolive* 46, 56- 65, 76-
80

Double coverage 798

Droits à l'information 365

Droits d'exiger 363

Droits patrimoniaux 364

**Droit de participer aux décisions
collectives** 365

Droits politiques 365

- E -

Erreur 48 - 55, 71-75

- *Erreur acceptable* 49 – 51

- *Erreur indifférent* 52 – 55

- *Erreur inexcusable* 53

- *Erreur sur valeur* 54

- *Erreur sur motif* 55

Exception d'inexécution 818, 833

- G -

Gaian division 311, 352, 384

Gebrauchswert (use-value) 421

Garantie comptable 743, 781 – 789, 807

Garantie d'actif 783

Garantie d'actif exploités 783

Garantie d'actif net 783

Garantie d'évictions 267 – 292, 307, 325

- *Garantie du fait personnel* 270 –
271, 281 – 282

- *Garantie du fait des tiers* 272

Garantie de passif 501, 744

Garantie de reconstitution 499, 611, 619,
627

Garantie de valeur 499, 611, 619, 627

Garantie des vices cachés 244 – 265, 307,
325

Garantie de rentabilité 744, 747 – 749,
753 – 762

Garantie de passif stricto sensu 783

Garantie extra-comptable 745, 790 – 797,
799 – 803, 805 – 806

- I -

Identification of shares 297 - 400
- Interests of the identification 298 – 341
- Presentation of the identification 343 – 400

Idemnisation forfaitaire 797, 823, 837

Imperative rules 90-92

Implicit clause of non-competition 543, 560

Impossibilité de réaliser l'objet social 488

Information 406 – 413
- Complexity of information 407 – 412
- Asymmetry of information 413

Institution 374

Instrumentum et negotium 348

- L -

Legal fiction 332 – 341

Liberté du commerce et de l'industrie 691 – 716

Liberté du concurrence 697

Liberté de déterminer le contenu du contrat 88 – 89, 133 – 134

Liberté d'entreprendre 692, 696

Liberté du travail 692, 696

- N -

Negative price 611, 627

Nullité absolu et nullité relative 92

- O -

Objet 93-94

Obligation de délivrance 244, 251- 253

Obligation précontractuelle d'information 58 – 59, 61

Opposability of transfer of ownership of shares 303, 321

Obvious unfairness 68, 142- 144, 705

- P -

Personnalité indépendante de la société 435, 490

Price 180 - 241, 306, 324

- Requirements of precision of price 183 – 193
- Requirement of objectivity of price 194 – 200
- Requirement of seriousness of price 201 – 203, 206 – 208

Principle of good faith 274, 276 – 278, 285, 544, 560

Prohibition of usury 684

- R -

Réduction de prix unilaterale 245

Representations and warranties 751

Restrictions on clauses of price in purchase of shares 589 – 634

Restrictions on clauses léonines 636 – 685

Retenue judiciaire 463 – 468

- S -

Sanctions of legal protections 480

Special needs in purchase of shares 457 – 468

- Special need of conventional stipulations 458 – 462
- Special need of judicial restraint 463 – 468

Special risks in purchase of shares 452 – 456

- Special risk of initial-overpricing for the shares 453 - 455
- Special risk of post-competition by the sellers 456

Specific performance 819 – 820, 834

Suppletive rules 90

- T -

***Tauschwert* (value of exchange) 422**

***Théorie de l'incorporation* 348 – 349, 383**

Theories of objective value 420 – 422, 431, 433 – 437

Theories of subjective value 417 – 419, 427, 438 – 440

Third party evaluator 597 – 598

- Article 1592 597

- Article 1843-4 598

- U -

Undeterminability of value of shares 405 – 440

- Epistemological difficulties 406 – 413
- Ontological difficulties 414 – 440

Unmaintainability of value of shares 441 – 449

Usurp of clientele 549 – 551

Utility 418, 427, 430

- V -

Value-adjustment mechanism 666, 753 – 762

Value *lato sensu* 416 – 422

- Value in use 418, 421, 434 – 436
- Value in a Marxist sense 421, 422
- Value of exchange 419, 422, 437

***Violence* 44 - 45, 67**

- *Violence économique* 45

- W -

***Wert* (Value) 421**

Table des matières

| | |
|--|-----------|
| Introduction | 1 |
| I. Research scope | 1 |
| A. Possible topics | 1 |
| 1. Possible topics on two relations..... | 2 |
| 2. Possible topics on two sides | 8 |
| B. Chosen topics..... | 9 |
| 1. Presentation of the criteria for choosing theme | 9 |
| 2. Application of the criterion for choosing theme | 11 |
| II. Research interests..... | 11 |
| A. Sophisticated French legal provisions: “a theatre with chains” | 12 |
| B. Simple Chinese legal provisions: “a theatre without chains” | 12 |
| C. Insightful Chinese conventional mechanisms: “dances without chains” | 14 |
| 1. “Herald” of the future French practices..... | 14 |
| 2. “Mirror” of the current French practices | 15 |
| III. Research structures | 15 |
| A. Thesis..... | 15 |
| B. Plan | 16 |
| Part I. Components | 17 |
| Title I. Purchase | 18 |
| Chapter I. Elements | 19 |
| Section I. Consents | 21 |
| I. <i>Vices du consentement</i> under French law | 21 |
| A. <i>Erreur</i> | 23 |
| 1. <i>Erreur acceptable</i> | 23 |
| 2. <i>Erreur indifférent</i> | 25 |
| B. <i>Réticence dolosive</i> | 26 |
| 1. Foundations for <i>réticence dolosive</i> | 26 |
| 2. Conditions for <i>réticence dolosive</i> | 27 |

| | |
|--|----|
| II. <i>Vices du consentement</i> under Chinese law | 29 |
| A. <i>Erreur</i> | 31 |
| 1. Unclear criterion in statutory law | 31 |
| 2. Rare application in positive law | 32 |
| B. <i>Réticence dolosive</i> | 32 |
| 1. Unclear criterion in statutory law | 32 |
| 2. Common application in positive law | 33 |
| III. Comparison | 33 |
| A. Difference in the applicability | 33 |
| B. Difference in the conditions | 33 |
| Conclusion of Section I | 34 |
| Section II. Content..... | 35 |
| I. Content under French law | 35 |
| A. Functions of <i>contenu</i> | 35 |
| 1. Principle: “ <i>liberté de déterminer le contenu du contrat</i> ” | 35 |
| 2. Exceptions: restrictions on the content of the contract..... | 37 |
| B. Predecessors of <i>contenu</i> | 38 |
| 1. Notion of <i>cause</i> | 39 |
| 2. Function of <i>cause</i> : determining the validity of a contract | 41 |
| 3. Function of <i>cause</i> : determining the category of a contract | 42 |
| C. Regimes of <i>contenu</i> | 45 |
| 1. <i>Contenu licite</i> | 46 |
| 2. <i>Contenu commutatif</i> | 50 |
| II. Content under Chinese law | 56 |
| A. Factors affecting the validity of the contract..... | 57 |
| 1. Principal contractual liberty..... | 57 |
| 2. Exceptional legal restrictions..... | 57 |
| B. Factors affecting the category of the contract | 62 |
| 1. Risk of re-identification..... | 62 |
| 2. Harmlessness of re-identification | 63 |
| III. Comparison | 64 |
| A. Similarity in the requirement of legality | 65 |
| 1. Presentation of the similarity | 65 |
| 2. Implications of the similarity..... | 67 |
| B. Difference in the requirement of counterpart | 70 |
| 1. In terms of the validity of the contract | 70 |
| 2. In terms of the category of the contract..... | 72 |
| Conclusion of Section II | 74 |

| | |
|---|------------|
| Section III. Price..... | 76 |
| I. Requirement of price in France..... | 76 |
| A. Presentations of requirements of price..... | 76 |
| 1. Requirement of precision of price..... | 76 |
| 2. Requirement of objectivity of price..... | 81 |
| 3. Requirement of seriousness of price..... | 84 |
| B. Implications of requirements of price..... | 86 |
| 1. Validity of a contract..... | 86 |
| 2. Legal regimes applicable to a contract..... | 88 |
| II. Lack of requirements of price in China..... | 90 |
| A. Universal provisions related to price in all contracts..... | 90 |
| 1. Legal regime of sale: not so different from other onerous contracts..... | 90 |
| 2. Legal regime of sales: a model law applicable to other onerous contracts..... | 91 |
| B. Judicial fixation of price in the absence of a clear conventional price..... | 92 |
| C. Judicial control over the onerous characteristic of a contract on the basis of a price..... | 93 |
| 1. Judicial activism when the parties' intention about the nature of the contract is unclear..... | 93 |
| 2. Judicial restraint when the parties' intention about the nature of the contract is clear..... | 94 |
| D. Judicial control over the fairness of a price..... | 94 |
| III. Comparison..... | 95 |
| A. The role of price in determining the qualification of a contract..... | 95 |
| B. The role of qualification of a contract in determining the conditions of validity..... | 96 |
| 1. Absence of justification..... | 96 |
| 2. Contradiction with logic..... | 96 |
| C. The role of judges in the fixation of price..... | 97 |
| 1. The role of judges in filling gaps of price..... | 97 |
| 2. The role of judges in supervising a precisely written price..... | 100 |
| Conclusion of Section III..... | 101 |
| Conclusion of Chapter I..... | 103 |
| Chapter II Effects..... | 104 |
| Section I. <i>Garantie des vices cachés</i> | 105 |
| I. <i>Garantie des vices cachés</i> in France..... | 106 |
| A. Foundations for <i>garantie des vices cachés</i> under French law..... | 106 |
| 1. <i>Garantie des vices cachés stricto sensu</i> | 106 |
| 2. <i>Obligation de délivrance</i> | 107 |
| B. Conditions for <i>garantie des vices cachés</i> under French law..... | 108 |
| II. <i>Garantie des vices cachés</i> in China..... | 109 |
| A. Provisions for <i>garantie des vices cachés</i> under Chinese law..... | 109 |
| B. Conditions for <i>garantie des vices cachés</i> under Chinese law..... | 110 |

| | |
|--|------------|
| III. Comparison | 111 |
| A. Comparison of the foundations for <i>garantie des vices cachés</i> | 111 |
| B. Comparison of the conditions for <i>garantie des vices cachés</i> | 111 |
| Conclusion of Section I | 112 |
| Section II. <i>Garantie d'éviction</i> | 113 |
| I. <i>Garantie d'éviction</i> under French law | 113 |
| A. Contents of <i>garantie d'éviction</i> under French law | 113 |
| 1. <i>Garantie du fait personnel</i> | 113 |
| 2. <i>Garantie du fait des tiers</i> | 114 |
| B. Foundations for <i>garantie d'éviction</i> under French law | 114 |
| 1. General principle of good faith | 115 |
| 2. Historic relic from Roman law | 115 |
| C. Implications of <i>garantie d'éviction</i> under French law | 116 |
| II. <i>Garantie d'éviction</i> under Chinese law | 117 |
| A. Contents of <i>garantie d'éviction</i> under Chinese law | 117 |
| 1. Lack of <i>garantie du fait personnel stricto sensu</i> | 118 |
| 2. Lack of <i>garantie du fait personnel lato sensu</i> | 118 |
| B. Rationale of <i>garantie d'éviction</i> under Chinese law | 119 |
| 1. Rationale for the lack of <i>garantie du fait personnel</i> as a statute rule | 119 |
| 2. Rationale for the lack of <i>garantie du fait personnel</i> as a corollary of the principle of good faith | 120 |
| C. Implications of <i>garantie d'éviction</i> under Chinese law | 121 |
| III. Comparison | 121 |
| A. Appropriateness of the existence or absence of the <i>garantie du fait personnel</i> | 121 |
| B. Inappropriateness of some features of the <i>garantie du fait personnel</i> | 123 |
| Conclusion of Section II | 124 |
| Conclusion of Chapter II | 125 |
| Conclusion of Title I..... | 126 |
| Title II. Shares..... | 127 |
| Chapter I. Identification of shares..... | 128 |
| Section I. Interests of the identification..... | 129 |
| I. Interests in France | 129 |
| A. Legal issues to be solved by the identification of shares | 129 |
| 1. Legal issues solved by specific rules for shares | 129 |
| 2. Legal issues not solved by specific rules for shares | 132 |
| B. Legal notions to be examined for the identification of shares..... | 134 |
| 1. Relations between the legal notions to be examined | 134 |
| 2. Interests of the legal notions to be examined | 137 |

| | |
|---|-----|
| II. Lack of interests in China | 138 |
| A. Issues solved by specific rules for shares..... | 138 |
| 1. The opposability of the transfer of ownership of shares..... | 139 |
| 2. The procedure of <i>agrément</i> | 140 |
| B. Issues solved by universal rules for everything..... | 140 |
| 1. Price..... | 140 |
| 2. Legal warranties. | 141 |
| 3. Allocation of obligations between sellers and buyers. | 141 |
| III. Comparison..... | 141 |
| A. Difference as to the prevalence of the problem of choice of rules..... | 142 |
| B. Difference as to the indispensability of the identification of shares..... | 144 |
| 1. Legal fiction as a method alternative to identification: | 145 |
| 2. Legal fiction as a method better than identification | 146 |
| Conclusion of Section I | 149 |
| Section II. Presentation of the identification..... | 151 |
| I. Identification of shares in France | 151 |
| A. The proposition to identify shares with <i>choses corporelles</i> | 151 |
| 1. Direct demonstration of the corporeality of shares | 151 |
| 2. Surreptitious change of the criterion of <i>choses corporelles</i> | 153 |
| B. The proposition to identify shares with <i>créances</i> | 157 |
| 1. By elimination | 157 |
| 2. By comparison..... | 159 |
| C. Proposition to identify shares with <i>positions contractuelles</i> | 162 |
| 1. Advantages of the identification of shares as <i>positions contractuelles</i> | 162 |
| 2. Obstacles to the identification of shares as <i>positions contractuelles</i> | 164 |
| II. Identification of shares in China | 168 |
| A. Discussions related to the identification of shares as <i>choses corporelles</i> | 169 |
| 1. Shares as ownership <i>per se</i> ? | 170 |
| 2. Shares as identified with their corporeal certificates? | 171 |
| 3. Shares as objects of ownerships?..... | 171 |
| B. Discussions related to the identification of shares as <i>créances</i> | 173 |
| C. Discussions related to the identification of shares as <i>positions contractuelles</i> | 174 |
| III. Comparison..... | 176 |
| A. Shares are always <i>positions contractuelles</i> under French law | 177 |
| B. Shares are sometimes <i>créances</i> under French law | 177 |
| C. Shares are never <i>choses strico sensu</i> under French law | 178 |
| 1. Impracticability of finding corporeality in shares | 178 |
| 2. Uselessness of demonstrating <i>choses incorporelles</i> as objects of ownerships..... | 178 |

| | |
|---|------------|
| Conclusion of Section II | 179 |
| Conclusion of Chapter I | 181 |
| Chapter II. Originalities of shares..... | 182 |
| Section I. Presentations of the originalities | 183 |
| I. Inherently undeterminable value | 183 |
| A. Epistemological difficulties in determining the value..... | 183 |
| 1. Complexity of information | 184 |
| 2. Asymmetry of information | 186 |
| B. Ontological difficulties in determining the value | 186 |
| 2. Simplicity of the determination of value of ordinary objects..... | 192 |
| 3. Difficulties of the determination of value of shares | 193 |
| II. Inherently unmaintainable value of shares..... | 197 |
| A. Unmaintainability of some elements | 197 |
| 1. Criteria for unmaintainability | 197 |
| 2. Elements of unmaintainability | 198 |
| B. Importance of the elements | 199 |
| 1. Rebuttal of the argument that the elements should not be considered | 199 |
| 2. Presentation of the idea that the elements are of central importance | 200 |
| Conclusion of Section I | 200 |
| Section II. Implications of the originalities of shares..... | 202 |
| I. Special risks: main problematics to be solved..... | 202 |
| A. Risk of initial-overpricing for the shares..... | 202 |
| B. Risk of post-competition by the sellers | 203 |
| II. Special needs: main opinions to be demonstrated | 204 |
| A. Conventional stipulations | 204 |
| 1. Conventional stipulations against risks of overpricing of shares | 204 |
| 2. Conventional stipulations against risks of competition by sellers..... | 205 |
| B. Judicial restraints (<i>retenue judiciaire</i>) | 205 |
| 1. Judicial restraint on providing protections | 206 |
| 2. Judicial restraint on imposing restrictions | 207 |
| Conclusion of Section II | 208 |
| Conclusion of Chapter II | 209 |
| Conclusion of Title II | 210 |
| Conclusion of Part I..... | 211 |
| Part II. Implementations | 212 |
| Title I. Legal interventions | 213 |
| Chapter I. Legal protections | 214 |

| | |
|---|-----|
| Section I. Legal protections against overpricing..... | 215 |
| I. Legal protections against overpricing in France | 215 |
| A. Observed insufficiency of the legal protections | 215 |
| 1. <i>Erreur and garantie des vices cachés</i> | 216 |
| 2. <i>Réticence dolosive</i> | 219 |
| B. Declared necessity of the legal protections | 222 |
| 1. Badly-defined regimes of the conventional protections | 222 |
| 2. Uncertain protections of the conventional protections | 223 |
| II. Legal protections against overpricing in China | 224 |
| A. Universal condition | 225 |
| B. Rare application..... | 225 |
| 1. Rare judicial litigations..... | 226 |
| 2. Rare doctrinal discussions | 227 |
| C. Uncertain application..... | 228 |
| 1. Observed uncertainty | 229 |
| 2. Supposed cause..... | 230 |
| III. Comparison | 232 |
| A. Presentation of the unsatisfactoriness | 232 |
| 1. Unsatisfactoriness reflected in the dilemma between rigidity and uncertainty | 232 |
| 2. Unsatisfactoriness reflected in the dilemma between insufficiency and excess..... | 234 |
| B. Causes for the unsatisfactoriness..... | 235 |
| 1. Supposed causes | 235 |
| 2. Real causes | 237 |
| C. Implications of the unsatisfactoriness | 237 |
| 1. Presentation of the implications | 238 |
| 2. Rebuttal of an opposition..... | 239 |
| Conclusion of Section I | 239 |
| Section II. Legal protections against competition by sellers..... | 240 |
| I. In France | 240 |
| A. Foundations of the legal protections for buyers of <i>fonds de commerce</i> | 240 |
| 1. Legal protection based upon <i>garantie d'éviction</i> | 240 |
| 2. Legal protection based upon other foundations..... | 241 |
| B. Transposition of the protection to protect buyers of shares..... | 242 |
| C. Regimes of the protection for buyers of shares | 243 |
| 1. Scope | 243 |
| 2. Duration | 246 |
| 3. Derogation | 247 |
| II. In China..... | 248 |

| | |
|--|------------|
| III. Comparison | 249 |
| A. Inappropriateness of the legal protection <i>per se</i> | 249 |
| 1. Appropriateness of the legal protection in <i>cession de fonds</i> | 250 |
| 2. Inappropriateness of the legal protection in purchases of shares | 254 |
| B. Inappropriateness of the recourse to the <i>garantie du fait personnel</i> | 255 |
| 1. Inappropriateness in the application <i>per se</i> of the <i>garantie du fait personnel</i> | 256 |
| 2. Inappropriateness of the method of application of the <i>garantie du fait personnel</i> | 257 |
| Conclusion of Section II | 258 |
| Conclusion of Chapter I | 259 |
| Chapter II. Legal restrictions | 260 |
| Section I. Legal restrictions on conventional arrangements against overpricing..... | 261 |
| Subsection I. Restrictions on clauses of price | 262 |
| I. More restrictions in French law..... | 262 |
| A. Clauses of price susceptible to the special restrictions of price for contracts of sales | 262 |
| 1. Presentation of the problems | 262 |
| 2. Solutions to the problems | 269 |
| B. Clauses of price essential in maintaining the identification of contracts of sales | 270 |
| 1. A symbolic price with another real <i>quid pro quo</i> | 270 |
| 2. A provisional price with a post-sale <i>garantie</i> | 271 |
| II. Less restrictions in China | 273 |
| A. Clauses of price usually not provoking special problems | 273 |
| 1. Little attentions paid to the validity of contracts | 274 |
| 2. Little attentions paid to the identification of contracts | 275 |
| B. Clauses of price sporadically provoking special problems | 275 |
| 1. Cases where a “transfer of shares” is identified with a gratuitous contract | 276 |
| 2. The problem related to the lack of guideline on the fixation of price | 276 |
| III. Comparison | 277 |
| A. A fake difference: the concern of the identification of the contracts..... | 277 |
| 1. Lack of interests of the applicability of legal regimes specially for contracts of sales | 277 |
| 2. Sufficiency of a mere symbolic price to apply the legal regimes specially for contracts of sales | 278 |
| 3. Expected disappearance of distinction between <i>garantie de valeur</i> and <i>garantie de reconstitution</i> | 278 |
| B. A real difference: the concern of the validity of the contracts..... | 279 |
| 1. A possible convergence..... | 279 |
| 2. An expedient suggestion | 281 |
| Conclusion of Subsection I | 281 |
| Subsection II. Restrictions on leonine clause | 282 |

| | |
|---|-----|
| I. Restrictions under French law | 282 |
| A. Implementations of the prohibition of leonine clauses | 282 |
| 1. Presentation of the prohibition of leonine clauses..... | 282 |
| 2. Application of the prohibition of leonine clauses..... | 283 |
| B. Foundations of the prohibition of leonine clauses..... | 289 |
| 1. To protect the interests of debtors of leonine clauses..... | 289 |
| 2. To protect something else | 292 |
| II. Restrictions under Chinese law..... | 293 |
| A. Legislative basis for the prohibition of leonine clauses | 293 |
| B. Judicial limitation of the prohibition of leonine clauses | 294 |
| C. Doctrinal discussions on the prohibition of leonine clauses | 295 |
| 1. Consensus as to the validity of leonine clauses binding only certain shareholders | 295 |
| 2. Divergences as to the invalidity of leonine clauses binding the target companies..... | 298 |
| III. Comparison..... | 298 |
| A. Necessity to protect the debtors of leonine clauses as not a sufficient <i>raison d'être</i> of the prohibition of leonine clauses | 299 |
| 1. Insufficiency expounded from a formal perspective | 300 |
| 2. Insufficiency expounded from a substantive perspective..... | 302 |
| B. Necessity to protect other interests as not a sufficient <i>raison d'être</i> of the prohibition of leonine clauses | 303 |
| 1. Necessity to protect other shareholders as not a sufficient <i>raison d'être</i> | 303 |
| 2. Links with the prohibition of usury as a sufficient <i>raison d'écarter</i> | 304 |
| Conclusion of Subsection II..... | 306 |
| Conclusion of Section I | 306 |
| Section II. Legal restrictions on arrangements against competition by sellers | 307 |
| Subsection I. Restrictions for protecting the debtors of the clauses..... | 309 |
| I. Restrictions in France..... | 309 |
| A. “ <i>Liberté du commerce et de l’industrie</i> ” | 309 |
| 1. “ <i>Liberté du commerce et de l’industrie</i> ”: the foundation of the special restrictions | 309 |
| 2. “ <i>Liberté du commerce et de l’industrie</i> ”: a constitutional liberty | 310 |
| 3. “ <i>Liberté du commerce et de l’industrie</i> ”: a liberty protecting sellers of shares | 310 |
| B. <i>Déséquilibre significatif</i> | 313 |
| II. Lack of restrictions in China..... | 313 |
| A. Non-application of the special restrictions in employment law | 314 |
| 1. Presentation of the legal restrictions in Chinese Labour Contract Law | 314 |
| 2. Applicability of the legal restrictions in Chinese Labour Contract Law | 314 |
| 3. Foundation of the legal restrictions in Chinese Labour Contract Law..... | 315 |
| B. Rare application of “obvious unfairness”..... | 316 |

| | |
|--|------------|
| III. Comparison | 317 |
| A. The reasons for the different requirements | 317 |
| 1. Different qualification of “ <i>liberté du commerce et de l’industrie</i> ” | 317 |
| 2. Different usage of “ <i>déséquilibre significatif</i> ” | 319 |
| B. The projections of the possible evolutions | 319 |
| 1. Chinese law will not impose special restrictions | 319 |
| 2. French law will continue to impose special restrictions | 321 |
| Conclusion of Subsection I | 321 |
| Subsection II. Restrictions to the clause for protecting the market | 322 |
| I. Restrictions in France | 322 |
| A. General prohibition of non-competition clauses | 322 |
| B. Exceptions to the general prohibitions | 322 |
| C. Discussions of the exceptions | 323 |
| II. Restrictions in China | 324 |
| A. General prohibition of “monopoly agreement” | 324 |
| B. Scholarly concern of non-competition clauses | 324 |
| C. Rare application of anti-trust law | 325 |
| III. Comparison | 325 |
| A. Reasons for the differences | 325 |
| 1. Failure of the Chinese judges to realize the existence of the problem | 326 |
| 2. Refusal of the Chinese judges to identify non-competition clauses as anti-competition practices | 326 |
| B. Projections of the developments | 327 |
| 1. A possible convergence | 327 |
| 2. A delayed convergence | 327 |
| Conclusion of Subsection II | 328 |
| Conclusion of Section II | 329 |
| Conclusion of Chapter II | 330 |
| Conclusion of Title I | 331 |
| Title II Conventional arrangements | 332 |
| Chapter I. Anti-overpricing techniques | 333 |
| Section I. Objects of anti-overpricing techniques | 334 |
| I. Objects of anti-overpricing techniques in France | 334 |
| A. Preferred use of patrimony-based objects | 334 |
| 1. Preference of patrimony-based objects reflected in <i>garanties comptables</i> | 334 |
| 2. Preference of patrimony-based objects reflected in <i>garantie extra-comptables</i> | 336 |
| B. Controversial use of performance-based objects | 337 |
| II. Objects of anti-overpricing techniques in China | 338 |

| | |
|---|------------|
| A. Perfunctory patrimony-based techniques | 338 |
| B. Sophisticated performance-based techniques | 338 |
| 1. Originally special for capital investment | 339 |
| 2. Gradually adopted in acquisition of business | 341 |
| C. Seeming irrelevant-events-based techniques | 342 |
| III. Comparison | 344 |
| A. Techniques with objects directly relevant to the value of the company | 344 |
| 1. Desirability of the choice of performance-based techniques | 344 |
| 2. Practicability of the choice of performance-based techniques | 345 |
| B. Techniques with objects indirectly relevant to the value of the company | 346 |
| Conclusion of Section I | 347 |
| Section II. Enforcements of anti-overpricing techniques | 348 |
| I. Enforcement in France | 350 |
| A. <i>Garantie comptable</i> | 350 |
| 1. Triggering events | 351 |
| 2. Application modes | 352 |
| B. <i>Garantie extra-comptable</i> | 354 |
| 1. Triggering events | 354 |
| 2. Application modes | 354 |
| C. Double coverage by both <i>garanties comptables</i> and <i>garanties extra-comptables</i> | 358 |
| II. Enforcement in China | 359 |
| A. Drafting of warranties and representations | 359 |
| B. Operation of warranties and representations | 360 |
| 1. Inefficiency of the warranties and representations | 360 |
| 2. Difficulties in the warranties and representations | 361 |
| III. Comparison | 361 |
| A. Insufficiency of <i>garanties extra-comptables</i> | 362 |
| B. Indispensability of <i>garantie comptables</i> | 363 |
| Conclusion of Section II | 363 |
| Conclusion of Chapter I | 364 |
| Chapter II. Anti-competition techniques | 365 |
| Section I. Shortcomings of the traditional non-competition clauses | 366 |
| I. Problems in France | 366 |
| A. Problems in establishing a breach | 366 |
| 1. Difficulty in establishing that the seller of shares is the debtor of the clause | 366 |
| 2. Difficulty in establishing the existence of a competing enterprise | 367 |
| 3. Difficulty in establishing the function the debtor plays in the competing enterprise | 367 |
| 4. Difficulty in establishing the fact that the debtor actually owns the competing enterprise | 368 |

| | |
|--|-----|
| B. Problems in applying remedies to the breach..... | 368 |
| 1. Specific performance..... | 368 |
| 2. Damages..... | 369 |
| II. Problems in China..... | 371 |
| A. Problems in establishing a breach..... | 371 |
| 1. Lenient interpretation methods adopted by the courts..... | 371 |
| 2. Difficulty in establishing that the seller of shares is the debtor of the clause..... | 372 |
| 3. Difficulty in proving the facts required to establish a case..... | 373 |
| B. Problems in applying remedies to the breach..... | 374 |
| 1. Refusal to pay the price..... | 374 |
| 2. Specific performance..... | 374 |
| 3. Damages..... | 374 |
| III. Comparison..... | 376 |
| A. Difficulty in establishing a breach..... | 376 |
| 1. Non-inherent problems..... | 376 |
| 2. Inherent problems..... | 377 |
| B. Difficulty in remedying the breach..... | 378 |
| 1. Problems common to all sanctions..... | 379 |
| 2. Problems in claiming monetary compensation..... | 379 |
| 3. Problem in demanding specific performance..... | 379 |
| C. Difficulties constituting the main shortcomings of non-competition clauses..... | 379 |
| Conclusion of Section I..... | 380 |
| Section II. Improvement of the traditional non-competition clauses..... | 381 |
| I. Solutions in France..... | 381 |
| A. Traditional non-competition clauses..... | 381 |
| B. <i>Clause de non-sollicitation</i> | 381 |
| C. Clauses of “garden leave”..... | 382 |
| II. Solutions in China..... | 382 |
| A. Depriving the sellers of the possibility of continuing to trade..... | 382 |
| 1. The practice in ancient time..... | 383 |
| 2. The practice in modern time..... | 384 |
| B. Giving the seller an incentive to ensure the actual “deliverance” of the intangible assets..... | 385 |
| 1. Deliverance represented by financial indicators..... | 385 |
| 2. Deliverance realized by an active obligation of the sellers..... | 386 |
| III. Comparison..... | 388 |
| A. Reinforcement of the enforceability of the clause..... | 388 |
| 1. External obstacles to competing activities of the debtor..... | 388 |
| 2. Tight controls over the person of the debtor..... | 389 |

| | |
|---|------------|
| B. Rearrangement of the contents of the clause | 390 |
| Conclusion of Section II | 391 |
| Conclusion of Chapter II | 392 |
| Conclusion of Title II | 393 |
| Conclusion of Part II | 394 |
| General conclusion..... | 395 |
| I. What has already been developed | 395 |
| A. Elaboration of the background | 395 |
| B. Demonstration of our thesis..... | 395 |
| II. What is yet to be developed | 396 |
| A. Insufficiency from a French perspective | 396 |
| 1. Insufficiency in our comparison of legal provisions of the two countries | 396 |
| 2. Insufficiency in our comparison of conventional practices of the two countries | 398 |
| B. Insufficiency from a Chinese perspective | 399 |
| Bibliographie | 401 |
| Index Alphabetique..... | 417 |