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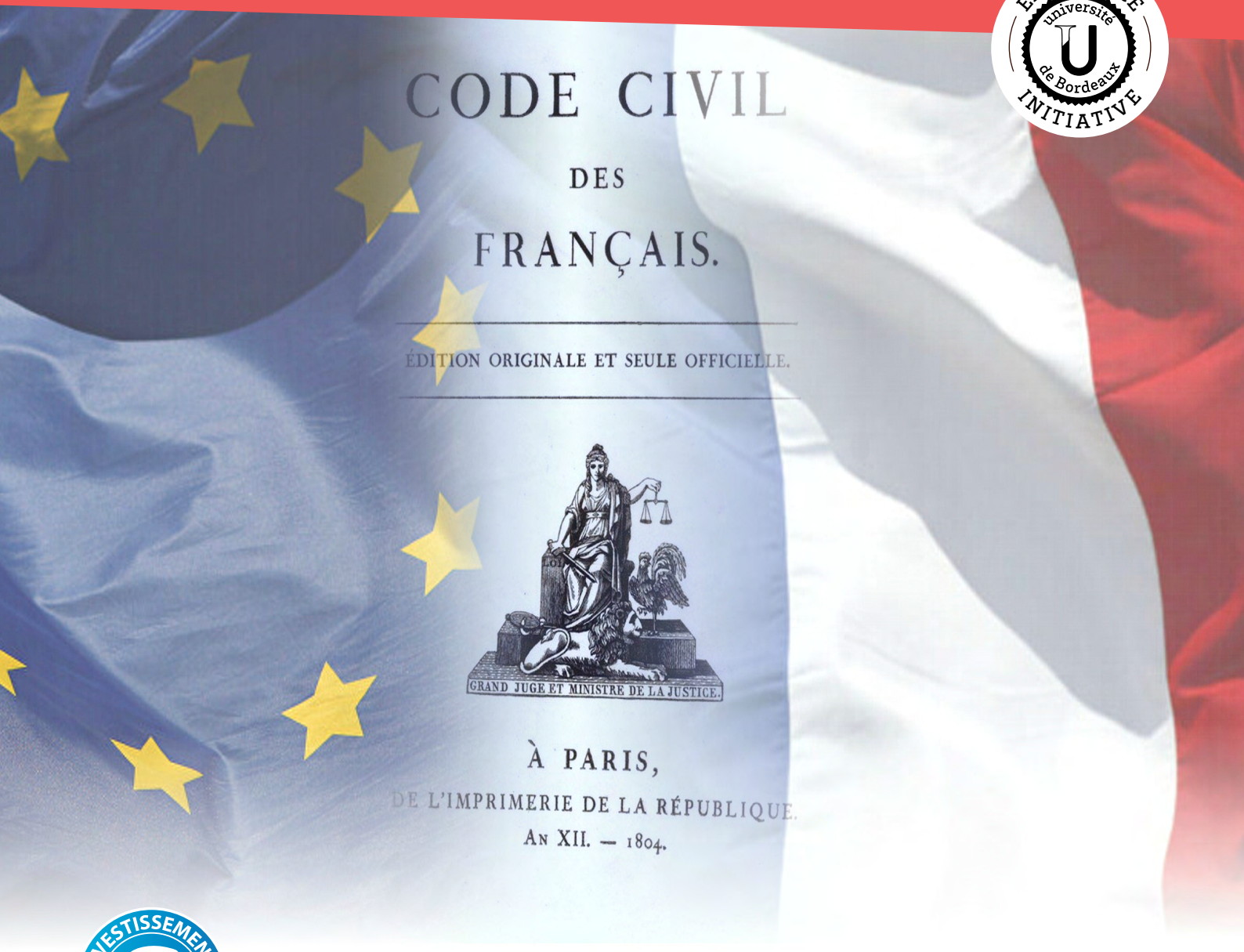

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The Characteristic Aspects of the Reform

Abandoning The Classification of Obligations: What Consequences for Assessing the Effects of the Contract?

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A small methodological revolution almost went unnoticed when Ordinance No. 2016-131 of 10 February 2016 reformed the law of obligations in France: the Civil Code abandoned the classification of obligations used hitherto in order to account for the effects (1). It could be said that this operational classification was based on two major distinctions which constituted the pillars for examining the effects of a contract: on the one hand, the distinction between the obligations to give, to do and not to do; on the other hand, the distinction between obligations regarding means and obligations regarding results.

The indisputable legal basis of the first distinction was made up of the former Article 1101 of the Civil Code which defined the contract (2), and the architecture of Chapter III of Title III of Book III of the Civil Code eloquently titled *"Of the Effect of Obligations"* (and not the contract), which referred to a Section 2 entitled *"Of the Obligation to Give"* at Articles 1136 to 1141, and a Section 3 entitled *"Of the Obligation to Do or Not to Do"* at Articles 1142 to 1145. This basis, which Tribune Favart (*) had described as an "eternal truth" (3), was swept away by the Ordinance.

Meanwhile, the legal basis of the second distinction was much more uncertain, as the contrast between obligations regarding means and obligations regarding results was only made in the early 20th century in Demogue's now legendary examinations (4). However, it is sometimes considered that he merely revealed a distinction that already existed – at least in a latent state – in the former Article 1137, which has since often been cited as its legal basis, itself also swept away by the Ordinance.

It is therefore strikingly clear: the reform would appear to have dispensed entirely with the classification of contractual obligations (5). It must also be said that this difference in legal status highlighted above – which legal status is indisputable for the former, but more doubtful for the latter – has somehow been reflected in the examination of their alleged disappearance. Since the triptych of give-do-not-do was specially regulated by the relevant legislation, the removal of those texts led some commentators to consider that this triptych is no more – or, more precisely, that the obligation to give is no more. This was perhaps the intention of the drafters of the Ordinance, as expressed in the Report to the President of the Republic (6). On the other hand, as regards the contrast between obligations regarding result and obligations regarding means, it has been said that this intention was much more doubtful (7): since the Civil Code did not expressly mention it in these terms, the Ordinance's similar silence would not alter the previous situation. To which it could be argued in response that this silence on the part of an Ordinance, the ambition of which was for many to codify existing case law, instead spoke volumes. At the very least, it may be said that the reform, assuming that it did not obliterate the distinction, did not intend to make it a tool in explaining the effects of the contract. And it is this point, common to the distinctions mentioned in terms of their function in examining the effects of the contract, which merits full attention.

As always, in order to gauge the extent of any change, it is important to compare the previous situation with the present, even if it is necessary to exaggerate the comparison (in order to qualify it later).

In his essential article devoted to the effects of the contract (8), Libchaber asks the following question: "Is the contract really anything other than the obligations it creates? (9). Assuredly, the 1804 Civil Code answers in the negative and if the classification of obligations occupied a central place, formally and intellectually, it is because the effects of the contract could only ever be explains in terms of obligations (10). Originally, the Code only governed the contract as a matrix of obligations, which probably explains – at least in part – why both French legislation and jurisprudence have focused their attention on the formation of the contract. This was considered only as an efficient cause of obligations and the creation of the contract was therefore the relevant contractual moment (11). In return, the next moment – that of the effects of the contract – was almost immediately overwhelmed in the law of obligations, which is why contract law was above all the law of the formation of contracts (12). Substantively, one might even say that the concept of "effects of the contract" had no tangible reality (Chapter III of Book III referred to "the effect of obligations"). No distinction was made between that and obligations; this was strongly felt, for instance, in the treatment of non-performance: in the Civil Code, there was no law on the non-performance *of the contract* but rather on the non-performance of obligations, taken as a whole.

To say that the above approach is now reversed by the Ordinance would be something of an understatement. The Ordinance has undoubtedly taken over what might be called the modern approach to the effects of the contract, initiated notably by the normativist analysis of Pascal Ancel (13), in turn borrowed from Kelsen. By distinguishing the obligational effect from the binding effect of the contract, it has paved the way for a differentiation in the effects of the contract – and thus for the final detachment of the concept of effects of the contract – by demonstrating that, in parallel to the creation of obligations (which is, moreover, only potential), the contract was at the root of a separate private norm, capable of being the explanatory medium for various effects of the contract other than obligations. This thesis has been extensively followed (albeit with qualifications) by French jurisprudence, which explains why the reform took over the "divorce" between obligations and contracts, the clearest manifestation of which is the abandonment of the classification of obligations used to account for the effects of the contract (14).The very clear isolation, at Title IV, of a "*general regime of obligations*", separate from the legislation on contracts (at subtitle I of Title III) goes in this direction, just like the conception and, as a corollary, the plan of this subtitle I: Chapter IV is expressly titled "*The effects of contracts*" (and no longer the effects of obligations), while the recognition of the non-binding effects of the contract emerges from the emphasis of the "*the proprietary effect*" (title of Subsection 2 of Chapter IV, Section 1) and the "*duration of contracts*" (title of Section 3) or the "*assignment of contracts*" (title of section 4); the latter two sections demonstrate the contract is now an independent norm (and is so over time) and entity (which can, as such, circulate) (15).

As is often the case, however, the break is not perfectly clear, and there is still some evidence of the old approach in the new law (and, moreover, in the disciplinary detachment of enforcement procedures which do not consider the origins of unfulfilled obligations). Firstly, it is striking that the major construction of the new Book III, which contrasts the "*sources of obligations*" (Title III) with the "*general regime of obligations*" (Title IV), necessarily leads to considering "the contract" as a mere source of obligations since it is subtitle I of Title III (alongside "extracontractual liability" –

subtitle II – and "other sources of obligations" – subtitle III). Secondly, the new definition of contracts at Article 1101 focuses only on obligations, ignoring its possible non-obligational effects. However, it is true that by referring in this definition of the modification, transmission or extinction of an obligation as a possible purpose of the contract, the text already treats it as something other than a pure act *creating* obligations. In the same vein, we should not be misled by the fact that the reform as a whole has by no means renounced a classification of obligations. Title IV devoted to the general regime of obligations, in addition to traditional jurisprudential classifications (pure and simple obligation/conditional obligation/time-delayed obligation/plural obligation; cumulative/alternative/ optional obligation; joint and several obligation/obligation whose acts of performance are indivisible; "the obligation to deliver specific property" at Article 1342-5) introduces, incidentally, more modern classifications, which had been called for by French jurisprudence. Thus Articles 1343 *et seq* isolate "*Particular Provisions Relating to Monetary Obligations*" (Sub-section 2), while at the same time bringing to light the model of the "a debt whose value is to be assessed" (which may be referred to as "the obligation of value") at Article 1343, paragraph 3. But precisely this classification of obligations, undeniable as it is, is now outside the bounds of the law of contracts, in the texts relating to the regime of obligations, which further credits the break between the two: the classification of obligations no longer serves to grasp the effects of the contract. Nevertheless, without denying the methodological innovation of the reform, the comments made above show that it remains ambivalent. This is why it seems important to us to clarify matters further by first ascertaining the extent of the evolution. We shall see that it is relative, which prevents us from concluding at this juncture that the consequences drawn from the classification of obligations in order to understand the effects of the contract have already all disappeared (I). However, because the evolution is nevertheless real, and even while its scale is currently unknown, efforts will have to be made to identify the possible consequences (II).

I. Reflections on the extent of the abandonment

It seems to us that the diagnosis is encompassed in the following assertion: in order to account for the effects of the contract, the classifications of obligations have been replaced by... nothing, or rather not very much at all. Law – like nature – abhors a vacuum, it is likely that such an empty space favours the *ad hoc* resurgence of these classifications as tools for examining the effects of the contract. Whilst not a complete abandonment, it will nevertheless represent an acknowledgement of their decline.

On the current state of things, it would seem that the Code has abandoned its attempt to grasp the effects of contracts through the various categories of obligations in favour of doing so by means of a new framework: the content of contracts (16), which is itself understood through the now central and unique notion of "*acts of performance*". Indeed, Articles 1162 et seq. have, in a way, replaced the former Articles 1136 to 1145. However, beyond this game of substitution and the deceptive appearance to which the attractive figure of the "act of performance" gives rise, it is – as has been said – the "vacancy" for an operational instrument to account for the effects of the contract that must be identified (and, consequently, the marginal subsistence of classical classifications as has been suggested). We shall begin by observing it with regard to the disappearance of the classification of obligations to give, do and not to do (A) and, secondly, with regard to the disappearance of the classification of obligations regarding means and obligations regarding results (B). A preliminary assessment (C) can then be made.

A. The scale of the abandonment of the classification between obligations to give, do and not to do

The new approach which, on the one hand, consists in perceiving the effects of the contract through its "content" and "performance" and, on the other hand, recognising a "proprietary effect" would appear to rent the ancient triptych apart. On closer examination, however, if that is indeed the case, this is due mainly to the removal of the obligation to give than it is to the negation of the obligation to do or the obligation not to do. An examination of the effects of the contract shows that the change consisted mainly in removing all trace of the obligation to give, with the previous state of the law not being disrupted with regard to the obligations to do and not to do, (although it has not been left untouched, as we shall see). From this point of view, it may be said that the previous classification has disappeared in itself and in its determining function; in reality, it has survived, although heavily curtailed. This is evidenced by a veritable enshrinement of the "act of performance", which is merely a front for the obligation to do. And it is not clear whether this conceptual recycling will be of any consequence: it does not change very much in the effects seen previously; nor does it shed light on previous questions (for example, how to consider the obligation to guarantee: where once there was a question of whether there was a genuine obligation to do, one would now ask whether there is a genuine "act of performance" (17)). We must, however, give an overview that is as faithful as possible to the new positive law, for it is not without its ambiguities (18).

Assuming that the obligation to give has disappeared, can it at least be said that the tripartite classification has been reduced to a bipartite classification? Once the obligation to give is removed, the obligation to do and the obligation not to do would be left alone. However, two significant changes are likely to cast doubt on this approach - which would definitively condemn both the classification and its operational character to govern the effects of the contract.

Firstly, the reform removed the former Article 1145 (19), which provided that the debtor of an obligation not to do "*owes damages by the mere fact of the violation*", which entails both the traditional solution that notice need not be given for the debtor at fault to incur liability, and at the same time the more recent - and questionable - case-law solution whereby the creditor was exempted from having to prove the harm or loss suffered in order to obtain damages (20). On these two points, there is therefore no difference in regime between the obligation to do and the obligation not to do: notice must still be given to the debtor (Article 1344), as is proof of the loss or harm suffered (21).

Secondly, and in the same way, the new texts relating to the penalties for non-performance no longer make an explicit distinction between the obligation to do and the obligation not to do, especially as regards performance (see the new Article 1221 which makes no distinction as to the obligation breached - compare this with former Articles 1142 and 1143). It is true that, in this respect, they merely endorse well-established developments in case law; however, as for the point which concerns us here, it is clear: as with the formal notice and the right to damages discussed above, tit is no longer necessary to distinguish between the obligation to do and the obligation not to do.

Admittedly, it is a new text which could nevertheless fuel the debate (22): Article 1222 provides that "*a creditor may also himself, within a reasonable time and at a reasonable cost, have an obligation performed or, with the prior authorisation of the court, may have something which has*

been done in breach of an obligation destroyed". This is a matter here of replacement which, as can be seen, may operate solely on the creditor's unilateral initiative unless the measure in kind would lead to the destruction of what has been done in breach of the obligation (as then the authorisation of the court is required). Some are tempted to see a clear survival of the contrast between the obligation to do (for which an out-of-court replacement is possible) and the obligation not to do (for which replacement may only be authorised by the court) (23). However, it is not clear whether this is the meaning of the text: literally, it is not the obligation breached that determines the rules for implementing penalties but the measure in kind necessary to restoring legality, namely the destruction of something that the debtor has done wrongly. However, as has been noted (24), it is conceivable that he did something in breach of an obligation to do (and not merely an obligation not to do), such as when he constructs a building affected by defects in workmanship. In any event, this difference in regimes - which is dubious in itself -would constitute a very narrow basis for a *summa divisio* whose scope, having become rather derisory, would no longer justify making it the key to explaining the effects of the contract (25).

Returning to the initial impression, could the survival of the classification be found in a hidden survival of the obligation to give? (After all, it was primarily the latter obligation which formed the basis of the classification; the contrast between the obligation to do and the obligation not to do, which were generally taken in at a single glance, has never had this privilege (26)). Although several commentators have noted in the aftermath of the reform that the fate of the obligation to give was by no means certain (27), the position is even less tenable. It has already been said: by now isolating the "proprietary effect" of "*contracts whose object is to alienate property* (...)" (Article 1196) in a dedicated sub-section, and by removing any reference to the obligation to give, the drafters of the Ordinance intended to enshrine the theory that the latter was simply a myth (28) and therefore a cumbersome model in legislation. More specifically, transfer of ownership is perceived as a legal effect of the contract and not at all as the result of the performance of an obligation (de *dare*) to which it had previously given rise. Hence the reflection in positive law of the idea, defended in French jurisprudence, that the transfer of property does not assume any positive action on the part of the alleged debtor - even in the event of a deferred transfer or in the event of a transfer of a generic thing or a future thing, for then the transfer is no less an automatic consequence of the performance of an obligation to do. It cannot be the object of any obligation (the non-performance of which cannot, moreover, even to be conceived, which is a counterproof) (29). Only yet again battle may resume, either by relying on the fact that the remaining legal bases - of which Article 711, which continues to state that "*ownership of assets is acquired and transmitted by (...) the effect of obligations*", is not the least - or by relying on the basis of logical necessity (a sort of natural law that does not speak its name) (30). The transfer of ownership would necessarily involve an act of voluntary abdication by the owner and the fact that it is completed on principle in the consent to the sale would not prevent the intellectual dissociation of this intangible tradition or, above all, its postponement to a later date (the *ipso jure* effect remains excluded, in this view, since a manifestation of abdicative will - realizing the performance of the obligation to give - would be necessary each time). It is true in this regard that the argument whereby the transfer of ownership of a generic thing or a future thing takes place *ipso jure*, as a result of an obligation to do which has nothing to do with an obligation to give, is perhaps a little misleading. It relies in fact on an inverted hierarchy of obligations: it is because the debtor undertakes to transfer ownership that he is obliged to do what is necessary for the thing to be individualised or manufactured, and not because he is obliged to individualise or manufacture that this results in a transfer of ownership (otherwise it would be to relate the sale of a future thing to a

service contract consisting in the manufacture of a thing). Similarly, the opponents of the obligation to give are a little short-sighted when it is a matter, as is customary in real estate matters, of deferring the transfer of ownership to the signature of the sale before a notary. In this case, it is somewhat contrived to speak of an obligation to appear before a notary and to sign a deed: who can fail to see that this is not a personal act but a juridical act, i.e. precisely this manifestation of abdicative will which the obligation to give implies? It is, however, true in that respect that if it is considered that the law has definitively abolished the latter obligation, the examination of this scenario may change, as will be seen later (31).

For the time being, in any event, whether it be the contrast between the obligation to do and the obligation not to do, or the obligation to give, it is clear that jurisprudence and case law have, within the interstices of the reform, texts or silences likely to serve in maintaining the classification of obligations and, above all, its use in accounting for the effects of the contract. It is therefore very difficult to conclude, right now and likely ever, that their operational character has disappeared. The comment is all the more valid for the classification of the obligations regarding means and result.

B. The scale of the abandonment of the classification between the obligation regarding means and the obligation regarding result

As mentioned at the outset, the disappearance of this classification is more dubious than the disappearance of that discussed above. Some authors openly argue for its retention (32). It is true that its existence, together with its previous use *praeter legem*, are likely to remain as they are, especially if one factors force of habit into the reasoning and the language of jurists. It has been said that it is "*almost natural law*" (33), as evidenced by its adoption by administrative law (34). In reality we are dealing here with a little-discussed, essentially quasi-philosophical, aspect of the reform: the functions of law or, perhaps more precisely, of legislation. Can its didactic function alone justify certain prescriptions (whose normative force is blunted)? If one answers in the affirmative, it will soon be concluded that practitioners, courts and jurisprudence will always require the distinction between obligations regarding means and obligations regarding result, just as they will not cease elsewhere to resort to the concept of the cause. It is neither easy nor effective to enact a prohibition on the use of a word, especially in law (and especially when it is not replaced by a satisfactory substitute). In the present case, it must be borne in mind that the use of the distinction between obligations regarding means and obligations regarding result in order to determine the effects of the contract is likely to be primarily the responsibility of litigants and, more specifically, of those who draw up contracts. The contracting parties - and especially their counsel - will always have an urgent need to state precisely each party's undertaking, in order to avoid any ambiguity and any future litigation. It is of primary importance to know whether the debtor undertakes to achieve an expressly agreed result, i.e. "*to provide an advantage that the act of performance is able to provide (or) the means conducive to achieving the desired result but which the act of performance cannot provide*" (35) (e.g., a physician's care with a view to a recovery that is by no means guaranteed). All in all, the parties' own perception of the effects of the contract, the contractual identification of these effects, implies the use of the distinction distinction - and therefore its retention. The same applies to the court seeking to interpret the contract or identify its mandatory content (the purpose which the distinction has most served, with the courts using it as a lever for legal policies to strengthen requirements regarding this or that debtor (36)). Hence one might guess that it is no longer simply a question of didactic necessity but one that ultimately also affects the substance.

The fact remains, however, that the criticisms that were made of the distinction prior to the reform remain intact. Essentially, they are due to the fact that the distinction does not, *in fine*, give much information about the rules on the effects of the contract. The assertion that the obligation regarding means involves proving misconduct on the part of the debtor for him to incur liability, unlike the obligation regarding result – for which the burden of proof is reversed (the debtor is *ipso jure* liable, unless he can prove the existence of an extraneous cause) – is largely misleading (37). Firstly, this is because the qualification of obligation regarding means or obligation regarding result is often a matter of expediency and decided after the event according to the evidential burden that the court intends to allocate. As has been correctly stated, "*there is in reality no difference depending on whether, in its sovereign appreciation, the court chooses to focus on the qualification of obligations regarding means or result or on the fact that the obligation has or has not been performed*" (38). Secondly, this is because case law rapidly developed intermediate categories in order to combine rules (the obligation regarding mitigated result, the reinforced obligation regarding means). Lastly, it is because it is artificial: whatever the obligation, "*there is always a result that has not been achieved: the debtor has not done what he promised*" (39), which is still to be proved. At most, it is conceded that the distinction "*contains a grain of truth: contractual obligations do not all have the same scope ... even though at first sight they would have the same object in abstract terms*" (40), which means that "*it cannot be disputed that obligations have variable contents and involve a different degree of effort on the part of the debtor*" (41). However, it must then be concluded the distinction ultimately has only a limited role to play in identifying what is due. It is not so useless as to deserve to be abolished. In simple terms, it is useful only for identifying the effects of the contract, and not for grasping the rules thereof.

C. Preliminary assessment

This last comment leads to an assessment, albeit uncertain and approximate, of the two distinctions used in order to understand the effects of the contract. As in several other aspects of contract law, the 2016 reform is one of completion: it merely completes a trend that had already been underway for several years and which was here a constant loss of speed for the operative character of the classifications. This has been noted above with the distinction between the obligation regarding means and the obligation regarding result, which French jurisprudence generally agrees to reduce, at worst, to a didactic role and, at best, a function in identifying the content of the contract (42). It has similarly been noted, although less clearly, with regard to the distinction between obligations to do, not to do, and to give. In spite of some remarkable resistance, opinion increasingly turned away from the obligation to give in favour of the theory of legal effect, for the purposes of examining transfers of ownership. In such circumstances, it is understandable that on the eve of the reform, one distinguished author was able to "*wonder whether, in the final analysis, a classification of obligations deserves to feature in the Civil Code*" (43).

The Ordinance, as we know, chose not to mention these operative classifications in the Code; but – as seen above – it is impossible to say as yet whether this has resulted in their eradication. The limits of the reform have only been hinted at. In extending the scope of the contract to its non-binding effects, the Ordinance merely refers to "*content*" and "*performance*". However, this expansion and the vagueness of the concepts are not operative. It must first be recognised that this new approach certainly allows us to understand that, in a contract, the benefit received which serves as a cause for the benefit provided may not be an obligation, so that the content of the

contract is a more welcoming concept for accounting for its economic function, since it is made up of something other than obligations (the proprietary effect of ownership of course, but also, for example, the right of option that gives rise to the unilateral promise of sale under the new Article 1124). However, in so doing, the Ordinance would appear to reason as though the contract no longer relied on its binding effect, its obligational effect being a secondary detail. This is to fall from one excess to the other: where the old Civil Code took a narrow view of the effects of the contract, which it reduced to the mere existence of obligations, the reform would appear to boil the regime of the effects of the contract down to that of the mandatory standard to which it has given rise. This standard does not say much about the acts of performance due. And this time, the concept of "content" of the contract fails to bridge the gap. More specifically, it leads back very quickly and first of all (even if not only) to the identification of the obligations that the contract has created. Whether we like it or not, in order to be real, non-obligational effects are not the most common manifestations of the contract and, inevitably, the question of "*quid debetur*?" is raised yet again. Since obligations are therefore the essential tool for identifying the effects of the contract, it is not surprising that the regime of these obligations consequently remains the essential frame of reference for governing the effects of the contract. Thus, in order to govern the effects of the contract which are not obligations, one will be forced to reason by analogy in order to apply the system of contractual obligations to non-obligational effects. This is because the reform has trapped itself: on several occasions, it has reasoned by reference only to obligations in order to govern the effects of the contract – and this is not the least of its paradoxes.

II. Reflections on the real consequences of this abandonment

From the foregoing, it follows that a study of the consequences of abandoning the distinction between the obligation regarding means and the obligation regarding result is of little interest. This is because, on the one hand, this abandonment is uncertain – or more precisely unrealistic; on the other hand, it would lend little to the assumption that it is real, since the role of classification in gauging the effects of the contract had no real consistency. Thus, it is the real consequences of the formal abandonment of the distinction between the obligation to do, not to do, and to give which draw attention (A). An examination thereof leads to a sort of reversal, showing that the classification of obligations cannot be circumvented, as perhaps the authors of the reform thought, although it must be renewed by the general theory of special contracts (B).

A. Uncertainties as to the rules on "proprietary effect" and personal acts of performance

The abandonment of the well-known tripartite classification is likely to sow a degree of discord within the rules governing "proprietary effect" (instead of the obligation to give) (1.) and the obligation on the part of the debtor to take positive steps that entail a personal undertaking (2.).

a. Proprietary effect

The very fact of no longer perceiving the effects of the contract through its obligations and of abandoning the obligation to give to the benefit of a transfer of ownership that takes place *ipso jure* leads, at first glance, to an impasse. Indeed, as we have just said, the Ordinance has merely begun a change in method without deploying the same with all its implications. Once it was decided that the obligation would no longer be the basic "atom" for determining the effects of the contract, it ought to have been necessary to regulate those effects by means of another reference system: the content or the act of performance. However, an examination of the new texts shows that the Ordinance has not done so, continuing to refer frequently to "*obligations*". This is the case, for example, with Article 1195 relating to unforeseeability; Article 1199 relating to the

effects of the contract *vis-à-vis* third parties; Articles 1203 *et seq.* relating to stipulations for third parties. This is particularly true of the texts relating to the sanction of non-performance of the contract. This could lead to a whole series of more or less striking questions.

An *initial question* concerns whether a text will apply to *all* the effects of the contract, including its non-binding effects, and particularly the proprietary effect (which replaces the obligation to give), whenever there is mention of the "act of performance". Given the reform's overall approach, we can assume that this will be the case (44).

A *second question* will be whether it will be possible to apply those texts which cover only "obligations" to such non-binding effects (45). This time, even though the solution of an application by analogy has already been mentioned, the answer may be more delicate. There is little doubt that the provisions relative to the term or condition may apply to the transfer of ownership (46). However, several commentators have questioned the application of penalties for non-performance and, in particular, whether the vendor ought to be able to "*retain ownership of the property he has promised preventively, when he knows that the expected consideration will not be provided*" (47). This solution was conceivable where there was an obligation to give, but it is much less so in the case of a legal effect occurring *ipso jure*, which is perhaps regrettable.

Conversely – and this is a *third question* – one wonders whether the purchaser would benefit from a stronger position if the vendor were to fail to sign the final sale: "*could the deed of sale be self-sufficient?*" (48), where up until now it has been necessary to secure a judgment (having the effect of a sale). Since the performance of the obligation to give has no longer any meaning, could the notarial act not establish that the legal effect has irrevocably occurred?

This leads to a *fourth question* arising from the automatic transfer of ownership. One author has observed that as the will no longer has any share in such a transfer, the exception to its immediacy – which is linked to the "*nature of things*" provided at Article 1196 paragraph 2 – is uncertain in terms of its scope. For "*as much as one understands that a contract relating to a thing to be manufactured still devoid of all existence cannot, by the force of circumstances, carry with it an immediate transfer of ownership (upon what?). Equally this impossibility no longer exists when the thing has begun to be manufactured. The nature of things is no longer opposed to the recognition of a right of ownership to the buyer, although the vendor continues to shape the thing. Consequently (...) the buyer might well have to bear the risks from that point on*" (49). This would be a very unfortunate consequence, and, indeed, it is doubtful whether the process of legal and automatic transfer pursuant to the contract would go so far. In the scenario of the thing to be manufactured, as in that of the individualisation of a generic thing, it is to be hoped that, as before, a manifestation of the joint will of the parties will be necessary in order to effect the transfer. Admittedly, it will perhaps no longer be possible, as was previously, to see the performance of the obligation to give. But one can at least find in it a (unilateral or contractual) act of identification of the thing without which, until that point, it has no individuality of its own to offer a basis on which the property could be fixed. Instead of the act of performance of the obligation to give, one would see in this act "*a process of individualisation of the thing which, once realised, would have the (legal and automatic) effect of the thing being acquired*" (50), pursuant to Article 1196.

Lastly, a *fifth and final question* may concern the fate of a transaction, little noticed but not be devoid of interest: the assignment of a debt. The disappearance of the obligation to give will render this inconceivable, which will necessarily require resorting to a transfer of ownership instead of the transfer of obligation.

b. Personal acts of performance

In parallel with the uncertainties surrounding the rules governing legal proprietary effect, the removal of the tripartite classification could cause some discomfort for the obligation to do. At first glance, as has been said, the reform is the moment of its "consecration" since it remains the sole survivor in a sense. However, this conquest of its domain results in a dilution of the relevant regime. The disappearance of the old Article 1142, which was obviously obsolete, nevertheless had the unfortunate effect of merging obligations that entail a personal undertaking on the part of the debtor himself, whether he takes physical or intellectual action, in the common lot of the single and abstract figure of the obligation to do, which has now become the "act of performance". It is impossible to ignore completely the fact that the obligation to take personal action has a specific character and that it is precisely the fact that it involves the person of the debtor, body or mind. This is not without consequences for the question of its performance. Where Article 1142 intended to isolate them (for such was its purpose, in truth), the new Article 1221 shrouds them in a veil of uniformity, through the broad and indefinite concept of "impossibility", with all the other obligations to do. These other obligations do not bind the debtor's person, such as the obligation to pay a sum of money (assuming it is an obligation to do) or the obligation to deliver something (which is sometimes referred to as the obligation of *praestare*), may be subject to enforced performance for which the frontier of impossibility is very remote (concretely, the impossibility will only present itself in the event of the disappearance of the thing). It is quite different from the obligation to do on a personal scale for which, as we know, the limit of moral impossibility leads to a very specific assessment of whether an attack on the physical or intellectual integrity, freedom and fundamental rights of the debtor is or is not tolerable. This is to say whether the "impossibility" envisaged by Article 1221 is a falsely unitary criterion, which calls for a differentiation of the rules on enforced performance enforcement depending on whether the obligation to do has a personal dimension. And one is even more inclined to believe this to be the case as the Ordinance itself has drawn that boundary between this type of obligation to do and those which do not bind the person of the debtor in any way (the obligation to pay a sum of money or to deliver a thing). Articles 1345-1 and 1345-2 relating to the new model for notifying creditors have considerably increased the difference between the two categories of obligation to do (51). In reality, this puts us on the road to a return of operational classifications, albeit renewed.

B. The return of the classification of contractual obligations and their renewal by the general theory of special contracts

a. An observation

As we come to the end of this study, we must begin with an observation. The reform, it seems, was intended to rid French law of classifications which, rightly or wrongly, were regarded as not particularly operational so as to determine the effects of the contract and their regime. Completing the gradual exhaustion of these classifications, the reform preferred to replace them with the model of the "content" of the contract and, above all, the "act of performance" (subject to the reservations we have seen above). In so doing, it has completed a trend that has been at work for a

long time already in French jurisprudence (more so than in case law): that of a sort of fusion of regimes governing contractual obligations based around the dominant figure of the obligation to do. Indeed, while the distinction between obligations regarding means and result was gradually confined to a (useful) descriptive and more truly prescriptive role, the classification of the obligations to give/do/not to do did little to disguise the fact that a dominant species had set up as a principal regime (the obligation to do) from which, sporadically, some rules diverged (which concerned the obligation not to do and especially the obligation to give). This means that beyond the apparent methodological revolution, and subject to a few adjustments yet to be made (see II, A. above), we are witnessing a change in presentation: French law has been shifting for some time already towards a hegemonic regime, that of the obligation to do, simply inflected, according to the well-known dialectic of the principle and the exception, by a few stalls in solutions specific to the transfer of property and to the service consisting in an abstention.

This change in presentation could be disappointing as a mere announcement: the reform may not really have innovated where there were expectations.

b. Projections

Indeed, it is striking that on the eve of the reform, different proposals were formulated not so much to remove the classifications of obligations in order to account for the effects of the contract, but to enhance them. The *Catala* preliminary draft took that approach (52), in particular to add the model of the obligation of *praestare* (conceived in the preliminary draft as an obligation to give an asset for use) and various authors had worked on a modern systemisation that was even more greatly enhanced. In particular, an article by Simler (53) in which he drafted plans for the obligation to pay a sum of money, the obligation to deliver or return a thing, the obligation to cover or guarantee, the obligation to provide a personal act of performance. "*Paying, delivering, guaranteeing, doing, not doing: such could be a more just and consistent approach to the reality of the actual diversity of obligations*" (54), he argues. However, in contemplating the various paths, the author concluded that there was no need to codify these classifications.

On this point, perhaps it is simply a question of methodology (Simler considers that these classifications fall within the remit of jurisprudence and teaching) - which is another debate. Whether it is the work of the legislature or of jurisprudence, the fact remains that the effects of a contract and their regime can only be determined by referring to a classification of obligations. More specifically, at least in part (for the most part, both non-obligatory effects remain secondary), it is necessary to identify the main types of obligations that arise and identify their specific regime. The reform gave up "*doing this work*" simply because of the paucity or overly general nature of these major types of obligations, *from the point of view of the ordinary law of contracts* (which was its sole purpose). But then a new and wide-ranging path opens up: that which could be taken by the law of special contracts which, in a sense, is called upon to take over and build where ordinary law has taken a step back. The connection is naturally made with a striking contemporary trend: one which calls for the construction of what some call the general theory of special contracts or the ordinary law of special contracts (55). Many authors - even sometimes in a scattered way - have proposed to "*decompartmentalise qualifications with special theories... the idea would be to abandon the sort of vertical classification that we know in favour of transversal regimes based no longer on the contrast between contracts defined in relation to each other, but on establishing bodies of rules linked to the purpose and function of a particular type of obligation, whatever the precise contract in which it is included*" (56).

The objective is quite clearly to go beyond the regimes based on broad categories of contracts and instead to consider regimes based on major categories of obligation: obligation to give, obligation to transfer the enjoyment of an asset, obligation to retain property, obligation to shape a thing, obligation to abstain, obligation to guarantee, obligation to take personal steps, etc. This means, in this perspective, the classification of obligations, largely renewed and enhanced, would return to centre stage in perceiving the effects of contracts. By a strange paradox, it would even be obligations going beyond contracts here. And the paradox is further accentuated if one bear in mind that some people can already see the beginnings of such a trend in the reform: thus the new model of the "service contract" (Article 1165) has been perceived as a new generic category encompassing any service to others and thus making it possible to isolate within it the tightened model of the contract of business conceived solely as that which organises the manufacture of a thing (57). In doing so, the way would be open to a distinction - with many consequences for the analysis of the transfer of ownership, the guarantee against defects and the rules governing enforced performance - between the "obligation to provide a service" and the "obligation to do a thing" (58). In short, having discovered that the effects of the contract deserved to be grasped *beyond* obligations, we might then discover once more they can only really be understood *through* the classification of obligations.

Notes

(1) Identifying this new approach, see C. Larroumet, S. Bros, *Traité de droit civil, tome 3, Les obligations, Le contrat,* 8e éd., 2016, n°51, p. 43.

(2) "*A contract is an agreement by which one or several persons obligate themselves to one or several others to give, to do, or not to do something*".

(*) Translator's note: Guillaume-Jean Favard de Langlade (1762 – 1831), a French politician and lawyer, served as Tribune, Counsel to the Court of Cassation and member of the *Conseil d'Etat* under Napoleon.

(3) Fenet, *Recueil complet des travaux préparatoires du Code civil*, vol.13, Videcoq, 1836, p. 317.

(4) R. Demogue, *Traité des obligations en général*, Rousseau, 1923-1933, vol. 5, No. 1237 and vol. 6, No. 599.

(5) On the classification of obligations, see the comments below.

(6) "*Article 1101 proposes, first of all, a modernised definition of the contract, inspired by the current Article 1101: abandoning the reference to traditional yet disputed notions of the obligations to give, do or not to do (these categories being essentially descriptive) (...)*". Admittedly one might say that it is only "the reference" to these obligations which has now been abandoned for the purposes of defining the contract. Strictly speaking, the Report does not state that the distinction has disappeared in law.

(7) See in particular P. Jourdain, « *Quel avenir pour la distinction des obligations de résultat et de moyens ?* », *JCP* ed. G. 2016, 909.

(8) R. Libchaber, « Réflexions sur les effets du contrat », *in Mélanges offerts à Jean-Luc Aubert, Propos sur les obligations et quelques autres thèmes fondamentaux du droit*, p. 211.

(9) R. Libchaber, « Réflexions sur les effets du contrat », cited above, p. 233.

(10) See G. Chantepie, M. Latina, *La réforme du droit des obligations, Commentaire théorique et pratique dans l'ordre du Code civil*, Dalloz, 2016, No. 80, p. 73.

(11) R. Libchaber explains it in the following terms: "*a contract is a technique serving to give rise to obligations, which is the aim of the will of the parties; it exists only to draw out the obligations that it carries, which in turn render obsolete an instrument conceived for them*" (R. Libchaber, cited above, pp. 217).

(12) The old plan and conception of Title III of Book III (revealingly titled "*Of contracts or contractual obligations in general*") was a perfect reflection of this approach, as Chapter II titled "*Of essential conditionss for the validity of agreements*" was followed by Chapter III titled "*Of the effects of obligations*".

(13) P. Ancel, « Force obligatoire et contenu obligationnel du contrat », *RTD civ.* 1999, p. 2).

(14) See e.g. the new wording of Article 1194, by comparison with the former Article 1135, which no longer refers to obligations.

(15) see F. Ancel, B. Fauvarque-Cosson, J. Gest, *Aux sources de la réforme du droit des contrats*, Dalloz, 2017, No. 21.45, specifically p. 86.

(16) In this sense, see C. Larroumet S. Bros, *Traité de droit civil, tome 3, Les obligations, Le contrat,,* 8th ed., 2016, No. 51, p. 43.

(17) It should be noted in this respect that the issue takes on a new dimension in light of the new Article 1165 which, by way of derogation, permits uncertainty as to price and unilateral price fixing on the part of the creditor for "contracts for the supply of services". On this point, see O. Deshayes, Th. Genicon, Y.-M. Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations. Commentaire article par article*, LexisNexis, 2016, p. 277.

(18) For an examination of the consequences of the reform on the distinction between the obligations to do/not to do/to give, see Y.-M. Laithier, « *La distinction entre les obligations de donner, de faire et de ne pas faire en droit français* ».

(19) "*If the obligation is one not to do, he who breaches it owes damages by the mere fact of the violation*".

(20) see Cass. 1er Civ., 31 May 2007, *Bull.*, n° 212.

(21) In defence of this interpretation, see Y.-M. Laithier, « *La distinction entre les obligations de donner, de faire et de ne pas faire en droit français* », cited above; M. Latina, *V° Contrat : généralités, Rép. Dalloz*, n° 182.

(22) On this point, see Y.-M. Laithier, « *La distinction entre les obligations de donner, de faire et de ne pas faire en droit français* », cited above.

(23) See H. Lecuyer, « L'inexécution du contrat », *C. C. C.*, 2016, dossier 7, n°13-14; D. Mazeaud, « L'exécution forcée en nature dans la réforme du droit des contrats », *D.* 2016, p. 2477, specifically n°15 to 18; P. Grosser, « L'exécution forcée en nature », *AJCA* 2016, p. 119.

(24) See G. Durand-Pasquier, « L'incidence des nouvelles règles relatives à l'inexécution des contrats sur les actes du droit immobilier et de la construction », *RDI* 2016, p. 355.

(25) However, see C. Boillot, « L'obligation de ne pas faire : étude à partir du droit des affaires », *RTD com.* 2010, p. 243.

(26) In this sense, see J. Huet, « Des distinctions entre les obligations », *RDC* 2006/1, p. 89.

(27) See O. Deshayes, « Les effets du contrat entre les parties », *JCP* 2015, suppl., n°21, p. 43.

(28) See the well-known indictment by M. Fabre-Magnan, « Le mythe de l'obligation de donner », *RTD civ.* 1996, p. 85.

(29) On this jurisprudential position, see in particular M. Fabre-Magnan, cited above, and Ph. Simler, « Obligation de donner et transfert de propriété. Contribution à la question de la classification des obligations », Rev. jur. Thémis 2011, p. 187, available for download at https://ssl.editionsthemis.com/uploaded/revue/article/2797_45-2_Simler.pdf

(30) For a tight defence of the obligation to give, see F. Zenati-Castaing, Th. Revet, Les biens, 3e éd., PUF, 2008, n°177, p. 280 et n°187, p. 300 ; Ph. Chauviré, *L'acquisition dérivée de la propriété. Le transfert volontaire des biens*, preface by Th. Revet, LGDJ, 2013; J. Dubarry, *Le transfert conventionnel de propriété - Essai sur le mécanisme translatif à la lumière des droits français et allemand*, preface by B. Dauner-Lieb & R. Libchaber, LGDJ, 2014. *Adde* L. Andreu, N. Thomassin,

Cours de droit des obligations, Gualino, 2016, n°29, pp. 33-34, who emphasise this logical necessity: "*To say that the contract has proprietary effect, that the transfer of ownership is an automatic effect of the contract because the parties wanted it, is to take a position further down the line from the transfer... and omit what comes before: the contract gives title to one of the contractors to receive the property of the other; this transfer of ownership was therefore "due" by one to the other*".

(31) See below.

(32) P. Jourdain, « Quel avenir pour la distinction des obligations de résultat et de moyens ? », *JCP* éd. G. 2016, 909 et du même auteur, « Obligations de moyens et obligations de résultat ».

(33) P. Jourdain, « Quel avenir pour la distinction des obligations de résultat et de moyens ? », cited above.

(34) On this point, see J. Antippas, « Regards comparatistes internes sur la réforme du droit des contrats. Réflexion sur l'identité contractuelle française », *AJDA* 2016 p. 1620.

(35) H. Boucard, *V° Responsabilité contractuelle, Rép. Dalloz*, No. 224.

(36) More recently recently, to give but one example, see the obligation of punctuality of result charged to the SNCF, Cass. 1er Civ., 14 December 2016, n° 14-28227.

(37) On all these points, see the detailed analysis conducted by H. Boucard, *V° Responsabilité contractuelle*, cited above; and Ph. Le Tourneau, *Droit de la responsabilité et des contrats*, *Dalloz action*, chapitre 1 — Classification des obligations contractuelles, by M. Poumarède, n°3208 et seq.

(38) J. Bellissent, *Contribution à l'analyse de la distinction des obligations de moyens et des obligations de résultat*, preface by R. Cabrillac, LGDJ, 2001, n°1182.

(39) D. Tallon, « Pourquoi parler de faute contractuelle ? », *in Ecrits en hommage à Gérard Cornu*, PUF, 1994, p. 437.

(40) Ph. Rémy, « La « responsabilité contractuelle » : histoire d'un faux concept », *RTD civ.*, 1997, p. 323, n°26.

(41) P. Jourdain, « Quel avenir pour la distinction des obligations de résultat et de moyens ? », cited above, p. 39.

(42) See, however, H. Boucard, *V° Responsabilité contractuelle*, cited above, which proposes that the distiction be founded not on the purpose of the act of performance but rather on the distribution of the risks of default, on the basis of a distinction between *force majeure* and foreign cause. However, the author agrees that this leaves untouched the question as to which category a given obligation belongs.

(43) Ph. Simler, « Obligation de donner et transfert de propriété. Contribution à la question de la classification des obligations », cited above, p. 202 and its conclusion at p. 209.

(44) Concurring with that view, see Y.-M. Laithier, « La distinction entre les obligations de donner, de faire, de ne pas faire en droit français », cited above.

(45) Wondering about this point, see S. Gaudemet, « L'effet translatif », JCP éd. N. 2015, dossier 1211, p. 49, spec. n°13.

(46) In this sense, see S. Gaudemet, « L'effet translatif », *eod. loc.*

(47) Ph. Chauviré, « Article 1197 : le transfert conventionnel de propriété », RDC 2015/3, p. 773

(48) S. Gaudemet, « L'effet translatif », cited above.

(49) A. Hontebeyrie, « Les effets du contrat dans le projet de réforme », Journal des Sociétés 2014, n°118, p. 47, spec., p. 50.

(50) C. Bufnoir, *Propriété et contrat*, reprint, pref. M. Boudot, LGDJ, 2005, p. 43. We shall read with great interest his remarkable ideas on the act of individualisation, in its relations with the transfer of property.

(51) While Article 1345-1 permits the performance of the "non-personal" obligation to do against the will of the creditor by way of deposit or sequestration, Article 1345-2 provides for the release of the creditor from obligations to perform a personal act.
(52) J. Huet, « Des distinctions entre les obligations », cited above.
(53) See in particular Ph. Simler's remarkable ideas in « Obligation de donner et transfert de propriété. Contribution à la question de la classification des obligations ».
(54) *ibid.*
(55) On this trend, see *Existe-t-il une théorie générale des contrats spéciaux ?*, Colloque du CRDP de la faculté de droit de Caen, 18 March 2011, *LPA* 28 November 2012, n° spéc.
(56) A. Bénabent, « Les difficultés de la recodification : les contrats spéciaux », *in Le Code civil, 1804-2004, Livre du Bicentenaire*, Dalloz-Litec, 2004, p. 245 (our emphasis).
(57) For this beautiful demonstration, see P. Puig, « Le contrat d'entreprise », *in* L. Andreu, M. Mignot, *Les contrats spéciaux et la réforme du droit des obligations*, Institut universitaire Varennes, 2017, p. 115.
(58) J. Huet, « Des distinctions entre les obligations », cited above.