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The search for a global and lasting contractual balance
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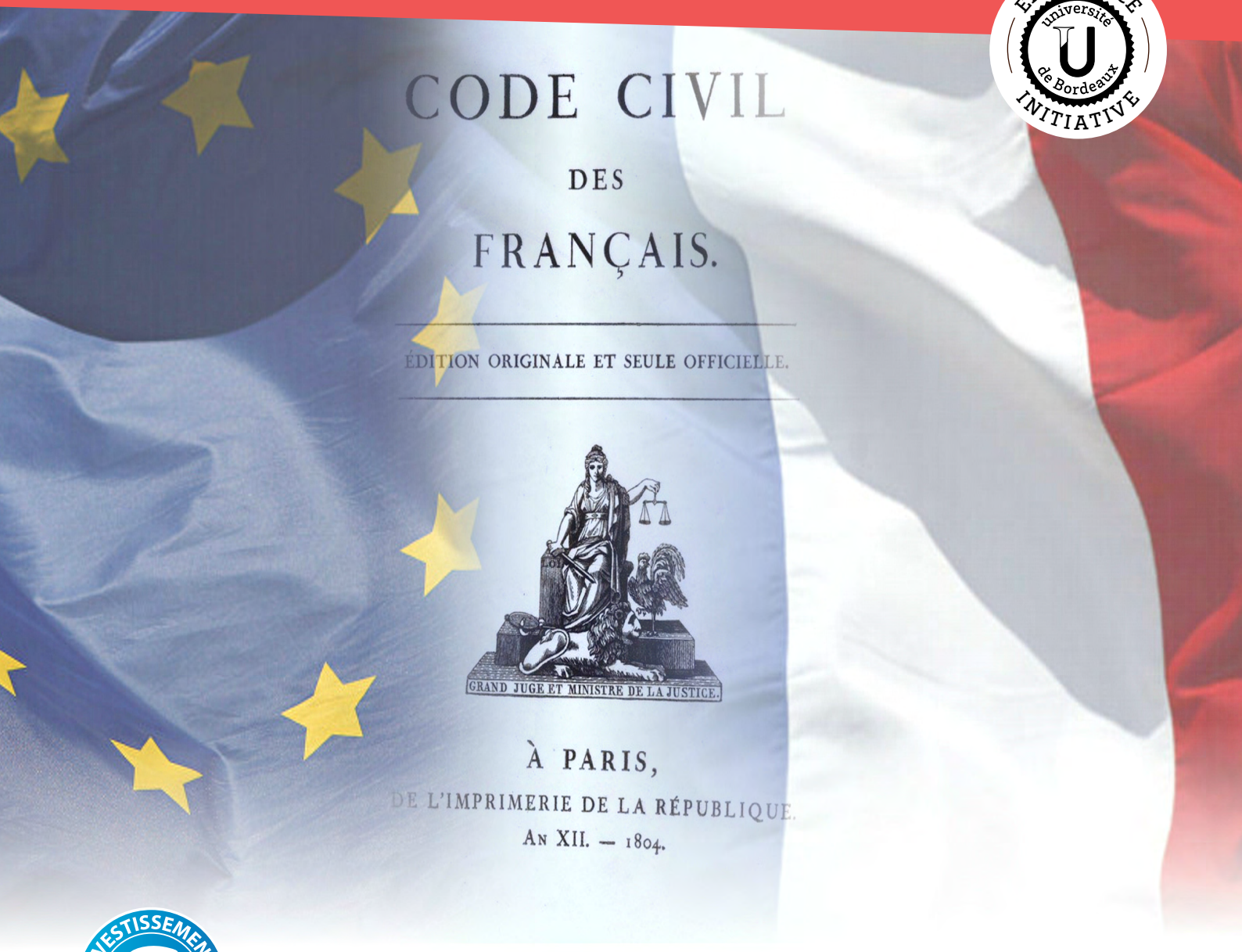

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The Characteristic Aspects of the Reform

The Search for a Global and Lasting Contractual Balance: the Content of the Contract and the Change of Circumstances

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Amongst the rules arising from Ordinance No. 2016-131 of 10 February 2016, those relating to the "content of the contract" (Articles 1162 to 1171, Civil Code) and that relating to change of circumstances (Article 1195, Civil Code) immediately draw attention. They contain the two most remarkable innovations in the reform of French contract law: the introduction of a judicial review of the "significant imbalance" in the rights and obligations of the parties to standard form contracts (Article 1171) and the introduction of a judicial revision or termination of contracts in the event of change of circonstances (Article 1995).

At first glance, and focusing on these two rules for the time being, the new French law stands out by the particular attention paid to the *contractual balance* (2). Clauses creating a "significant imbalance" *ab initio* can now be excluded from standard form contracts on the basis of the sole provisions of the Civil code. Imbalances arising from a change of circumstances may now result in a judicial revision or termination of contracts.

This impression is confirmed if one observes, without rigour, that the section on the "content of the contract" contains several other rules, scarcely less important from a symbolic point of view and equally important from a practical point of view, which invalidate undertakings made without consideration or sanction a party which fixes the price at an unreasonably high level. Article 1169 invalidates onerous contracts in which the consideration is "*illusory or derisory*". Article 1170 holds that clauses which render the essential obligation of a contract ineffective are deemed to be unwritten. Lastly, Articles 1164 and 1165 sanction abusive price-fixing.

Such a superficial view of things creates two risks.

The first, fuelled by good intentions, is to pass the reform off for what it is not: a very late update of a Civil Code until then wrongly impervious to the contractual balance. The new rules would finally make contracts fairer; they would "strive for a better contractual balance" (3). Moreover, the balance sought is intended to be "comprehensive and sustainable": comprehensive in that it would relate to the contract as a whole, covering all of its clauses; sustainable in that it would adapt to changing circumstances, evolving with it. This sounds appealing.

It does not take long, however, to understand that this is an overly optimistic view. The reason why the 1804 Code does not appear to be as preoccupied with contractual balance as the new law is, is that such a balance comes at a high price: the interference of the courts. It is the courts which eradicate clauses creating a significant imbalance. It is they who, ultimately, revise or terminate contracts that become excessively onerous for a party because of a change of circumstances. Lastly, it is they who must assess whether a consideration is illusory or derisory, determine whether a clause removes all substance from an essential obligation, or characterise

and sanction illegal price-fixing. In light of what? To put it bluntly, the courts rule in light of their idea of contractual balance; in light of an *objective* contractual balance. Their action is reflected in a rebalancing of contracts which, while it serves contractual justice, runs the risk of undermining contractual freedom and predictability.

The second risk, fuelled this time by suspicion, is that of exaggerating the importance of the judicial review of the contractual balance in the new legislation and of castigating a development that would sacrifice freedom for the benefit of a widespread supervision of contracts, with a view to observing a strict equality between the parties.

What is playing out here is not new: it is the place of the judge in the law of contract (4), it is the respective places of freedom and justice in contract law. One way to approach these difficulties is to ask whether the new French contract law, which is characterised *a priori* by an increased involvement of the courts in the contractual balance, excessively undermines contractual freedom. No need to maintain the suspense: this infringement of contractual freedom is more limited than it seems (I) and appears to be justified (II).

I. The judicial review of the contractual balance is limited

The courts' review of the contractual balance is doubly limited. Firstly, it necessarily has a derogatory nature since there remains a principle of *indifférence de la lésion* (A). Secondly, it is strictly regulated by the legislation authorising it, the latter laying down precise conditions for its instigation and limiting its purpose and effects (B).

A. An exceptional review

One of the "*load-bearing walls of French contract law*" (5) is and remains the fact that the objective balance of benefits exchanged between contracting parties is not a condition for the validity or effectiveness of contracts. It is for the parties alone to assess whether the obligations entered into are balanced and not for the courts to examine the balance struck by the parties. This rule gives contractual freedom its full measure and makes the risk of imbalance in the contract a necessary evil: "*The danger of loss*," according to Ripert, "*is the price of freedom*" (6).

This cardinal principle was laid down by the former Article 1118 of the Civil Code. It is now enshrined and in some respects amplified by the new Article 1168 of the Civil Code: "*In synallagmatic contracts, a lack of equivalence in the acts of performance of the parties is not a ground of nullity of the contract, unless legislation provides otherwise*" (7). Although the text only deals with nullity, it goes without saying that the imbalance can not be sanctioned in any other way : termination, revision, lapse, etc. (8).

The judicial review of the contractual balance is therefore exceptional. It should be noted that nullity for lack of consideration (Article 1169, C. civ.), as well as the elimination of clauses which remove all substance from an essential obligation (Article 1170, C. civ.), should not be counted amongst the exceptions. This should be quickly demonstrated in order to put paid to the idea that the exceptions to the principle would be innumerable and would undermine the value of this principle altogether.

French law does not give binding force to all agreements concluded between two parties. It requires that the agreement not be unlawful and that there be a reason for the debtor's

undertaking. The “cause” traditionally served to fulfil these two functions. Only the latter one concerns us here.

By establishing the existence of the cause, French law succeeded in annulling onerous contracts in which the undertaking given by one of the parties is without consideration or receives only such a small amount of consideration, it is held to be non-existent. The requirement is now replaced, without any substantive changes, by the rule provided 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*” (10).

The link to imbalanced contracts is obvious, but the differences are also striking. Whilst the review of imbalanced contracts makes it possible to revise the obligations of the parties, the review of the non-illusory or non-derisory nature of the consideration makes it possible to review only the total absence – or reputedly so – of consideration. This is not merely a difference of degree. More fundamentally, the review of the existence of the consideration is not governed by the logic of the review of imbalanced contracts (*lésion*) (11). By requiring that the undertaking of each party to an onerous contract be "caused", French law does not seek to ensure a minimum balance of benefits: it deprives of any legal force those contracts which are not based on any economic rationale. What is prevented is not a “loss-making” contract; it is a contract that binds the parties for the sole reason that they wanted it when there was no economic justification (12). The proof of this is that if the agreed consideration exists, the contract cannot be cancelled, even if that consideration is objectively insufficient. Let us take an example from a judgment of the Court of Cassation. Hirers had rented computer equipment for a short period of time and for a rent of twice the purchase value of the goods. The contract was therefore very disadvantageous for them. In this case, the Court ruled in 2010 that "*the reason for the obligations entered into by the hirers was to make leased equipment available, and that, even supposing the contracts were unbalanced, they were not without cause*" (13). The outcome would be the same under new Article 1169: since the consideration for the payment of rent exists – i.e. the enjoyment of the equipment – the contract cannot be cancelled even if it is disadvantageous or unbalanced for one of the parties.

The same reasoning can be held with regard to the mechanism newly introduced at Article 1170 of the Civil Code. This is not a surprise since this provision generalises case-law solution that was based on the cause (14). Under said Article, "*Any contract term which deprives a debtor’s essential obligation of its substance is deemed not written* ". What are the clauses concerned? They are not those which create an imbalance between the rights and obligations of the parties but those which, in totally removing the substance of the "essential obligation" of the contract, result in denying the debtor’s obligation (15). What is unlawful on the basis of Article 1170 is therefore not the conclusion of an unbalanced contract but the stipulation of a clause by which the debtor purports to take back with one hand the undertaking that he gave with the other. Such a contradiction must be resolved. It can only be in favour of the effectiveness of the contract, by the reactivation of the essential obligation, i.e. by freezing the stipulation which deprives the latter of its substance.

B. A framed/defined review

When the courts are genuinely vested with a power to review the contractual balance, it is significant that that power is limited in terms of its field and restricted in terms of its scope.

Let us begin with the new judicial review of "significant imbalance". This review, inspired by comparable consumer law mechanisms (16) and the law on restrictive competition practices (17), is enshrined at Article 1171. According to this text: "*Any term of a standard form contract which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written* (para. 1)*. The assessment of significant imbalance must not concern either the main subject matter of the contract or the adequacy of the price in relation to the act of performance* (para. 2)"*.* As can easily be seen, the mechanism is doubly limited (18). Firstly, it applies only to standard form contracts, i.e. contracts in which the "general conditions", are "determined in advance" "without negotiation" (19). Secondly, the courts can in no case review whether the price corresponds to the act of performance (20). In other words, the review can only relate to the "secondary" clauses of the contract as opposed to the clauses defining the subject matter of the obligations and the price due, which is where the economic heart of the contract lays.

Let us continue with the review of the imbalance resulting from a change of circumstances. Article 1195 provides: "*If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation* (para.1)*. In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine* (para. 2)"*.* A simple reading of the text would suggest that judicial review or termination of the contract should be very rare: they were conceived only as a last resort in order to provide for those cases in which the parties not only did not forsee the circumstances rendering the performance of the contract excessively onerous, but also have not made any provison for allocating the risk of such circumstances themselves, and lastly have not agreed to revise or terminate the contract should such circumstances arise.

Let us finish with the review of the contract price, with regard to which there has been no innovation as significant as those just described above. The relevant texts are Articles 1164 and 1165 of the Civil Code. These provisions both provide that the price may be fixed unilaterally by one party, the former in framework contracts, the latter in service contracts. Apart from these assumptions, unilateral price-fixing would appear to be excluded (21). Where it is permitted, and only in such cases, unilateral price-fixing is accompanied by a mechanism for reviewing illegal price-fixing, which then involves the courts. Articles 1164 and 1165 provide that, in the event of abuses in price-fixing, "*a court may hear a claim for damages and, in an appropriate case, for the termination of the contract*" (Article 1164, para. 2) or "*a claim for damages*" (Art. 1165). The ordinance draft contained provision for the courts also to be granted the power to review the price in such cases, but the text adopted did not ultimately enshrine that penalty.

It follows from the foregoing that the courts' power to interfere with the contractual balance is not as frequent and far-reaching as one may at first think (23). It is also justified.

II. The judicial review of the contractual balance is justified

Within the limits in which it is enshrined in positive law and which have just been recalled, the judicial review of the contractual balance strikes us as justified. No doubt it is partly a matter of personal opinion. However, the justification we have in view aspires to a form of objectivity. It holds that the review of the contractual balance by the courts does not really infringe contractual freedom since it intervenes only in case of insufficiency (A) or impotence of the will (B).

A. The review justified by the insufficiency of the will

There is obviously only necessary to protect the balance desired by the parties where said balance stems from the exercise of free and enlightened wills. There is therefore no disadvantage in allowing the courts to review the contractual balance when the wills of the parties are deficient. An example of this is the cancellation of the contract in the event of fraud that applies even if the error caused relates to the value of the acts of performance exchanged (Article 1139). Other examples are closer to our subject matter here: courts can revise imbalanced contracts detrimental to persons lacking capacity (Article 1149) or annul contracts in case of abuse of a state of dependency (24).

In the case of the "significant imbalance" sanctioned by Article 1171, it is possible to believe that the will of one of the parties is in fact insufficient and that it is this consideration which justifies and fixes the limits of the courts' intervention. As has been stated above, the mechanism is firstly confined to standard form contracts, i.e. contracts whose "general conditions" are "drafted in advance" by one party and imposed to the other without any possibility to negotiate. Why this initial restriction? To confine the judicial review to those cases in which the clauses were not inserted in the contract by mutual agreement but instead were imposed by one party on the other, who then has no other choice but to accept or reject the contract as a whole (25). In short, it is a mean of restricting the review to cases in which contractual freedom is not total. Why then did the drafters of the Ordinance introduce a second limit, that is that the review of the significant imbalance can not relate to the definition of the main subjectmatter of the contract nor to the adequacy of the price in relation to the acts of performance? After all, it may happen that a party is, in fact, deprived of the power to negotiate those aspects of the contract as well. This is quite common. If, therefore, the mechanism is triggered by an impossibility to negotiate, why not allow the courts to review the price in cases where the price is not negotiable? The explanation lies, to our mind, in the following consideration. Even when it has no negotiating power, the party who subscribes to a standard-form contract pays attention at least to the main economic aspects of the contract: subject matter of the contrat and price. It must be considered that said party fully and consciously accepts them and that this agreement prohibits any subsequent judicial review of the general balance of the acts of performance (26). Things are different for "secondary" clauses. In a standard form contract, these "secondary" clauses are not really and fully accepted by the subscribing party. Little, if any, attention is paid to such clauses. Being unable to amend or hope to have them removed, the subscribing party does not read them in practice or attempt to gauge their potential effects on the contract (27). A review of the imbalance that they are likely to cause is understandable here. This is precisely the scope of the judicial review enshrined by Article 1171, albeit indirectly. According to François Chenedé, "*This confinement is fully justified. In standard form contracts* (...)*, the contracting party fully and knowingly accepts the price of the main act of performance, a price which he may find advantageous. Only ancillary stipulations - pre-drafted and non-negotiable - cannot be reviewed. It is precisely in these ancillary clauses, sometimes*

referred to as "general conditions", that abusive stipulations may breach the general balance of the contractual relationship to the detriment of the subscribing party" (28).

We will deal more swiftly with the review of abusive price-fixing. A party has the right to fix the price alone in two cases: where a clause in a framework contract so provides (Article 1164) or where an obligation arising from a service contract has been performed prior to an agreement as to price (Article 1165). In such cases, it is perfectly natural for the contractor on whom the price is imposed to be able to react if this price is abusive. Not having agreed to the price as fixed, this contractor must be able to appeal to the courts. Again, this is not an infringement of contractual freedom but rather a necessary adaptation of the usual rules to take account of practical necessities which lead the legal order to tolerate the fact that a contract may be formed without prior agreement on the price. The counter-test is that when such an agreement has been reached, the courts cannot review the price. The only exception is the case law authorising the courts to review excessive fees (29). But still, this case law has never armed the courts with the power to review a fee agreed upon by the parties in full knowledge of the facts: it can only apply when the fee has been granted prior to the performance of the obligation, i.e. at a time when the adequacy of the price for the promised act of performance is held to be impossible to verify. The will of the parties in the latter case can be described as impotent: an element on which the assessment of the contractual balance depends is beyond its scope. The following comments will be devoted to precisely such a case of the impotence of the will.

B. The review justified by the impotence of the will

The balance chosen by the parties cannot be scrupulously respected and therefore excluded from judicial review unless the parties have been able to understand the factors or circumstances that may influence it. If it turns out that there was no means of gauging in advance the act of performance due by one party or the cost of the performance of said act of performance due by the other, and the parties have not accepted the related risks, there is no obstacle in principle to reviewing the balance agreed upon on the basis of such incomplete information.

The unforeseeable change of circumstances is precisely the typical case for a review based on the impotence of the will. The new Article 1195 of the Civil Code allows the courts to revise or terminate the contract when circumstances, which were unpredictable at the time the contract was entered into, occur and render the performance of the debtor's obligations "*excessively onerous*" without the debtor having accepted this risk. There are two possible scenarios here. Either the parties considered the possibility of such a risk, and then what they decided is binding, without the courts reviewing or terminating the contract. The parties may exclude any review in the event of unforeseeable events, they can split the extra-costs arising from those events or provide for a different renegotiation procedure to those referred to by the law (30). That is contractual freedom, which is also the freedom of taking risks (31). Or the parties have not considered such a risk, and thus a judicial review or termination of the contract is now possible. Is this a revolution? One might well doubt it. Suffice it to say that French law, even before the reform, admitted that the occurrence of *force majeure* entails the termination of the contract as a whole if it results in an impossibility of performance. This is tantamount to apportioning the risks of an impossibility caused by a change of circumstances between the parties (32). It is therefore not extravagant and indeed is quite consistent that the consequences of the change of circumstances should be equally divided between the parties where the unforeseeable event involves not an impossibility to

perform but a significant increase in the cost of performance for one of the parties. This is precisely the outcome to which Article 1195 leads in allowing revision or termination.

Conclusion

In conclusion, it appears that the new French law of contract increases, as can be seen at a glance, the courts' powers over contractual balance. The main manifestations are the review of the "significant imbalance" in standard form contracts and the admission of a review or termination of contracts in case of change of circumstances. However, this increase in no way constitutes upheaval in the architecture of French law. The rule remains, as a principle, that courts cannot review the contractual balance. Not only does it remain, but its place has not become purely symbolic. It continues to serve as the spine of French contract law. The new hypotheses of judicial review do not undermine it, since they concern cases in which the will of the parties is either insufficient or impotent. What we are witnessing, therefore, is not an obsessive fixation with objective balance leading to a weakening of contractual freedom, but rather a pragmatic adaptation of the Civil Code to the realities of the 21st century. There are contracts which are concluded without any genuine agreement on the clauses contained therein; there are contracts concluded without the parties anticipating the possibility of a change of circumstances. It is no insult to the freedom of contract to allow the courts to correct imbalances in such cases.

Notes

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(2) Contractual balance is here understood as the equivalence of benefits or, more generally, of the advantages exchanged between parties in a synallagmatic contract. In "antagonistic" contracts which will constitute the working hypothesis, this balance is attained when each party receives from the other benefits which are of the same importance and value as those which he provides. In favour of taking into account another contractual pattern, in which the interests of the parties converge, see S. Lequette, *Réforme du droit commun des contrats et contrats d'intérêt commun*, Dalloz 2016, p. 1148.

(3) On the contractual balance in general, see L. Fin-Langer, *L'équilibre contractuel*, PhD thesis, LGDJ, 2002, preface by C. Thibierge.

(4) On this issue in general, see the article contributed by L. Sautonie-Laguionie in this issue of the *Montesquieu Law Review*, and latterly D. Mazeaud, D. Mazeaud, *L'office du juge en droit des contrats,* RDA, n°13-14, fév. 2017, p. 100 et s.; and the proceedings of the colloquium "*Le juge, auteur et acteur de la réforme du droit des contrats*", published in RDC, 2016-2, p. 351 et seq., with contributions from D. Guével, D. Mazeaud, D. Fenouillet, T. Revet, J.-F. Fédou, A. Etienney de Sainte-Marie, J. Richard de la Tour, N. Blanc, B. Sturlèse, M. Mekki, N. Ancel, J.-B. Seube and Ph. Brun; *adde* M. Ghislain de Monteynard, *La recherche d'un équilibre contractuel au travers de la jurisprudence de la Chambre commerciale de de la Cour de cassation*, *in* Rapport annuel de la Cour de cassation 2000, La documentation française, 2001 (available on the website of the French Court of Cassation).

(5) O. Deshayes, T. Genicon, Y.-M. Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations*, LexisNexis, 2016, under article 1168.

(6) G. Ripert, *La règle morale dans les obligations civiles*, 4th edition, 1949, LGDJ, No. 63.

(7) On the scope of the text, which is general, and on the amplification of its symbolic value by the reform, we allow ourselves to refer to O. Deshayes, T. Genicon, Y.-M. Laithier, *op. cit., loc. cit* .

(8) Compare with N. Dissaux and C. Jamin, "*Pas de nullité pour lésion, soit ; mais une réfaction ?*" in *Réforme du droit des contrats, du régime général et de la preuve des obligations*, Dalloz 2016, under Art. 1168.
(9) Proving that these cases are increasing in number over time, see D. Mazeaud, Dem.Cisee, Dalloz, SEE Lesion, No. 27 et seq.
(10) In the case of gratuitous contracts, the existence of the cause is replaced by the rule at Article 1135 para. 2 without any real substantive change: "However, mistake about the motive for an act of generosity is a ground of nullity where, but for the mistake, the donor would not have made it.".
(11) For a demonstration, note G. Chantepie, *la lésion*, LGDJ, 2006, preface by G. Viney, n ° 70 et seq. ; L. Fin-Langer, *op. Cit* ., No. 702.
(12) In the same vein, see S. Pellet, Le « contenu licite et certain du contrat », *Droit et patrimoine*, May 2017, p. 63: "*Unbalanced agreements are therefore in fact spared: it is the non-existence, and not the insufficiency, of the consideration which will lead to the nullity*".
(13) Cass .Com., 7 April 2010, No. 09-10129,
(14) This is a well-known saga in French case law, which began in 1996 with the *Chronopost* decision and ended in 2010 with the judgment in *Faurecia II*. On all this, see O. Deshayes, T. Genicon and Y.-M. Laithier, *op. cit* ., under Art. 1170.
(15) On Article 1170 and the dangers of an amplifying interpretation of the text, see G. Chantepie and M. Latina, *op. cit*., under Art. 1170; O. Deshayes, T. Genicon and Y.-M. Laithier, *op. cit*., under Art. 1170; rappr. S. Pellet, article cited above, p 63.
(16) Consumer Code, Article L.212-1, on which see in particular J. Julien, *Droit de la consommation*, Montchrestien, 2015, n ° 205 et s.; JD Pellier, *Droit de la consommation*, Dalloz, 2016, no. 93 et seq.
(17) Commercial Code, Article L.442-6, I, 2°, on which see in particular E. Mouial Bassilana, J-Cl *Concurrence consommation*, fasc.730: *Le déséquilibre significatif. - Article L. 442-6, I, 2° du Code de commerce.*
(18) See also D. Mazeaud, article cited above, p 103: "*Legal certainty should not suffer too much from the new power granted to the courts. Indeed, the power of the courts is strictly limited".*
(19) The definition is given at Article 1110: "*A standard form contract5 is one whose general conditions are determined in advance by one of the parties without negotiation*".
(20) In French consumer law, the restriction is the same, subject to a reservation which will be discussed later (C. Conso, Art. L.212-1). In the law on restrictive practices, the restriction does not appear in the law (C. com., Art. L.442-6, I, 2°). The Court of Cassation inferred from this that the significant imbalance may be "*the result of an inadequacy of the price for the good sold*" (Com., 25 January 2017, n ° 15-23547, JCP 2017, doctr 255, note M. Béhar- Touchais, Dalloz 2017, 481, note F. Buy).
(21) See O Deshayes, T. Genicon and YM. Laithier, *op. cit*. under Art. 1164 *contra* C. Grimaldi, RDC 2017-2, forthcoming.
(22) On the difference in wording between these two texts, see O. Deshayes, T. Genicon and Y.-M. Laithier, op. cit., Art. 1165).
(23) In the same vein, see D. Mazeaud, cited above
(24) Civil Code, Art. 1143: "*There is also duress where one contracting party exploits the other's state of dependence and obtains an undertaking to which the latter would not have agreed in the absence of such constraint, and gains from it a manifestly excessive advantage*".
(25) Emphasising this point, see T. Revet, *Les critères du contrat d'adhésion*, Dalloz 2016, 1771.
(26) It should be noted that in French consumer law, the review of unfair terms may exceptionally concern the adequacy of the price for the advantage: where the clauses are not "*drafted in a clear*

and comprehensible way" (Consumer Code, Art. L.212-1, para. 3). This clarification, which confirms the demonstration made in the text, was not included in Article 1171 of the Civil Code.

(27) There is further confirmation of the originality of consent to the general conditions at Article 1119.This text deals with the conflict of general conditions and enshrines the rule on the exclusion of clauses that are incompatible between themselves. This implies that even when the general conditions are negotiable, accepting them - which is the condition for a conflict to take place - does not imply agrees to their content in all things - failing which, there would be no conflict. On this text, see O. Deshayes, T. Genicon, YM. Laithier, *op. cit.*, under Article 1119.

(28) F. Chénedé, *Le nouveau droit des obligations et des contrats*, Dalloz, 2016, No. 23.351.

(29) One might also wonder whether this case law remains in positive law since the reform: see C. Grimaldi, RDC 2017-2 (forthcoming); T. Revet, *Le juge et la révision du contrat*, RDC 2016, p.373 et seq.; G. Chantepie and M. Latina, *La réforme du droit des obligations*, Dalloz 2016, No. 431.

(30) Article 1195 is not a matter of public policy: see eg. G. Chantepie and M. Latina, *op. cit.*, under Art.1195; O. Deshayes, T. Genicon and Y.-M. Laithier, *op. cit.* under Art.1195; B. Fages, *Droit des obligations*, 6th ed., LGDJ, 2016, No. 348.

(31) H. Barbier, *La liberté de prendre des risques*, PhD thesis, PUAM, 2011, preface by J. Mestre, esp. No. 359 et seq.

(32) On this point, see Rép. Civ. Dalloz, V° *Théorie des risques*. The solution is now enshrined at Article 1218.