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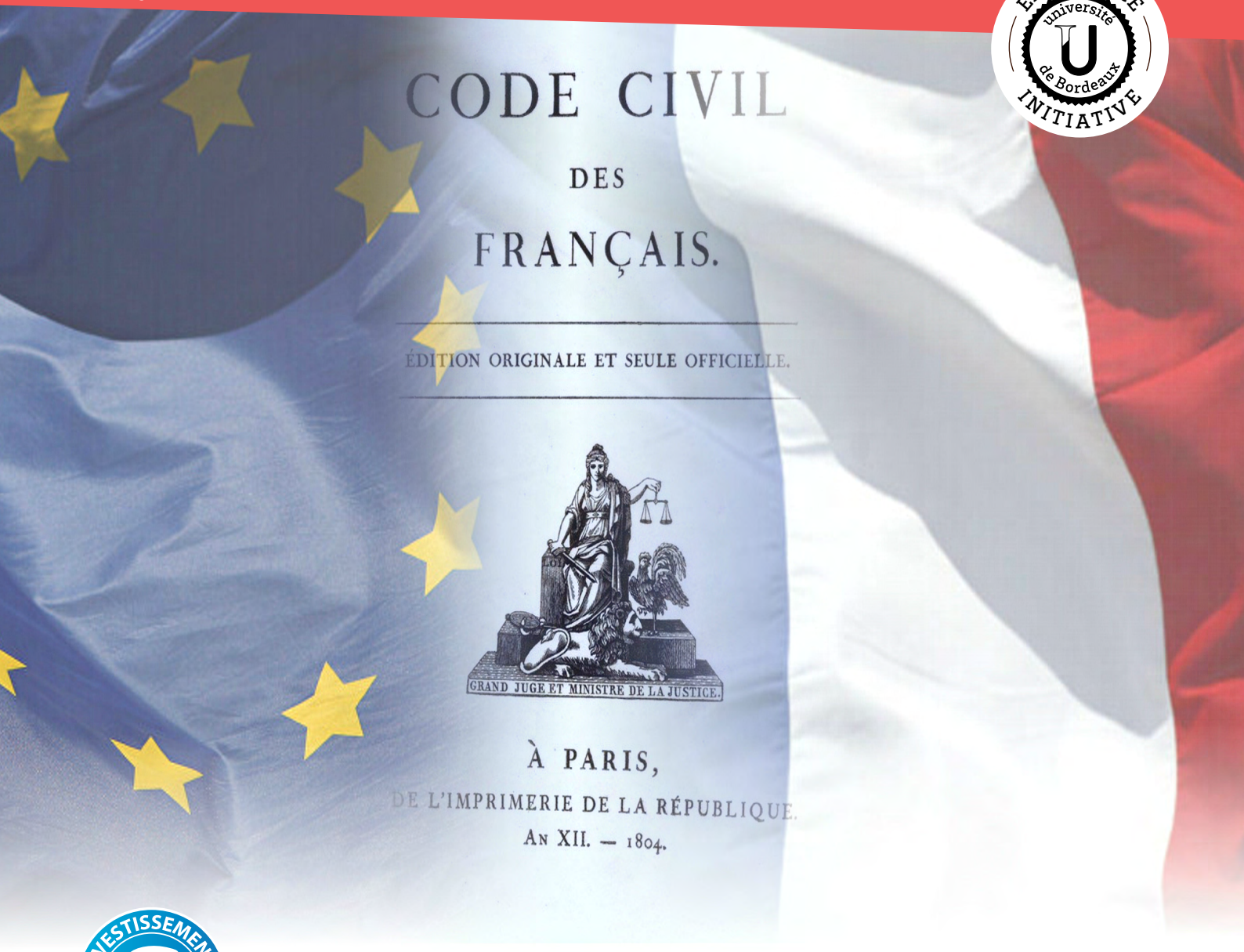

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The spirit of the reform of French contract law

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To probe the spirit of a law to reveal its complexity by highlighting its dependence on historical, economic, social, moral and even geographical factors is a delicate exercise. To probe the spirit of an ordinance is even more so since, in accordance with Article 38 of the Constitution (1), it was drafted by the Government and did not give rise to parliamentary debate once legislative authorisation was obtained; any interpretation of the will of the "legislature" is thus rendered more complex (2).

The reform of French contract law introduced by Ordinance No. 2016-131 of 10 February 2016 reforming the law of contract, the general regime of obligations and the proof of obligations has not spared this difficulty (3).

Yet the long process of elaborating the reform, closely linked to the European construct, from the first attempts at reform in the early 20th century to the celebrations of the bicentennial of the Civil Code, has left its mark.

This allows us to draw out its spirit (II) after recalling the reasons and objectives behind it (I).

I- Reasons and objectives

A) Reasons

The reasons are widely known: they are linked to time but also to the European context.

a) The Civil Code of 1804, marked by time

Presented as a "Work" that is both "practical" in that it displays no "dogmatic ambition" and "without any claim to be academic" (4); "a transactional Work" (5) striking a balance between written law and customary law, the old law and the intermediate law; a "coherent Work" (6) owing to the "systematisation of the civil law of its time" ; and a "Work inspired" (7) by revolutionary principles (respect for individual liberty, the power of free will) while preserving traditional structures (family, property), the Civil Code could by its codifying vocation "halt, for a time, the evolution of the law" (8). This was so true that between 1804 and 1960 it was only amended very slightly, remaining three-quarters intact, with the main changes not affecting the ordinary law of obligations (9).

Although this remarkable stability is proof of the high quality of the work accomplished in 1804, it cannot be denied that it led to the exclusion of entire swathes of civil law from the Civil Code, the regulation of which was nevertheless made necessary by the economic developments and social problems of the early 20th century. These other sections of civil law were either governed by independent civil laws (see in particular the compensation scheme for victims of industrial accidents resulting from the Law of 9 April 1898, but also the Law of 13 July 1930 on terrestrial insurance, the 1938 Law on co-ownership 1938, or literary and artistic property with the Law of

11 March 1957), or left in the care of case law (see, e.g., the enshrinement of unjust enrichment, the abuse of rights, or the major decisions handed down in matters of tort law).

These trends emphasised the isolation of the Civil Code and widened the distinction between the Civil Code and the civil law. The *Commission de réforme du Code civil* (Civil Code Reform Commission) chaired by Professor Julliot de la Morandière after the Second World War halted its work without going beyond the recasting of the preliminary book of the Civil Code and Book I on natural persons and the family. While a sweeping movement to recast French family law and the rights of persons was subsequently undertaken from 1964 onwards at the instigation of Jean Carbonnier (10), it was not until the imminent celebrations for the bicentennial of the Civil code in 2004 and the development of proposals on European contract law that the process of reforming the ordinary law of obligations truly began once more.

b) The reform, guided by Europe

Without going back to the days when Europe mobilised lawyers for its own benefit, as evidenced by the elaboration after the First World War of a draft Franco-Italian code of obligations (11), or the involvement of great French jurists in the elaboration of European law – which was, in their view, inextricably linked to the European construct as a political project (12) – there was a time when the prospect of the advent of what was deemed to be a necessary European contract law had a suspensory effect on the domestic reform of contract law. Some scholars, such as Julliot de la Morandière in 1961 (13) or Jean Carbonnier, had suggested suspending the French project to recodify contract law pending a European codification (14); we can gauge the weight that these authoritative and enlightened opinions could have carried at the time. The absence of any reform of French contract law was the response to a concern to manage the space opened up by European unification. As early as 1945, the higher interest of European unification of this area of the law had already been identified.

Hope and expectation led the French authorities to give precedence to reforming other parts of the Civil Code, in particular those on family law and the rights of the person, recast from 1964 onwards.

However, as the European contract law project became a priority for the European Commission (15), the action of the French jurists, for the purpose of a domestic reform which would not be dictated by Europe, replaced that expectation, which had been endured for far too long. When French domestic contract law underwent its first "European shocks" (16), there were calls denouncing European legislative inflation and the poor quality of that legislation (17). Some decisions of the Court of Justice of the European Union, but also and especially of the European Court of Human Rights, have reinforced the sense of acculturation and "pulverisation" of the law into subjective rights (18).

On 12 April 2002, at the invitation of the First President of the Court of Cassation (19), Professor Christian von Bar, who had just created a "Study Group on a European Civil Code", delivered a lecture in English entitled *Towards a European Civil Code. From Principles to Codification: Prospect for European Private Law*. The indignation of some, as expressed at the end of the lecture, was followed by a number of heated articles (20). On 1 July 2002, the *Académie des sciences morales et politiques* (Academy of Moral and Political Sciences) unanimously adopted a motion rejecting the draft European Civil Code and European contract law project (21).

Resistance to the influence of European law and foreign laws, in the English language, stiffened all the more with the publication of the first *Doing Business* report (2004 edition, under the aegis of the World Bank) which rather put down the French legal tradition, accused of not being attractive for "doing business", thus reviving another form of French legal nationalism.

Thus, for a long time suspended pending pre-emption by European law, the reform of contract law found a new, federating reason in the development of European contract law proposals, not to postpone this reform but rather, on the contrary, to anticipate it in order to preserve and defend the specific features of French contract law (22).

In this context, shortly before the bicentennial of the Civil Code, "a handful of university specialists in civil law" (in the words of Pierre Catala) undertook a project to modernise the law of obligations. The "trigger" was a conference organised by the University of Sceaux, examining French law against the European principles of contract law resulting from the work of the commission chaired by Professor Ole Landö (23).

The awareness of the urgent need to reform domestic law was thus born of the confrontation of French law as contained in the 1804 Civil Code with the principles of European contract law.

The political impetus, essential to launch these projects, came from the highest authority of the State on the occasion of the celebrations for the bicentenary of the Civil Code in 2004, during which the then President of the Republic, Jacques Chirac, speaking at the Sorbonne, issued the challenge to rewrite "*the law on contracts and on securities in five years* " (24).

It was all the more necessary to muster the energies convinced of the need to bring about this reform, although it cannot be denied that this impetus was only sustained because it was so fuelled by the ardour of those who saw it as an opportunity to reaffirm the French conception of contract law - or even to build a dam against the errors of a European law considered too far removed from continental law, and by the enthusiasm of those who saw in it the opportunity to modernise French contract law by placing it in a comparative perspective to better ensure its integration or consideration in the European concert.

B. Objectives

In the context of the reform process, the objectives are twofold. They are intended, first of all, as the determination of the goal, of what the reform should ideally target, and even of the values it was intended to promote. Those are the substantive objectives. They must also be worded in a methodological way so as to envisage the means that will be used to build the reform. These are the methodological objectives.

Each of these aspects brings elements that contribute to forging the spirit of the reform.

1) Substantive objectives

The legislative preparatory work for the reform provides several lessons for the substantive objectives pursued.

a) Certainty and attractiveness

The impact study for Law No. 2015-177 of 16 February 2015 on the modernisation and simplification of the law and procedures in the fields of justice and home affairs, Article 8 of which contains the permission granted to the Government to reform those matters by Ordinance, states that it is a question of *"initiating a reform to simplify civil law intended in particular to amend Book Three of the Civil Code in order to modernise, simplify and increase the accessibility and effectiveness of the ordinary law of contracts, the regime and proof of obligations*" (25).

The Law's explanatory statement also states that "*if this legislation proposes to modernise the law of obligations by introducing new provisions, a large part of the bill aims to consolidate the advances made by enshrining the solutions that have emerged over several years in case law, which are already known to practitioners, as established law in the Civil Code. It is essentially a question of responding to the constitutional objective of the intelligibility of the law, of strengthening legal certainty, while contributing to the influence and attractiveness of the French legal system*".

Lastly, the Report submitted to the President of the Republic on Ordinance No. 2016-131 of 10 February 2016 on the reform of contract law, the general regime and proof of obligations also devotes several paragraphs to the "*objectives of the reform*".

This report even gives some important details since it proposes to prioritise these same objectives, stating that "*legal certainty is the primary objective pursued by the Ordinance, which aims first of all to make the law of Contracts, the regime and proof of obligations*". It goes on to say that "*the second objective pursued by the Ordinance is to strengthen the attractiveness of French law, politically, culturally and economically*".

b) Contractual justice

Independently of the strength and the very importance of these objectives, another, more diffuse but very present, appears to transcend them or at least seek to support or unite them; it is the search for contractual justice: as indicated in the Report to the President of the Republic "*enhancing the attractiveness of our law does not mean that we should not give up balanced solutions that protect the parties but are also effective and adapted to changes in the market economy* ".

This search for contractual justice stems first from the consolidation of case-law proposed by the reform, since it leads to the adoption of solutions resulting from a judicial process and thus passed through the filter of the courts, following the adversarial submission of the claims and pleas of the parties.

This search for contractual justice is followed by the enshrinement of rules that guarantee a certain balance between the rights of the parties to prevent abuse (cf. membership contracts, economic violence, unfair clauses, frustration).

2) Method objectives

The method adopted is doubtless insufficient to reveal the spirit of a reform. However, it serves partly to reveal its spirit. From this point of view, the elaboration of the Ordinance of 10 February

2016 is full of lessons, as it is marked by a desire to turn to foreign experiences, to comparative, European and international law.

While the reaction to Europe has, as we have seen, contributed to raising awareness of the need for reform and therefore also to its successful conclusion, the *Chancellerie* did not wish to turn this into what would purely be an extension of that stance.

Of course, French contract law had to be modernised in order to make it better understood, to facilitate its comprehension by practitioners and its dissemination in Europe and in the world. However, this approach could not be reduced to recalling, consolidating or clarifying the French specificities without undertaking the preliminary work of testing them, comparing and taking into account the European and international environment.

That the law of a State is part of its national heritage, that it is the fruit of a tradition and the expression of the society in which it is applied is one thing. That, at the beginning of the twenty-first century, at the time of the internationalisation of economic exchanges, the sole objective should be to preserve the specificity of French law without looking at foreign experiences would have been a a pitfall.

This comparative approach was necessary in order to take stock of the facts and, where necessary, to abandon concepts or notions which gave rise in France to legal constructions of an exaggerated technicality (26); and yet it was found that these were sometimes ignored, without real damage, by other laws or legal systems (27).

The *Chancellerie* therefore paid close attention to comparative law and to the plans for the harmonisation of European contract law which had been drafted in recent years. In particular, it drew its inspiration from the European Contract Law Principles (ECDP) for their search for common traditions and convergences between European legal orders, as well as from the Unidroit Principles on International Commercial Contracts, the American method of restatements, and the solutions adopted by the Vienna Convention on the International Sale of Goods for their search for the best possible solution for international commercial contracts.

It was able to benefit from the important publication in 2008, in the *Droit privé comparé et européen* collection published by the *Société de legislation comparée*, of the works devoted to "*Terminologie contractuelle commune*" (*Common Contractual Terminology*) (28) and «*Principes contractuels communs*" (*Common Contractual Principles*) (29). These works, by their analysis of the guiding principles, built on the three pillars of contractual freedom, certainty and loyalty, followed by that of each article of the CEDP, examined and compared with other sources (30), have been a valuable tool for the comparative analysis of French contract law.

The *Chancellerie* therefore had access to precious material for "testing" the new domestic law of obligations, comparing, conserving and sometimes discarding some of the solutions adopted in 1804.

II. The spirit

From all this, from the state of mind, from the causes set out in the objectives pursued, one observation emerges: the construction of the reform was made more pragmatically than ideologically.

This explains why a single vision of the new contract law cannot be established. As the professors Alain Bénabent and Laurent Aynès have written, the reform is the fruit of a compromise (31) between the proponents of a liberal vision which entails the desire to facilitate economic exchanges, to limit the brakes and the supporters of a more protective vision which implies the need to introduce into the law rules enabling a certain balance between the rights of the parties.

This observation makes it possible to discern the spirit of this reform, both liberal and protective, bearer of tradition but also of rupture.

A. The liberal spirit of the reform

The liberal spirit stems from the principles originating in the philosophy of the Enlightenment and in particular in the power "*to do anything that does not harm others*". This reflects the fact that the reform is firmly rooted in the history and spirit of the Civil Code.

This liberal spirit is bolstered and strengthened as a result of the recent reform, not only by the express affirmation of the principle of contractual freedom and the various provisions that define it, but also by the desire to guarantee the effectiveness of transactions driven by an economic view of contract law. It is also probably, more fundamentally still, by the affirmation of the suppletive nature of the reform.

1. Contractual freedom, enshrined in various forms

a) Enshrining contractual freedom

The new Article 1102 of the Civil Code establishes contractual freedom as a general principle of law.

Substantively, this enshrinement is a continuation of the Civil Code, although no-one would argue that contractual freedom had not already been recognised. Although the Civil Code did not make explicit provision for it, it was accepted that contractual freedom resulted indirectly from the former Article 1123 - under which "*All persons have the capacity to contract, except if declared incapable of doing so by law*" - and from an *a contrario* reading of Article 6 of the Civil Code - under which "*One may not by private agreement derogate from laws that concern public order and good morals*" - it must be concluded that the parties are free to derogate from rules which do not relate to public order and good morals.

While there is no substantive break with the Civil Code, however, the formal break is significant as the Ordinance of 10 February 2016 chooses to put an end to this paradoxical situation of indirect recognition in order to erect contractual freedom as a general principle of law. It distances itself from the spirit of the 1804 Civil Code which, it was said, was intended to be "practical" by not displaying "dogmatic ambition" (32) and therefore not inclined to proclaim great principles. There is no doubt that there is a need to examine the need, in the 21st century, to enshrine that principle of contractual freedom which the 1804 Code chose not to enshrine expressly.

It should be noted that there was a great need to do so; this view was endorsed by a number of domestic law reforms (33), not to mention European and international harmonisation proposals (34).

It was on the basis of these precedents that it was decided to include this principle in the Civil Code, at Article 1102 (35).

b) The various forms of contractual freedom

Several articles from the reform echo this principle. As regards pre-contractual negotiations (Article 1112 of the Civil Code), the principle is freedom - not only for their initiative and conduct, but also for their breakdown (provided that there is no misconduct involved). Similarly, the reform clarifies the outlines of contractual freedom within the framework of the formation of the contract by affirming the principle of the free withdrawal of an offer as long as it has not reached its intended recipient (Article 1115), but also the principle of the free withdrawal of an offer (Article 1116) even when this is done in breach even of an obligation to maintain the same for a certain period.

The principle of consensus enshrined at Article 1172, the affirmation of the prohibition of perpetual undertakings (Article 1210), the unilateral termination of contracts of indefinite duration (Article 1211), the principle of evidence by all means (Article 1358) and the possibility of concluding contracts relating to proof (Article 1356) all contribute to the various forms of contractual freedom.

2. The certainty of transactions

To say that the Ordinance enshrines the principle of contractual freedom in a variety of forms does not fully reflect the liberal spirit which, in certain respects, drives the Ordinance of 10 February 2016. This spirit supports the provisions designed to guarantee the effectiveness of transactions and to integrate a more economic view of the law. This liberal hallmark is enshrined by the recognition of a general principle of binding force; it is also reflected in several other provisions.

a) The general principle of binding force

The new Article 1103 of the Civil Code reiterates the former Article 1134, paragraph 1, of the Civil Code on the binding force of the contract, but sets it up as a general principle of contract law, like a number of European and international proposals. The wording is identical to that of Article 1134, para. 1 (except to speak of contracts instead of agreements) and the consequences of that principle are taken up, not as a general principle but at Article 1193, which recalls that "*Contracts can be modified or revoked only by the parties' mutual consent or on grounds which legislation authorises*".

The position of this text is significant: coming after the affirmation of the principle of contractual freedom (Article 1102) but before the principle of good faith (Article 1104), it reflects a desire to express the pre-eminence of binding force, which the principle of good faith cannot call into question. Good faith does not prevail over legal certainty. Thus, the case law established in *Maréchaux*, according to which "*if the rule whereby agreements are to be performed in good faith allows the court to sanction the unfair use of a contractual prerogative, it does not authorise it to prejudice the substance of the rights and obligations legally agreed upon by the parties*" (36) ought remain relevant under the new contract law.

b) The various forms of the liberal hallmark

Several provisions reflect this liberal vision of the reform showing a concern for economic efficiency. These include, *inter alia*, abandoning the concept of cause as a condition for the validity of contracts. It is well known that French case law developed the notion of cause, no longer confining itself to a purely objective conception (the cause of obligation) in order to include it in a wider trend of "subjectivisation" (subjective and practical cause of the contract). The choice made by the Ordinance to enshrine the main functions forged by case in a number of articles, without taking up the notion of cause, also contributes to this desire to ensure greater certainty of transactions, each part focusing on the boundaries not to be crossed in provisions that accurately reproduce the functions of the cause, without having to maintain a notion only vaguely outlined.

In the same vein, mention may be made of the introduction of enquiry procedures. In order to avoid, as far as possible, periods of uncertainty in the life of the contract - which is a factor of legal insecurity, both at the time of the formation and during the performance of the contract - the Ordinance establishes the mechanism for enquiry procedures. This is not a legal action but an "interpellation" between the parties, since the mechanism allows one party, particularly when the contract is affected by a ground of nullity, to compel the other party to disclose its intentions; otherwise it will not be able to do so in the future. This is the purpose in particular (38) of Article 1183 of the Civil Code, which states that "*A party may claim in writing from a person who could rely on the nullity of the contract either to affirm it, or to proceed with an action for nullity within a period of six months, on pain of losing the right to do so*". The scope of such enquiry procedures and their use by legal practitioners will have to be the focus of all attention because it could be a highly effective mechanism for companies to prevent the risk of nullity of the contract, and thus contribute to the attractiveness of French law. While Article 1183 would appear confined to the sanction of relative nullity (since Article 1180 states that absolute nullity cannot be covered by the confirmation of the contract), the fact remains that many cases of nullity can be better controlled ahead of time by the parties.

Lastly, this liberal hallmark can also be seen in the provisions which seek to develop the individual prerogatives granted to the creditor in the event of non-performance or incomplete fulfillment of an obligation on the part of the debtor. This is the case for unilateral termination by notice (Article 1226) which allows the creditor, at his own risk and peril and subject to certain formalities, to terminate the contract by simple notice (39); and for the right of the creditor, after giving formal notice, to enforce the obligation of the debtor who does not comply, within a reasonable time and at a reasonable cost (Article 1222) (40), in the event of incomplete performance of the obligation on the part of the debtor, to demand a reduction in the price (Article 1223); or finally, where the debtor has failed to perform his obligation, or even when it is patently clear that he will not perform the same, for the creditor to refuse to perform his own, or to suspend performance unilaterally (Articles 1219 and 1220).

3. Freedom as a guide for the courts and the parties

The liberal spirit of the recent reform goes beyond the affirmation of the principle of contractual freedom and certainty and their various forms. It is inherent to this reform, conceived, of course, as the ordinary law of contract, but the vast majority of articles remain suppletive to the will of the parties.

It is moreover from the enshrinement of the principle of contractual freedom that the Report to the President of the Republic deduces the suppletive character of these texts when it states that "*their suppletive character is inferred directly from Article 6 of the Civil Code and new Articles 1102 and 1103, unless explicit mention is made as to the mandatory nature of the text concerned*". If, however, some articles contain the words "*unless otherwise provided*" (Article 1216-1, paragraph 2), or an equivalent wording, the Report takes care to note that this stipulation does not authorise "*any a contrario interpretation and does not in any way call into question the general principle of the suppletive character of the texts: this reminder is the result of a purely didactic concern taking into account the wishes expressed by professionals concerning certain specific texts, (particularly on the general regime of obligations)*".

Whilst not resulting from the text of the Ordinance but emanating instead from the Report to the President of the Republic, this statement is far from being anecdotal. Although it has no legal force of its own in the sense that the Report submitted to the President of the Republic is merely intended to shed light on the reasons why the text is proposed and its content (41), it would be excessive to deny the Report any kind of influence (42). Although it is not intended to replace parliamentary debates, it accompanies the Ordinance, not only to enlighten the signatory - the President of the Republic - and the countersigning ministers "*as to the reasons why the text is proposed and on its content*" but also to explain "*the reasons which led to the amendment of the regulations in force and the economy of the steps taken in this direction*" and present "*the content of the essential articles of the proposals*" (43).

The clarification provided by the Report on the suppletive nature of the provisions contained in the Ordinance is therefore important. Although it cannot be denied that the codification undertaking of which the Ordinance of 10 February 2016 is part also reflects a desire to recognise the persistence of the role of the State - which may impose by law a framework for governing contractual relations, or even perhaps to slow down the phenomenon of the privatisation of rules - this clarification provided by the Report is a useful counterweigh to this fair consideration, since it also encourages us not to conceive this framework necessarily as the expression of public policy on contractual matters.

This spirit therefore invites practitioners to construct their contractual relationship as they see fit and in such a way as to best serve their interests. It must also guide the involvement of the courts. As has been shown, codification does not have the effect of curbing case law. On the contrary, the fact that it results in the fixing of the law produces rather the opposite effect since it leads the courts to adapt the law to social developments. This is the natural "backlash" of codification, as revealed by Gérard Cornu. It would thus be futile to hope to reduce the role and influence of case law after the adoption of this reform. On the other hand, we must hope that the courts preserve the liberal spirit of the reform in their interpretation of the texts.

In the event of doubt as to the scope of a rule, this should drive the courts to favour a suppletive reading, leaving room for the initiative and inventiveness of the parties, a peremptory reading which would have the effect of reducing the creative part (44). The reform thus invites the courts, in interpreting the new law, to make the spirit prevail over the letter of the law.

Conversely, in their task of interpreting the contract, the courts will see their powers of review framed by the new law so as not to obstruct by another means the newly enshrined principle of

contractual freedom: it is no coincidence that, notwithstanding the reminder of the rule according to which the contract is interpreted according to the common intention of the parties "*rather than stopping at the literal meaning of its terms*" (Article 1188); Article 1191 lays down a rule which could be described as a "sentinel of contractual freedom" according to which "*clear and precise clauses cannot be interpreted on pain of being distorted*".

B. The protective spirit of the reform

It is doubtless on this point that the substantive break with the 1804 Civil Code, under which contract law and the law of obligations were largely dependent on the dogma of the autonomy of the will - itself inspired by Article 1 of the Declaration of the Rights of Man and of the Citizen 1789 positing in principle that "*Men are born and remain free and equal in rights*" - is the most significant. The "legislature" of the 21st century could not ignore the emergence in legislation of the protection of the weak against the strong, which first appeared in the 20th century and, without taking the place of those spheres that are the preserve of special codes, refuse to import into the Civil Code a portion of this protective spirit, itself marked by a degree of realism and pragmatism.

This spirit is reflected in a willingness, on the one hand, to protect the contractual partner from bad faith and, on the other hand, to put an end to excessive contractual imbalance and, no doubt more discreetly, to entrust the courts with the role of arbiter of the contractual relationship.

1. Protection through the promotion of good faith

a) Good faith

While good faith was expressly permitted by the Civil Code only for the performance of the contract at former Article 1134 paragraph 3, it had been extended beyond the performance of the contract in French case law. Inspired by the European harmonisation projects which enshrine this principle, as well as (albeit to varying degrees) the legislation of various European Union countries (45), Article 1104 of the Civil Code now enshrines the principle of good faith at all stages of the contract, during its negotiation, formation and performance.

There are several references to good faith in the Ordinance: at Article 1112 for negotiations which must "*satisfy the requirements of good faith*"; at Article 1198 to settle disputes between several successive purchasers of movable tangible property or immovable property (the party who publishes first will be preferred provided that he is acting in good faith (46)); at Article 1342-3 (payment made in good faith to an apparent creditor is valid); and at Articles 1352-1, 1352-2 and 1352-7 relative to refunds.

Good faith obviously covers a wide area without being limited to specific stages in the contractual process. This option clearly demonstrates the legislature's desire to impose a spirit of fairness on this whole process. It also aims to give some force to the principle of good faith. While the proposals submitted to the consultation in 2015 did not specify it, the text adopted affirms the public nature of the principle of good faith, as is the case for the projects of harmonisation of European contract law (47).

If the "legislature" has not clarified the content of the principle of good faith, the influence of European sources on the French reform should legitimately drive practitioners and judges to draw

inspiration from clarifications brought by these projects in attempting to identify the content thereof. In this regard, DCFR Article I.-1: 103 states that "*(1) The expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question*". The commentary of this text from the DCFR also provides the key to interpreting it: it is stated that "*Cheating is contrary to good faith and fair dealing. The reference to openness identifies another important characteristic of good faith and fair dealing. It denotes an element of transparency in a person's conduct. Consideration for the interests of the other party does not require that the other party's interests be preferred. Only a basic level of consideration will normally be required*".

b) From good faith to consistency

Should a general principle of consistency have been enshrined alongside good faith? This was contemplated in an article which read as follows: "*A party may not act in contradiction with its previous statements and conduct on the basis of which the contractual partner has legitimately based himself*". Not only does this prohibition of contradiction exist in Article 1.8 of the Unidroit Principles, but it constitutes a general principle of international trade law. It is also a rule accepted in common law countries (in the form of estoppel) (48).

French case law also uses this principle in particular to frame the principle of contractual freedom in pre-contractual negotiations or to sanction the withdrawal of an offer by the offeror before the expiry of the period during which he has undertaken to maintain the same (49). It is also an underlying rule when the courts cancel contractual clauses that have the effect of stripping the contract of its interest for one of the contractual partners.

However, insofar as the new contract law contains specific texts to address these issues, the enshrinement of a general principle has ultimately proved unnecessary. Several of the particular applications of the principle of consistency identified by the DCFR are in fact part of the new French contract law. Articles 1156 and 1188 thus establish the rule whereby the apparent authority of a representative which has been established by the statements or conduct of a represented party shall be binding on the latter in respect of the acts of the representative. They still set down the rule whereby, when the common intention of the parties concerning the interpretation of the contract cannot be established, the contract must be understood in such a way that reasonable persons placed in the same situation as the parties would understand it. In the same vein, one could draw from the enshrinement of enquiry procedures a "preventive" implementation of a principle of consistency. Does this nor in fact force the hands of the parties to eliminate defects in their agreement and thus behave consistently?

If it is not specifically enshrined, the principle of consistency is, however, in some sense a variation of the principle of good faith (50).

c) Scope

The affirmation of a general principle of good faith at Article 1104 of the Civil Code raises questions as to its scope. Whilst it is not disputed that this principle applies to all the rules of contract law, and that this requirement is found in different articles of the Code, the principle should not, however, call into question the binding force of the contract. Such a reading would be excessive. As recalled above, if good faith is elevated to the rank of general principle, it is also

placed specifically alongside the principle of binding force, raised to the same rank and, furthermore, placed ahead of Article 1104.

This position is not neutral. Here again, the DCFR can be cited, in particular Article I - 1: 102 on interpretation, paragraph (3) of which states that "*In their interpretation and development regard should be had to the need to promote: (a) uniformity of application; (b) good faith and fair dealing; and (c) legal certainty*".

Good faith does not, therefore, override legal certainty, although legal certainty cannot be conceived without good faith. These are the principles which will henceforth have to guide the interpretation of the texts of the new contract law. Thus, the absence of good faith cannot be sanctioned by the nullity or the termination of the contract. Only the liability of the contractual partner acting in bad faith may be called into question. It is, moreover, suggested in the Report to the President of the Republic that the "preliminary provisions" within which "*although intended to provide guidelines on contract law, do not constitute rules of a higher level than those which follow and on which the courts could rely to justify increased interventionism; these are more principles intended to facilitate the interpretation of all the rules applicable to the contract and, if need be, fill in the gaps*".

d) From good faith to the duty of information

In a new way, Article 1112-1 enshrines the "duty" of information (and not the obligation) in the section on the conclusion of the contract (and not in the section on consent), while also conferring an imperative nature on this duty since the parties can neither limit nor exclude it: "*The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party*". As a subjective corollary to the principle of legal certainty that the enabling law highlights, the confidence that one party may have in its contractual partner will guide the court in its task, provided that it has been "*legitimately*" given.

2. Protection against excessive imbalances

Whilst reaffirming the principle whereby the court may not rule on the balance of acts of performance (51), the "legislature" considered it necessary to propose measures to protect parties to a contract against excesses.

It proceeds first by drawing lessons from existing case law based on the concept of cause, to prohibit illusory or derisory benefits in all onerous contracts. This excessive imbalance is a cause of nullity of the contract as provided at the new Article 1169 of the Civil Code: "*An onerous contract is a nullity where, at the moment of its formation, what is agreed in return for the benefit of the person undertaking an obligation is illusory or derisory*".

In the same vein, there is the enshrinement of a defect of violence characterised by the abuse of a situation of dependency to force a party to conclude a contract, a case already known in case law under the term of "economic violence" (52). This device - a further contribution of comparative law - is halfway between the defect of consent and lesion, since proof of a benefit derived from the situation is required, bringing this defect in line with the mechanisms adopted in other countries and codifications of European contract law involving qualified lesion (53).

The protective spirit is also the result of the creation of a special mechanism governing standard-form contracts. The general distinction between bespoke and standard-form contracts, inserted into French ordinary law by Article 1110 of the Civil Code, is a remarkable innovation (54). This text uses the criterion of negotiation of the content of the contract by the parties: the contract is bespoke if its "*stipulations are freely negotiated between the parties*" (paragraph 1); it is a standard-form contract when its "*general conditions are determined in advance by one of the parties without negotiation*" (paragraph 2). This definition, with its contrasting construction, is not simply a stylistic device. It should also serve in interpreting these texts in such a way that if there were doubt as to what a standard-form contract is, the interpreter could also refer to what it is not (a bespoke contract). It is within this framework that the fight against clauses that create a "significant" imbalance between the rights and obligations of the parties is enshrined (cf. new Article 1171). However, the impact of this provision must be tempered: it does not entail the termination of the contract but merely permits the exclusion of the so-called abusive clause, which will be deemed to be unwritten. It is therefore more driven by a concern for protection than punishment.

Lastly, in more extreme situations, when unforeseeable events make it excessively onerous for a party to perform the contract, after inciting the parties to renegotiate or adapt their contract, the new article 1195 of the Civil Code recognises the right of the courts to make this adjustment, or even to revise the contract. This provision is a sign of the break with the spirit of the 1804 Civil Code, since almost 140 years later, it has reversed to the *Canal de Craponne* decision of 6 March 1876 in which the Court of Cassation, on the grounds of compliance with the binding force of the contract, refused the courts the right to revise a contract.

3. The courts

Beyond the mechanisms adopted to combat such excesses, the protective spirit is ultimately reflected in the use of standards and of adjectives such as "reasonable", "legitimate", "manifest", "excessive".

The use of standards has been criticised (55) in that they would lead to the application of legal rules falling into the hands of the courts. It is true that it will be for the courts to assess whether a party can "legitimately" be unaware of information that is of decisive importance (Article 1121-1). They must determine what constitutes a "*manifestly excessive*" advantage serving to characterise a defect of economic violence (Article 1143); or whether a party's act of performance of a party complies with "*the legitimate expectations of the parties*" (Article 1166); what is meant by a "*significant imbalance*" between the rights and obligations of the parties in order to characterize an abusive clause (Article 1171); or what is meant by the "*manifest disproportion*" between the cost of performing the obligation by the debtor and its interest for the creditor, which prevents the debtor from having to perform his obligation in kind (Article 1221). But is this not the expression of the natural role of the courts, whose task is to give content to these notions and apply them to the specific cases brought before them, under the supervision of the Court of Cassation (56) ? It must be seen more as a call for its moderating role and the prohibition of excessive situations (57), this being the final item borrowed from the protective spirit that drives this reform.

Notes

(1) Article 38 of the Constitution provides that "*In order to implement its programme, the Government may ask Parliament for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law.*
Ordinances shall be issued in the Council of Ministers, after consultation with the Conseil d'État. They shall come into force upon publication, but shall lapse in the event of failure to table before Parliament the Bill to ratify them by the date set by the Enabling Act. They may only be ratified in explicit terms.
At the end of the period referred to in the first paragraph hereinabove Ordinances may be amended solely by an Act of Parliament in those areas governed by statute law."

(2) Although the reform was drafted by the Government, it was the Parliament – and therefore the legislator – which had the power to legislate in this area ; hence the term "legislature" in quotation marks.

(3) *Ordonnance nº 2016-131, 10 févr. 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, *JORF* 11 February 2016.

(4) Gérard CORNU – Précis DOMAT – Droit civil – Introduction, éditions Montchrestien – 1985 n°285.

(5) *op. cit.* n° 286.

(6) *op. cit.* n° 287.

(7) *op. cit.* n° 288.

(8) *op. cit.* n° 290.

(9) Cf. in particular the reinstatement of divorce in 1884, the improvements to the status of natural children in 1912, and the surviving spouse in the law of succession in 1891.

(10) *Loi du 14 décembre 1964 sur la tutelle* (Law of 14 December 1964 on guardianship); *Loi du 13 juillet 1965 sur les régimes matrimoniaux* (Law of 13 July 1965 on matrimonial regimes); *Loi du 3 janvier 1968 sur les incapables majeurs* (Law of 3 January 1968 on adults lacking legal capacity); *Loi du 3 juillet 1971 sur l'adoption* (Law of 3 July 1971 on adoption); *Loi du 3 janvier 1972 sur la filiation* (Law of 3 January 1972 on filiation); *Loi du 11 juillet 1975 sur le divorce* (Law of 11 July 1975 on divorce).

(11) The Draft Franco-Italian Code of Obligations. *Il progetto del Codice delle obbligazioni franco-italiano (1927),* republished by Editions Panthéon Assas, 2015. On this Franco-Italian initiative, see C. Witz, La longue gestation d'un code européen des contrats, *RTDciv*. 2003.447.

(12) To quote but one: Henri Mazeaud: "*To make Europe, our Europe – and we know of the vital need to build it*", he writes, "*we must create a European law. What remains to be overcome? The spirit of particularism and pride of which we are all imbued... the question is not one of which amongst the Italian code, the Swiss code, the German code or the French code will prevail; the question is whether, as the drafters of the Napoleonic Code did when they unified French law, lawyers of goodwill want to seek, amongst the civil institutions of all the countries of our Europe, those which must be preferred*" – H. Mazeaud, L'influence du Code civil dans le monde, Travaux de la Semaine internationale du doit, Association Henri Capitant et Société de législation comparée, Paris, 1950, Pedone 1954, p. 571.

(13) Julliot de la Morandière wondered thus: "*Is it conceivable that a genuine Common Market should develop without unity of legislation? And instead of considering overhauling only the part of her Code relative to obligations and contracts, should France not rather take the initiative of proposing, at least to the signatories of the Treaty of Rome, an international conference on the subject of obligations and contracts with a view to developing a single set of rules?*" Reported by R.

Houin, « Pour une codification européenne du droit des contrats et des obligations », in *Etudes juridiques offertes à Léon Julliot de la Morandière*, Dalloz 1964, p. 223.

(14) J. Carbonnier, in *L'évolution contemporaine du droit des contrats*, Journées Savatier, 1985, 1996, p. 96 et seq.

(15) In 2001, the Commission issued a communication "*on European contract law*".

(16) On these "European impacts" of the years 1990-2000, see J.-L. Halperin & F Audren, *La culture juridique française. Entre mythes et réalité, XIX-XXme siècles,* CNRS éd., 2013, p. 257.

(17) Bruno Oppetit was one of the first to denounce this expansionism of norms of technocratic origin and, moreover, have a high degree of normativity in *L'eurocratie ou le mythe du législateur suprême*, Dalloz 1990, p. 73.

(18) J. Carbonnier, *Droit et passion du droit*.

(19) Motion reproduced in *Pensée juridique française et harmonisation européenne du droit,* dir. B. Fauvarque-Cosson et D. Mazeaud, coll Droit privé comparé et européen, Société de législation comparée, vol. 1, 2003, p. 57.

(20) V. in particular Y. Lequette, « Quelques remarques à propos du projet de Code civil de Monsieur von Bar », Dalloz 2002, chron., 2202; « Vers un code civil européen ? », *Pouvoirs,* n°107, 2003, 97; collected in *Pensée juridique française et harmonisation européenne du droit* , cited above.

(21) J.-L. Halperin & F Audren, *op. cit.*, pp 262-263.

(22) It is interesting to note that it was also the European texts that led Germany to reform its law of obligations in 2002: Cf. Reinhard Zimmerman, « Réforme du droit des contrats : l'expérience allemande » dans « Réformer le droit des obligations et le droit des sociétés – Etudes de droit français et allemand », Collection Trans Europe Experts volume 8 page 25.

(23) Pierre Catala – *Présentation générale de l'avant-projet*, in « Avant projet de réforme du droit des obligations et de la prescription » Documentation Française – June 2006, page 11.

(24) Excerpt from Jacques Chirac's speech, 11 March 2004: "*It took ten years to rewrite, thanks to the work of Dean Carbonnier, the first book on persons. I suggest that because of the urgency of the matter, we should try to move faster for the reform of the law of obligations. Let us rewrite contract law and the law of securities in 5 years*".

(25) Cf. impact study page 75 inserted in the legislative file for the Law of 16 February 2015, available on the website of the French National Assembly.

(26) "*It was these technical subtleties that separated the systems most deeply and made us too easily admit that laws that ignored or rejected certain techniques were not comparable to laws that are traditionally highly technical. The modern conception of comparative law tends to suppress or at least reduce these ancient barriers*" – Marc Ancel, « Utilité et méthode du droit comparé », éditions ides et calendes, Neuchatel 1971 page 107.

(27) This approach also makes it possible to better take into account legislative dynamism because "*a living legal system is in a permanent state of becoming; and while the law of jurists tends to ensure the stability of legal relations, the law of the citizen, the litigant and the individiual tends to adapt unceasingly to the fluctuations of economic and social life. Hence the complexity of law in action, the natural propensity of which is to burst the banks of written rules at any moment*", Marc Ancel, *op. cit*, page 116.

(28) Association H. Capitant et Société de législation comparée, *Projet de cadre commun de référence. Terminologie contractuelle commune*, « Droit privé européen et comparé », vol. 6, 2008.

(29) Association H. Capitant et Société de législation comparée, *Projet de cadre commun de référence. Principes contractuels communs*, « Droit privé européen et comparé », vol. 7, 2008.

(30) Cf. the Unidroit Principles Relating to the Contract of International Trade, 1980 Vienna Convention on the International Sale of Goods, Draft European Code of Contracts, Proposed Draft Reform of French Law on Obligations and Limitation, DCFR under development at the time.
(31) In this sense cf. Alain Bénabent & Laurent Aynès who note that it "*is difficult to detect in this new whole a clear philosophy of social relations. It is rather a work of compromise that draws its inspiration from the convergence of the Catala and Terré proposals, as well as the European Principles of European Contract Law (PECL). The new text is realistic and pragmatic, divided between liberalism (suppression of the cause) and a moderate socialism (economic violence, abusive clauses), concern for efficiency (unilateral breakdown, unilateral price fixing and reduction, simplification of the assignment of debt) and that of balance (treatment of unforeseeability)*" Dalloz 2016.
(32) Gérard CORNU – Précis DOMAT – Droit civil – Introduction, éditions Montchrestien – 1985 n°285.
(33) Cf. the work of the working group convened under the aegis of François Terré at the *Académie des sciences morales et politiques*, which proposed the enshrinement of this principle: Article 3 "*The parties are free, within the limits fixed by law, to choose their contractual partner and to determine the form and content of the contract*".
(34) This is the case with Article 1: 102 of the CEDP, Article 1.1 of the PU, or Article II 1: 102 of the DCFR. Such a principle is also proposed by the work of the Henri Capitant Association and the *Société de legislation comparée* on "common contractual principles" (PCC, Article 0: 101: "*Any person is free to contract and choose his own contractual partner. The parties are free to determine the content of the contract and the rules of form applicable to it. Contractual freedom is exercised in compliance with mandatory rules*".
(35) On the other hand, this text does not contrast contractual freedom with fundamental principles. For an overview of the reasons for this choice, cf. « Aux sources de la réforme du droit des contrats », Bénédicte Fauvarque -Cosson, Juliette Gest, François Ancel, Édition Dalloz, 2017 n° 23-24.
(36) Com. 10 juill. 2007, nº 06-14.768. D. 2007. 2839 obs X. Delpech, note P. Stoffel-Munck; D 2007. 2966, obs S. Amramni-Mekki & B. Fauvarque-Cosson.
(37) Thus, the three main functions of the cause are found in the following articles: reviewing the lawfulness of the contract at Article 1162 ("*A contract cannot derogate from public policy either by its stipulations or by its purpose (...)*"); reviewing the parties' expectations at Article 1169 ("*An onerous contract is a nullity where, at the moment of its formation, what is agreed in return for the benefit of the person undertaking an obligation is illusory or derisory*") and reviewing contract terms at Article 1170 ("*Any contract term which deprives a debtor's essential obligation of its substance is deemed not written*").
(38) Other similar provisions are provided at Articles 1123 and 1158 of the Civil Code.
(39) Case law had already held that "*the seriousness of a party's conduct in a contract may justify the other party's unilateral termination of the contract at its own risk*" (Civ.1re , 13 October 1998)
(40) On the other hand, this authorisation by the courts will be necessary if the creditor wishes to destroy what has been done by the debtor in breach of his obligation or if he wants the debtor to advance the sums necessary for the performance of its obligation by a third party.
(41) The *Conseil d'Etat* draws the conclusion that the report is not a decision that can be referred to the courts for judicial review – Conseil d'État Sect, 19 October 2005, *Confédération générale du travail et autres*, n° 283471

(42) It also meets a legal requirement laid down at Article 2 of Ordinance No. 2004-164 of 20 February 2004 on the modalities and effects of the publication of laws and certain administrative acts.

(43) cf. Le Guide de légistique élaboré par le Secrétariat général du Gouvernement n°3.1.2, available on the Legifrance website

(44) It is perhaps already the path that the Mixed Chamber of the Court of Cassation recently (Ch. Mixte 24 March 2017) rightly decided to take, giving an open interpretation of the theory of nullity. See in this regard « Première influence de la réforme du droit des contrats » - Bénédicte Fauvarque-Cosson - Dalloz 2017. 793.

(45) CEDR, art.1 : 201; DCFR, Art.I 1 :102; PU, Art.1.7; P CC, Art. 0: 301 and 0: 302. German and Swiss law make the principle of good faith a fundamental principle, while English law is opposed to the adherence to a general principle of good faith, considered a source of legal uncertainty.

(46) While French case law held that in the event of a dispute between successive purchasers of the same right in respect of immovable property, priority was given to the person who had published the first even though he was acting in bad faith, Article 1198 paragraph 2 provides that: "*Where two persons acquire rights over one and the same immovable property in turn and hold their right from the same person, the person who first published his title of acquisition made in an authenticated instrument on the land register is preferred, even if his right is later, provided that he is in good faith*".

(47) PDEC, art. 1 : 202; PU, art. 1.7; PCC, art. 0 : 301.

(48) The principle of consistency was adopted by the Terré group (Projet Terré, Art. 6). However, the main illustrations of the principles of consistency, as set out in case law and jurisprudence, have been incorporated into the new contract law from the perspective of good faith.

(49) Com. 8 mars 2005, nº 02-15.783, *Bull. civ.* IV, nº 44; *Dalloz* 2005. 883, obs. X. Delpech; *Dalloz* 2005. 2836, obs. S. Amrani-Mekki & B. Fauvarque-Cosson; *Dalloz* 2006. 155, obs. D. R. Martin & H. Synvet; *RTD civ.* 2005. 391, obs. J. Mestre & B. Fages; *RTD com.* 2005. 397, obs. D. Legeais.

(50) Indeed, DCFR proposes this as an illustration of the principle of good faith (DCFR, art.I - 1: 103 (2): "*It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party's prior statements or conduct when the other party has reasonably relied on them to that other party's detriment*".

(51) cf. The new Article 1168 recalls that in synallagmatic contracts, the lack of equivalence of the acts of performance is not a cause of nullity of the contract "*unless legislation provides otherwise*".

(52) Civ. 1 April 3, 2002, 00-12.932, *Bull. Civ.* I, No. 108; *D.* 2002. 1860, and Obs., Notes J.-P. Gridel, note J.-P. Chazal; *D.* 2002. 2844, obs.D. Mazeaud; *RTD civ.* 2002. 502, obs. J. Mestre and B. Fages; *RTD com* .2003. 86, obs. A. Francon. The decision in the present case refused to take into account such a defect of violence.

(53) Portugal, the Netherlands in particular and for draft European and international contract law: Article 4: 109 of the PECL, the UNIDROIT principles (Art.3.10 became Article 3.2.7 in the 2010 version) or Article 30.3° of the Gandolfi Code, which speak not of "economic violence" but of "qualified lesion", which consists of a significant imbalance resulting from immoral or unfair behaviour (exploitation of the weakness of others). The DCFR also enshrines this possibility in Article 7.207 : "*"Unfair exploitation" (1) A party may avoid a contract if, at the time of the conclusion of the contract: (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and (b) the other party knew or could reasonably be*

expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive
benefit or grossly unfair advantage. (2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed. (3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice without undue delay after
receiving it and before that party has acted in reliance on it".

(54) For Thierry Revet, "*the distinction between bespoke contracts and standard-form contracts not only forms the "summa divisio of private contracts*", but affects the "*very conception of the contract*" and could lead to the "*break-up of ordinary law into two corpora which will no longer cease to move away from each other -a sort of "Yalta" of contract law. It should be noted, however, that since 1977, German contracts have existed under ordinary law, which are also considered to be based on the will of the parties, a system of combating non-negotiated clauses ("general conditions of sale") which Create a significant imbalance between the rights and obligations of the parties*" - see § 307 BGB, formerly § 9 *Gesetz zur Regelung des Rechts der Allgemeine Geschäftsbedigungen*) : "*The terms of the general conditions are ineffective if, contrary to good faith requirements, they disadvantage the contractor of the stipulant inappropriately. An inappropriate disadvantage may also arise from the obscure or unintelligible nature of the clause*".

(55) This multiplication of standards and adverbs is also perceived as the legislature's delegation of its normative authority to the courts and "*a call for a strictly judicial definition of the rule in case of litigation in such a way as to increase the unpredictability of contract law*" - See in particular Laurent Aynès, in « *le juge et le contrat : nouveaux rôles ?*» *Revue des contrats* 2016 *hors série*, page 14.

(56) See Bruno Sturlèse, Advocate General of the Third Civil Chamber of the Court of Cassation, « Le juge et les standards juridiques » - Colloque Cour de cassation – Le juge auteur et acteur de la réforme du droit des contrats » - Revue des contrats 2016 n°2

(57) In support of a new role of the contract judge, cf « Quel juge pour le contrat au 21ème siècle » François Ancel Dalloz 2017, 721.