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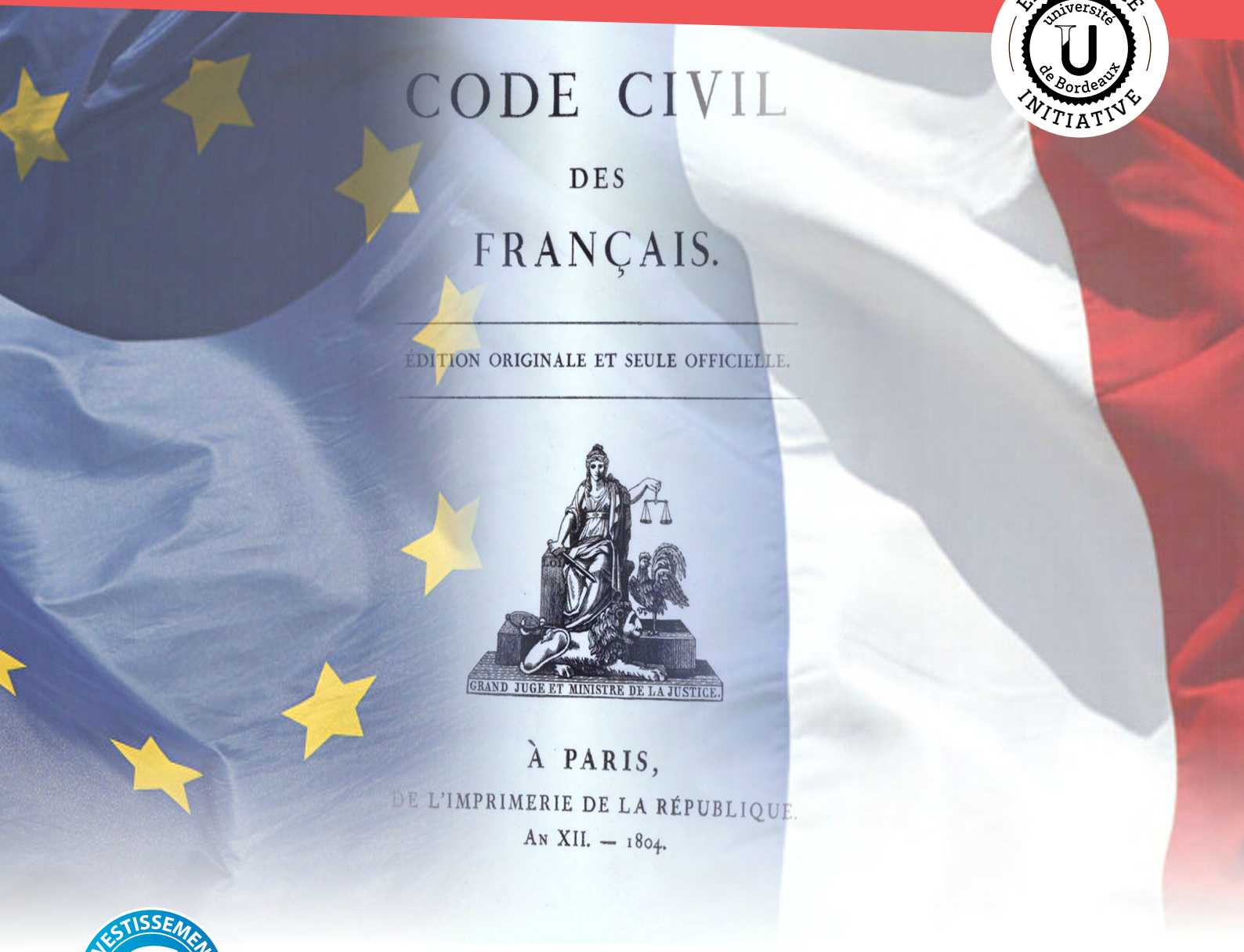

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The Impacts of the Reform

The Impact of Civil Code Reform on Administrative Contracts

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Compared to other legal systems (1), the French legal system is characterised by the place accorded to the notion of administrative contracts. The singularity of French law derives first of all from the scope of the concept, which encompasses all contracts concluded by legal entities governed by public law (the State, local authorities and public institutions); from the particularity of the rules relating to it, forming what French jurisprudence has dubbed the "*general theory of administrative contracts* " (2); and from the unity of its litigation system, which is entrusted to the administrative courts.

Neither Ordinance No. 2016-131 of 10 February 2016 on the reform of contract law nor the preparatory work deal with the issue of administrative contracts. The solutions drawn from the case law of the *Conseil d'Etat* have remained outside the scope of contractual comparisons; as opposed to foreign legal systems, which have provided useful points for reflection. For their part, neither the Ordinance of 23 June 2015 relating to public contracts nor the Ordinance of 29 January 2016 on concessions – i.e. the two main texts concerning administrative contracts – makes reference to the provisions of the Civil Code.

On the face of it, the question of the relationship between the Civil Code and administrative law does not arise: far from falling within a common legal area, civil contracts and administrative contracts gravitate in parallel and separate legal worlds which, like the legislation regulating them, have a natural vocation to ignore each other. Gaston Jèze explains that "*administrative tribunals are competent for administrative contracts because it is a question of applying a special legal regime; the essential character of administrative contracts is that they are subject to a set of special rules* " (3). Whilst revealing the shortcomings of the "*general theory* " of administrative contracts, these appearances are misleading: if the taking into account of the needs of public services justifies introducing public law into the contract, the administrative contract remains dominated by the contractual concept. As contemporary jurisprudence readily admits, the legal identity of all contracts, irrespective of the "category" to which they belong, implies that their legal regime is inspired by common principles (4). At the beginning of the 20th century, in the wake of the *Blanco* decision, the *Conseil d'Etat* chose to describe markets, concessions and most bilateral acts of the administration as “contracts” (5). This choice results from the assertion of the jurisdiction of the administrative courts where such contractual acts relate to the performance of a public service mission (6) and where the parties also choose to include an overriding clause of ordinary law in their contract (7). It is also less explicit that civil law and administrative law share the same concept of contracts. As Leon Duguit points out, there cannot be two notions of contracts within the same legal order (8).

Since this "contractual turning point", the hybrid objects that are administrative contracts have operated at the intersection of public law and a frame of reference which is that of the Civil Code. Based on a concept of combination with public service requirements, the position of the notion of administrative contracts with respect to the Civil Code remains fundamentally ambivalent.

Outlining what the impact of the new provisions of the Civil Code on administrative case law will be tomorrow is therefore a delicate exercise.

I. The ambivalence of the relationship between the administrative law of contracts and the Civil Code

Different but not indifferent: this is the position of French administrative contract law with regard to the Civil Code. Different, for there is a "*general theory of administrative contracts*" with principles "*applicable to all administrative contracts*" (9). Not indifferent, however, as the notion of administrative contracts, if not its "general theory" (10), was constructed in reference to the Civil Code: the administrative courts drawing on the general categories of contract law for their conceptual and theoretical apparatus and using, where necessary, the technical solutions therein, sometimes even without the slightest consideration for the autonomy of administrative law. (11)

The notion of contract is unitary in French law. Attempts made in public law jurisprudence to establish a different definition of the contract have failed in the face of the attitude of the administrative courts to a conventional reading of the Civil Code, unless otherwise stated. Administrative law and civil law share the fundamental principles of contract law: contractual freedom, consensualism, the binding force of the contract and the rule of relative effect. And while the administrative courts agrees to make an exception, it is to take into account either rules of public law deemed incompatible, or the specific purpose of administrative contracts (12).

Ambivalence characterises the relationship between administrative law and civil law. The response to the attraction of bilateral administrative acts (contracts and concessions in particular) in the contractual sphere was a symmetrical trend of rejection by French administrative law of the individualistic and liberal conception of the contract resulting from the Napoleonic Code and characterised by the idea of the independence of the will (13). This initial rejection justified the elaboration by the administrative courts of separate rules intended to ensure that, whenever the rule of civil law proves to be inadequate, the requirements for the organisation and functioning of the public service will prevail over a strict compliance with the contract.

Gauging the differences between the Civil Code and administrative contracts remains a difficult exercise, therefore, as a symbolic issue for administrative law to establish its autonomy. The first pitfall is that the "classics" of French administrative law, such as Gaston Jèze and Georges Péquignot, have long stuck to a broadly false presentation of civil law that was deliberately rigid and ignorant of developments in civil case law, and this with a view to constructing the theoretical model of the administrative contract and highlight its differences. The other obstacle is the concern of public law jurisprudence to emphasise what removes administrative case law from solutions accepted in civil law, particularly in order to systematise "*the general theory of administrative contracts*" on the basis solely of questions concerning their performance; even going so far as to base their jurisprudential analysis mainly on a particular kind of contract – the concession (14): a "contract" which, as subsequent administrative case law would later show, owing to its (public service) purpose and its content (the regulatory clauses), is a mixed act giving the appearance of a contract (15). The difficulties are further emphasised by the way in which the Civil Code is received by administrative case law: sometimes explicitly but most often implicitly, the court functioned essentially by analogy. This was especially so since, drawing on the Civil Code, the administrative courts never strictly retained the concept of obligations and far less attempt any systematisation (16): they reasoned mainly on the basis of the contract itself, finding

the necessary legal provisions in the special legislation governing contracts and concessions; failing which, they adapted or even reconstructed the rules of the Civil Code in accordance with the specific needs of public entities (17).

An examination of decisions handed down by the *Conseil* d'Etat shows, however, that civil law is present everywhere in the solutions and reasoning developed by the administrative courts: the provisions of the Civil Code act either as a frame of reference – even when it was a matter of dismissing the rule of civil law – or as a technical mechanism then directly applied by the administrative court. The *Conseil d'Etat* even tended to stick to the blueprint provided by the rule inscribed in the Civil Code, ignoring internal dissent in judicial case law and the complexity of jurisprudential constructs (18). Even the notion of overriding clause, a criterion of the administrative contract, is not justified under the provisions of the Civil Code (19). In contractual matters, compliance with civil law was presented by a member of the *Conseil d'Etat* (20) as a factor in legitimising the rule of administrative law: the acceptance of civil law contributes to the unity of the legal order, contributing in this way to the legal certainty of the parties and makes it possible to presume the merits of the administrative court's legal reasoning. The administrative courts generally favours a functional reading of the Civil Code, in which the courts seek the immediate effectiveness of the Code's solutions, which they will apply in a public law context that can be dominated by other issues such as competition, the protection of public finances or the continuity of public services.

II. The impact of Civil Code reform on the administrative contract system

It has already been noted above that the reform of the Civil Code was carried out without any direct reference to administrative law. Nevertheless, administrative law is not in a position to ignore developments in civil law: the unity of the French legal order means that civil and administrative contracts are of the same essence (21). The question is therefore how the administrative courts will receive the new Civil Code, and not to establish whether the new Civil Code will begin a process of reconciliation with administrative law, including provisions which the administrative courts are not intended to adopt (22).

The indifference of civil statute law is echoed in the freedom of the administrative courts. Compared to the Civil Code, the administrative courts are in a very different position to that of the ordinary courts. This asymmetry further increases the difficulty of the prospective exercise. Indeed, while the civil courts are obliged to apply the Civil Code, even going so far as to force its interpretation, the administrative courts have in fact a choice as to the applicable rule. Depending on the circumstances of the case and the content of the civil law norm, the court may either depart from the Civil Code or retain it as a source of inspiration or even as a directly applicable rule. And these are always considerations, over which the administrative court has full mastery, which govern the choices made by the court. These contingencies are linked to the organisational requirements of public services or, more broadly, to the public law environment in which the contracting authority acts. Their perception may vary over time, as illustrated by the *Conseil d'Etat* resorting on successive occasions to civil law structures that were initially dismissed (23). Moreover, the evolution of the legislative texts is a variable that can limit the convergence of laws. The question of the theory of unforeseeability illustrates this aspect. At a time when the Civil Code seems to be devoted to the solutions accepted by administrative case law, the texts applicable to public contracts and concessions, on the contrary, provide a framework for the possibility of amending contracts and limiting the use of the theory of unforeseeability (24).

In spite of the methodological difficulties to which any search for internal comparative law is exposed, it is possible to sketch out some semblance of an answer. While there are no obstacles in public law to the administrative courts integrating the reform of the Civil Code into their case-law, certain developments in the new Civil Code may potentially challenge solutions accepted by the *Conseil d'Etat*. The autonomy of administrative law, unless it is excessively solicited, can hardly justify maintaining administrative case law as it stands. Conversely, other new solutions appear to be potentially transposable in administrative law and could, amplify the trend towards a rapprochement between the two laws, if they were to be adopted by the administrative courts. We shall confine ourselves to giving a few examples.

While the administrative courts have abandoned the expression "nullity of the contract" in favour of its "cancellation", disputes concerning the validity of the contract tend to multiply. The evolution of administrative case law even tends to grant the invocation of the Civil Code a more significant place. The *Conseil d'Etat* has indeed established the requirement of fair contractual relations, holding that the parties to the contract cannot avail themselves of all sorts of irregularities in an attempt to escape their contractual obligations. Consequently, the court now pronounces the cancellation of the contract only as a last resort when it finds that the content of the contract is unlawful or that there is a particularly serious defect, in particular as a result of the conditions in which the parties have given their consent (25).

In this respect, the reforms introduced by the Ordinance of 10 February 2016 are liable to alter the course of administrative case law insofar as it adheres in principle to the civil theories of the defects in consent and the cause.

The abolition of the cause has sparked the most intense debate in civil law. These debates will undoubtedly be extended to administrative law, and particularly on the matter of whether, when the *Conseil d'Etat* refers to the cause in administrative contracts, it is to the cause as defined in the old Civil Code or a meta-legal principle outside the Civil Code (26). The condition of the cause has been replaced by the requirement that the contract have lawful and certain content. As such, the wording of the new article of the Civil Code need not trouble the administrative courts: failure to comply with one of the two conditions will be enough to bring about the cancellation of the contract (27), without the administrative court having any obligation to rely explicitly on the new provisions of the Civil Code. Nevertheless, will administrative case law necessarily have to depart from any reference to the cause as it has currently understood? The direction taken by the new legal provisions is not exactly the same as that which prevailed prior to the reform of the Civil Code. The contractual situations at issue will not necessarily be analysed in the same way, depending on whether the court questions the purpose, reasons or content of the contract. In this sense, for want of a total superposition between the new and the old Civil Codes, the contentious treatment of the condition of the cause appears to preserve a utility in administrative law which it seems to have lost in civil law.

The reasoning which the Conseil d'Etat derives from the condition of the cause covers either those scenarios not found in civil law or solutions which emerge from an approach particularly suited to the general objectives of public law. In particular, they enable the administrative courts to make the general interest prevail over the strict interests of the contracting parties (28). Thus, with respect to the cause sanctioned by the civil courts, the *Conseil d'Etat* has established a new model in which the cause is the legal basis of the contract (29). This expansion of the cause allows it to

insert into the contractual dispute a mechanism close to the exception of unlawfulness, which is not without practical interest as developments in contractualisation result in turning many administrative contracts into genuine norms applicable to third parties. At the same time, the legal treatment of the cause as a goal pursued by the parties allows the courts to maintain the unity of administrative disputes by transposing a general condition of validity of administrative acts which sanction administrative morality and the misuse of powers through the purpose of the act itself (30).

The issue of defects in consent probably raises fewer questions. It would appear that the new wording of the Civil Code may be broadly assimilated by administrative case law, which finds therein the basis of already accepted solutions concerning fraud, error or violence (31). Rather, it is the law's silence of that should be questioned, and in particular the total absence of reference to the concept of *dolus incidiens* (deceit as to a matter not essential to the contract) in the Code or in the preparatory works. This silence implicitly confirms the validity of judicial case law which has long ceased to refer to the concept in question; except that the administrative courts have developed a series of solutions on this basis, which enable the public authorities, victims of the the manoeuvres and agreements of the candidate companies in the context of the award of a contract, to obtain just compensation for the damage suffered even when the contract has already been fully performed (32). The *Conseil d'Etat* has circumvented the question by admitting that the candidate companies responsible for such fraudulent manoeuvres may be held liable extra-contractually. Although not enshrined as a principle, the concept of fraud appears to be admitted in its effects by allowing administrations who are the victims of the anticompetitive practices of their counterparts to obtain compensation rather than a cancellation of the contract (33).

The convergence of civil and administrative law finds particular expression in the new Article 1195 of the Civil Code. *A priori*, the approximation of the contractual regimes seems to go in the direction of an alignment of the ordinary courts with the position of the administrative courts (34), the legislature codifying the principles of the theory of unforeseeability established by the *Conseil d'Etat*. In order to take account of an unforeseeable situation, the parties are permitted to renegotiate the contract and, failing that, to apply to the court for its revision. The amendments to the Civil Code, however, establishes a new context: each case law now evolving on a common legal ground and under the gaze of the other, one might think that, given their remaining differences, the developments yet to come may result from reciprocal influence. In administrative law (35), the triggering of the theory of unforeseeability depends on the upheaval of the economy of the contract, where the new Civil Code evokes performance that would be excessively onerous. Above all, the legislative texts applicable to contracts and concessions establish a ceiling above which the amendment of the contract requires a relaunch of competitive tendering and therefore the award of a new contract (36).

There are other areas for which the reform makes it possible to envisage further rapprochement. For instance, the concept of framework contracts (agreements) that is found in each piece of legislation applicable specifically to both types of contracts (37). Undoubtedly, the provisions on termination of the contract will hardly lend themselves to genuine change. The reform of the Civil Code, in admitting a measured unilateralism, appears either to fall short of or to be incompatible with solutions marked by the inequality of the administrative contract (38). On the other hand, we can imagine that a better consideration of the legal provisions establishing the system of the breakdown of contractual negotiations (Article 1112) could allow the administrative courts to

consolidate judicial solutions that are still fragile or piecemeal (39). In this sense, the decision in *Commune de Case-Pilote* - which literally appropriates the solutions handed down by the Court of Cassation in the event of withdrawal from a promise of sale - is the guarantee of further rapprochement in the sphere of pre-contracts (40).

This, however, is purely conjecture. The impact of the Civil Code on the law of administrative contracts is in fact affected by maximum uncertainty. The reason for this is mainly due to the discretion left to the administrative courts, which will continue freely to draw on the Civil Code, depending on the needs of the court considering the contract and the requirements of each case, without being fully bound by the provisions that it transposes. In this respect, the way in which the two reforms of contract law (the Civil Code and public procurement law) were carried out by way of ordinances - from the front blindly - even when the *Conseil d'Etat* had been mandatorily involved on the basis of its advisory role, suggests that the time for meetings between civil and administrative contracts other than circumstantial may not yet have come.

Notes

(1) Rozen Noguellou, Ulrich.Stelkens (eds), *Droit comparé des contrats publics*, Bruylant, 2010.
(2) This wording is attributed to Gaston Jèze who, between 1927 and 1934, published a book in three volumes titled *Les contrats administratifs de l'Etat, des départements, des communes et des établissements publics*. The last two volumes would subsequently form volumes IV, V and VI of the *Principes généraux du droit administrative*, under the title "*Théorie générale des contrats de l'Administration*". Other instigators are: Georges Péquinot, *Théorie générale du contrat administratif*, Pédone, 1945 and André de Laubadère, *Traité théorique et pratique des contrats administratifs*, LGDJ, 1946.
(3) G. Jèze, *Les contrats administratifs de l'Etat, des départements, des communes et des établissements publics*, cited above, p.8.
(4) See, in particular, J. Waline, *La théorie générale du contrat en droit civil et en droit administratif*, in *Mélanges Ghestin*, LGDJ, 2001, p. 965). See, however, Sophie Nicinski, *Le dogme de l'autonomie de la volonté dans les contrats administratifs*, in Mélanges Guibal, 2006, p.45.
(5) Yves Gaudemet, "*Pour une nouvelle théorie générale du droit des contrats administratifs : mesurer les difficulté d'une entreprise nécessaire*", *RDP*, 2010, n ° 2-2010, p. 315.
(6) *Conseil d'Etat*, 4 March1910, Thérond, *Grands arrêts de la jurisprudence administrative* (GAJA), 20th edition, 2015, n ° 19.
(7) *Conseil d'Etat*, 31 July 1912, *Société des Granits porphyroïdes des Vosges*, GAJA, n ° 24
(8) Léon Duguit, *Traité de droit constitutionnel*, 2nd edition, volume III, Paris, 1923, p. 41: "*The contract is a certain legal category, and when the constituent elements are united, there is a contract that always has the same characteristics and effects*". In the same vein, Pierre Delvolvé, *Les nouvelles dispositions du Code civil et le droit administratif*, RFDA 2016, p. 613 quoting Georges Vedel: "*a dualistic system cannot be admitted within the same State, not even between public and private law*".
(9) The expression was adopted for the first time in case-law by CE, Ass., 2 May 1958, *Distillerie de Magnac-Laval*, Rec. 246. The Constitutional Council refers to the "*principles applicable to administrative contracts*": Cons. constit. N° 84-185 DC of 18 January 1985, *Loi modifiant et complétant la loi n° 83-663 du 22 juillet 1983 et portant dispositions diverses relatives aux rapports entre l'État et les collectivités territoriales*, recital 26.
(10) For a jurisprudential attempt to assert the autonomy of the administrative contract, see Georges Péquignot, cited above.

(11) See the many examples given by Laurent Richer, *Droit des contrats administratifs*, LGDJ, 2014, 9th edition, n ° 39.
(12) Julien Martin, *Les sources de droit privé du droit des contrats administratifs*, PhD thesis, University of Paris II, 2008
(13) Sébastien Saunier, *L'autonomie de la volonté en droit administratif français, une mise au point*, RFDA 2007, p.609.
(14) Roland Drago, "*Paradoxes sur les contrats administratifs"*, Etudes J. Flour, Paris, 1979, p.151. See also Hubert Hubrecht, PhD thesis, Bordeaux.
(15) *Conseil d'Etat*, 5 March 1943, *Compagnie générale des eaux*, Dalloz 1994, J. 121, concl. Odent. The theory of the "mixed act" was confirmed by the decision in *Cayzeele* (*Conseil d'Etat*, 10 July 1996, *Actualité juridique-droit administratif*, p.732).
(16) Roland Drago, *La notion d'obligation : droit public et droit privé*; Archives philo. Droit, No. 44, 2000, p. 46. See, however, Rozen Noguellou, *La transmission des obligations en droit administratif*, LGDJ 2004.
(17) For example, regarding the capitalisation of interests, see Emmanuelle Marc, *De l'anatocisme, Brèves observations sur l'émergence supposée d'un droit commun des contrats*, in *Mélanges en l'honneur du Professeur Michel Guibal*, 2006, vol. I, p.305.
(18) Jean-Baptiste Seube, *Contrats privés-contrats administratifs : points de convergence*, in *Mélanges Guibal*, cited above, vol. 1, p. 2).
(19) Concerning the prohibition of potestative conditions (Civil Code, Articles 1170 and 1174), *Conseil d'Etat*, 25 February 2005, *Association pour la transparence et la moralité des marchés publics*, Rec. p. 71.
(20) Nicolas Boulouis, *Regards d'un rapporteur public du côté du droit privé des contrats*, AJDA 2009, p.921.
(21) Pierre Delvolvé, *Les nouvelles dispositions du code civil et le droit administratif*, RFDA 2016, p. 613. Jeremy Antippas, *Regards comparatistes internes sur la réforme du droit des contrats, Réflexion sur l'identité contractuelle française*, AJDA 2016 p.1620.
(22) From this point of view, see Jeremy Antippas, *Regards comparatistes internes sur la réforme du droit des contrats, Réflexion sur l'identité contractuelle française*, AJDA 2016 p.1620
(23) Contemporary jurisprudence has thus pointed out "a more or less explicit alignment of the law of administrative contracts with the ordinary law of obligations": François Brenet, *La théorie du contrat administratif, évolutions récentes*.
(24) Hélène Hoepffner, *La modification des contrats*, RFDA, 2016, p. 280.
(25) *Conseil d'Etat*, Ass., 28 December 2009, *Commune de Béziers* (1), GAJA, cited above, N° 112. Emmanuel Glaser, *Les habits neufs du juge du contrat*, AJDA 2011.
(26) Frédéric Lombard, *La cause dans le contrat administratif*, Dalloz 2008.
(27) In this sense, see *Conseil d'Etat*, Ass. 28 December 2009, *Commune de Béziers*, cited above.
(28) Julien Boucher & Bénédicte Bourgeois-Machureau, *Les trois visages de la cause dans les contrats administratifs*, AJDA 2008, p.575.
(29) *Conseil d'Etat*, 20 February 2008, *Office national de la chasse et de la faune sauvage*, n° 302053.
(30) *Conseil d'Etat*, 15 February 2008, *Commune de La Londe-les-Maures*, n° 279045.
(31) Benoit Plessix, *La théorie des vices du consentement dans les contrats administratifs*, RFDA 2006, p.12.
(32) *Conseil d'Etat*, 14 December 1923 Soc. *Soc. des grands moulins de Corbeil* ; CAA Paris 22 April 2004; AJDA 2004, p. 1417, conclusions by Haim

(33) *Conseil d'Etat*, 19 December 2007, *Société Campenon-Bernard Franck Moderne*, an exemplary illustration of the theory of fraud in the litigation of administrative contracts, RFDA 2008, p.109
(34) François Chenedé, *Les emprunts du droit privé au droit public en matière contractuelle*, AJDA 2009, P.923
(35) *Conseil d'Etat*, 30 March 1916, *Compagnie générale d'éclairage de Bordeaux*, GAJA, cited above, n ° 30
(36) Hélène Hoepfner, RFDA 2016, cited above.
(37) Civil Code, Article 1111 and Ordinance of 23 July 2015, Article 4.
(38) In this sense, see Rozen Noguellou, *La fin du contrat, éléments de comparaison entre le droit public et le droit privé*, in *Mélanges Guibal*, cited above, p.341. However, the *Conseil d'Etat* admitted that, where the contract does not relate to the performance of a public service mission, if not the non-performance exception, there is at least the possibility of inserting a unilateral termination clause into the agreement to the benefit of the private contractor: CE, 8 October 2014, *Société Grenke location*, n ° 370644
(39) *Conseil d'Etat*, 9 December 2016, *Société foncière Europe*, JCP A 2012, 2128, note Julien Martin.
(40) CE, 2 April 2015, *Commune de Case Pilote*, No. 364539, where the administrative court expressly refers in the text of its judgment to the case law of the Court of Cassation: "*as held by the Court of Cassation*", JCP A 2015, n° 2251, note Julien Martin.