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The circulation of contracts and obligations
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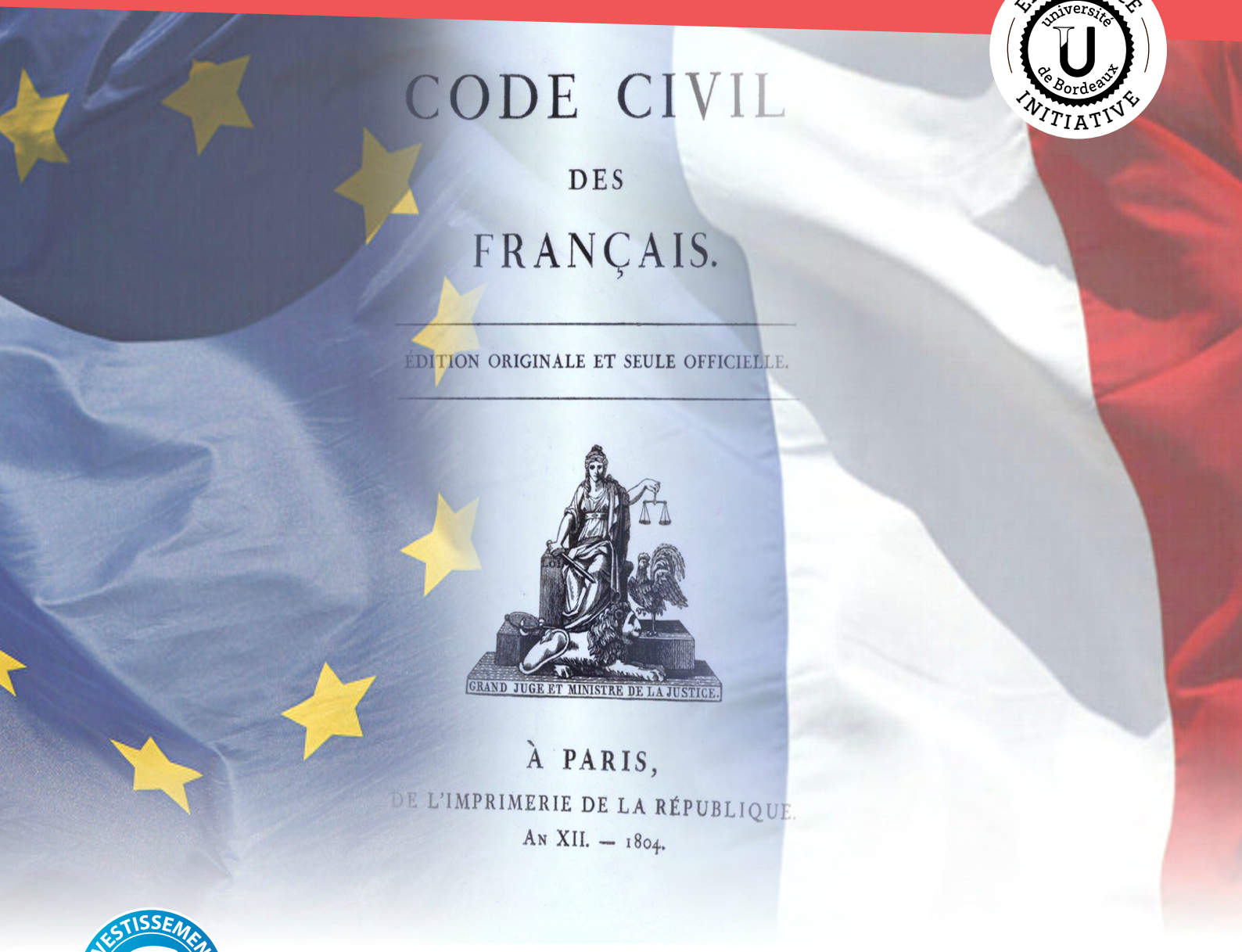

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The Characteristic Aspects of the Reform

The Circulation of the Contract and the Obligation: Reinforcing the Objectification of Undertakings?

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The millennial tendency to objectivise undertakings

To wonder about the objective and subjective parts of French contract law is to ask three questions: what is the strength of the connection between obligations and the individuals who create them? What scope and role should be given to the contractual freedom to transfer an obligation just as the ownership of a thing would be transferred? How can one reconcile the eminently personal contractual undertaking based on trust and loyalty with the useful and legitimate use of this bond for economic purposes? (1) The more the subject is disregarded, the more this will confirm the objective nature of the undertaking. To ask the question: "*the circulation of the contract and the obligation: reinforcing the objectification of the undertaking?*" is not without reference to the historical tension which has developed between, on the one hand, the strength of the personal and relative connection between two parties to a contract and, on the other, the consideration of the obligation, both economically as an asset and legally as a transferable object.

At the heart of the matter lie therefore assignment of rights, the assignment of debt and the assignment of a contract, the admission of which in the French legal system has followed unique processes. Debt collateral or subrogation will not be discussed here, even if these concepts are close to the assignment of debts, both by their interests and their effects. This matter has undergone a very important historical evolution starting from the radical Roman conception, which viewed the contract only as an irreducible subjective link and consequently forbade any assignment of the obligation (2). When, in 1898, Eugene Gaudemet spoke of "*the general evolution of the notion of obligation, which has increasingly emerged from the primitive conception of a purely personal obligation between two individuals, to become an economic asset, independent of the individuality of the creditor or the debtor*" (3), it was in connection with the publication of the German Civil Code in 1896.The presentation of the debt recovery system introduced in this new code as a separate institution allowed Gaudemet to conclude that this distinct legal mechanism was "*the latest expression of this progress*" (4). Over a century later, the subject of the objectification of undertakings has become eminently relevant once again.

The reform of the law of obligations

The Ordinance of 10 February 2016 on the reform of contract law and the general regime of obligations shuffled the cards in three ways: first, by simplifying the law on assignment of debts and by withdrawing it from the scope of the law on sales in order to place it under the general regime obligations; secondly, by enshrining the new institution of the assignment of debt inserted after that of assignment of rights; and thirdly, by including the general rules on the assignment of contract amongst the effects of the contract for the first time. The three institutions now find their place in ordinary contract law and in the general regime of obligations. These important changes to the Civil Code are obviously points to be included in the assessment of the objectification of obligations and this to serve the fluidity and the financing of all kinds of activities, be they civil or

economic. The patrimonialisation of the obligation or the contract is inferred from their principal transferability, which in turn derives from practical needs. Encouraging the circulation of obligations and contracts involves analysing the undertaking as an object, thus favouring the objective point of view at the expense of the subjective point of view of the contractors and more particularly from the debtor's personal point of view. That is to say, the contractor who "undergoes" the assignment (as a third party to this contract), whether he is a debtor (assignment of debt), a creditor (assignment of rights) or both (assignment of contract).

In the same general vein of the historical development described by E. Gaudemet at the end of the 19th century, we will consider, in a first part, the reinforced circulation of obligations and contracts and the objectification of the contractual undertaking. Assignment of rights, the assignment of debt and the assignment of contracts are indeed part of a conveyance mechanism that transfers a credit, a debt or standing as a party to a contract from one collection of assets to another. Nevertheless, in spite of the reinforcement of a dynamic of circulation, the personal link necessarily affected by the transfer - since the transfer of the obligation or the contract inevitably modifies the legal relationship between a creditor and a debtor - is taken into consideration. As J. Carbonnier wrote, "*in a general way, it is only in a very abstract theory of obligations that one can consider the change of creditor to be a matter of indifference to the person subject to assignment*" (5). Next, we shall see that the rules, because of the "*irreducible originality*" of the legal link "*with respect to other objects of legal commerce*" (6) are far from disregarding contractors and strictly regulate the possibility for a contractor to amend certain aspects of an obligation without the consent of the contractual partner. The principle of the relativity of agreements cannot be completely eliminated by the treatment of mandatory reports as an economic reality. As for the enforceability of defences, it gives the measure of the resistance of the subjective (7). This is why, in a second part, the persistence of personal relationships in the circulation of obligations and contracts will be explained.

I. The reinforced circulation of obligations and contracts and objectification of contractual undertakings

We will distinguish between the circulation of obligations (both in their active aspect with assignment of rights and in their passive aspect with the assignment of debt) and that of contracts in relation to the objectification of undertakings.

A. Circulation of obligations and objectivism

a. Amendment of the rules governing assignment of rights

If the assignment of rights is an institution born of practice which had found its place in Articles 1690 et seq. of the former Civil Code, the reform of February 2016 has revamped certain aspects of it (especially its solemn character - Art. 1322 Civil Code; the abolition of the formalism of the enforceability of the assignment against the debtor - Article 1324; and the identical date of the assignment of rights and its enforceability against third parties - Article 1323 et seq. Civil Code) by enshrining it in the first section of the Chapter titled "*Transactions Relating to Obligations*" (Article 1321 et seq.) (8). The objectification of undertakings is hidden behind several provisions. First, the contractual assignment of intangible assets is highlighted at Article 1321 Civil Code, which defines assignment of rights as "*a contract by which the creditor (the assignor) transfers, whether or not for value, the whole or part of his rights against the assignment debtor to a third party (the assignee)*". This provision strongly emphasises the characteristics of this specific subject, which is widely conceived (apart from the fact that it may be gratuitous, and may relate to

all or part of the rights concerned, this transfer agreement "*may concern one or more rights, present or future, ascertained or ascertainable*" (9)), its conditions (the rights must be transferable, which excludes claims for maintenance or wages and transfers made as collateral which have not been authorised (10)) and its scope (the assignment also contractually extends to the "*ancillary rights of the right that is assigned*"). The provisions thus emphasise the characteristics and the scope of a long-accepted right to circulate. Secondly, in the case of assignment of rights, contrary to assignments of debt or contract, the objectification of the undertaking is all the more real as "*the consent of the debtor is not required unless the right was stipulated to be non-assignable*" (Article 1321, paragraph 4, Civil Code).

Lastly, one of the most significant amendments to the system of assignment, symbolising the objectification of undertakings concerns the enforcement of the assignment of rights against the debtor, which has been relaxed with the disappearance of the formalism formerly imposed by Article 1690, Civil Code. Indeed, Article 1324 of the Civil Code providing that "*the assignment may be set up against him only if it has been notified to him or he has acknowledged it*", abandons the previous formality of service on the debtor by a bailiff or the acceptance of the assignment by an authentic act. The simplification of the methods of enforceability of the sale against the person subject to assignment, which is in line with the judicial relaxations brought to the formalities under Article 1690 of the former Civil Code (11), also reconciles the assignment of rights under ordinary law with those performed under the aegis of the *loi Dailly*, characterized by its flexibility, the pledge of receivables and even the new regime of subrogation. This also means that the new relationship created between the debtor and the assignee (who finalises the assignment of rights by giving it all its effects) does not derive either from the consent or agreement of the debtor (Roman law system) or from an assumption of rights by the assignee against the debtor (a scheme under the old law which allows the control of the debt to be conferred), but from information being given to the debtor; this is an objective legal fact rendering the assignment enforceable .The absence of notification does not preclude the internal transfer (and therefore of the sole emolument of the right in question) - further evidence of the smooth circulation of rights limited by the assignor/assignee relationship (12).

b. Enshrining a new institution: the assignment of debt

The reform enshrined the assignment of debt in a new section under the chapter on "*Transactions Regarding Obligations*", following on from the assignment of rights (Articles 1327 to 1328-1 of the Civil Code). Consequently, a debtor may assign his debt, together with the interest and all the defences it entails, to an investor by being released in respect of the creditor, provided that the latter agrees. Many know that the debtor's ability to substitute a third party in the same obligatory link, provided the creditor consents, has obvious practical benefits. This is borne out by the fact that the transfer of debts had to be carried out in France through other legal techniques that had long been enshrined in the Civil Code (the notarial practice of delegation used for the purchaser to assume mortgage debt which will be deducted from the price paid to the seller) (13) or by *sui generis* techniques (defeasance and swap contracts in capital market law).

The admission of the assignment of debt seems to fit perfectly into the course of the millennial history of the law of obligations, which is a tale of the empowerment of the obligation in relation to the person of the creditor and that of the debtor. Historically, the obligation has gradually become transferable, in all its aspects, both active and passive. The new French reform admitting

the value and the patrimonial nature of a debt can be presented as the continuation of this general trend towards the objectification of the obligation.

Three articles help to understand the mechanism of the transfer of debt. Article 1327 Civil Code, which provides that "*a debtor may assign his debt to another person with the agreement of the creditor*", introduces in a rather revolutionary way the assignment of the purpose of the obligation in its passive aspect, i.e. the transfer of the original debt, allowing the individual succession of the debt (14). Next, Article 1327-1 Civil Code provides that "*if the creditor gave his agreement to the assignment in advance, or if he has not taken part in the assignment, he may find it set up against him, or may take advantage of it himself, only from the day when he was notified of it, or once he has acknowledged it*". This is a mechanism for enforcing the assignment of debt against the creditor when the latter has agreed in advance. Lastly, Article 1327-2 Civil Code states that if the creditor does not "*expressly*" consent to the discharge of the debtor "*for the future*", unless otherwise stipulated, the original debtor "*is bound jointly and severally to pay the debt*". By this provision is required the express consent of the creditor to ensure that the ownership of the debt is genuinely transferred, i.e. it definitively discharges the original debtor.

To what extent is there a real objectification of the undertaking by the assignment of debt? Firstly, because it is the debt in all its components that is assigned to the assignee: whether due or not, whether firm or conditional, present or future (15). Secondly, because the reluctance in French jurisprudence with regard to the assignment of debt, especially those based on the necessary connection of the debt to its cause (16), are denied by the new institution. Debt can therefore circulate, like rights and any property, through the effect of a contract for the transfer of ownership, although the rules governing the assignment of rights and the assignment of debt are separate and adapted to the respective singularity of the thing assigned.

B. Circulation of contracts and objectivism

a. Legal enshrinement of the assignment of contract

The assignment of a contract has long been known in legal practice and to the special legislation on contracts, for example in matters concerning leases and contracts of employment (not forgetting the law on insolvency procedures), and has also been approved in French case law. However, the circulation of the status of "party to the contract" is henceforth inserted into ordinary contract law, which does not call into question the existing special rules on the assignment of contract (17). The "*Assignment of Contract*", inserted between Section 3 "*The Duration of Contracts*" and Section 5 "*Contractual Non-Performance*", is among the effects of the contract at Section 4. The reform thus enshrines an institution in the general theory of contract which has long been recognised as extremely useful in order to avoid the destruction of a contractual relationship when a contracting party no longer has an interest or has no means of performing it, and while both the assignor and the assignee as well as the person subject to assignment may also have an interest in the assignment.

Article 1216 Civil Code, which stipulates that "*a contracting party, the assignor, may assign his status as party to the contract to a third party, the assignee, with the agreement of his own contractual partner, the person subject to assignment*", clearly expresses the idea that this concerns the substitution of a contractual position, an overall assignment of a contractual relationship; in other words, the replacement of a contractual partner without breaking the contractual relationship, but in no case merely by adding an assignment of rights and an

assignment of debt (18). The assignment of a contract therefore has a unitary character (19). The status of party to the contract thus encompasses not only that of creditor and debtor, but also all the prerogatives and duties attached to that status (20). A third party replaces one of the parties to the contract without breaking the contractual relationship; he becomes the creditor and debtor of the rights and debts arising from the contract and the contractual prerogatives attached to the status of party.

The strengthening of the objective nature of the undertaking is symbolised by the acceptance of the principle of the voluntary alienation of the position of contracting party, like any obligation. Articles 1216 et seq of the Civil Code form the basis of a new "*principle of assignability: any contract could in principle be the subject of an assignment*" (21), except of course contracts *intuitu personae*, and unless otherwise stipulated, and again with the limits that will be seen below. This new principle subject, like the assignment of rights, to solemnity since "*an assignment must be established in writing, on pain of nullity*" (Article 1216, paragraph 3, Civil Code) (22), is not insignificant. It means that if the contractual link exists, it is not for all that "a straitjacket" (23). To admit that it necessarily leads to characterizing the contractual prerogative and the transmission of rights (and not only obligations) in an objective way.

As regards the agreement of the person subject to assignment, which "*may be given in advance, notably in a contract concluded between the future assignor and person subject to assignment, in which case assignment takes effect as regards the person subject to assignment when the contract concluded between the assignor and the assignee is notified to him or when he acknowledges it*" (Art. 1216 Civil Code), it would appear that the legislature has considered its nature as authorisation, the refusal of which could be considered unfair, and not for that of the discretionary consent of a party to the contract of assignment (24). Paradoxically, following this interpretation, this *a priori* subjective condition makes it possible to justify the possibility of an assignment of the status of party for any contract, even *intuitu personae*, even including a non-assignment clause.

II. Circulation of obligations and contracts and the persistence of personal relations

Admitting a form of objectification of the undertaking, through the assignment of rights, debt and that of the status of party to the contract with all its prerogatives is, obviously, a salient feature of the reform of contract law. But this tendency is tempered, for in all cases it is a contractual - and therefore relative - link which is assigned, the objectivity of which can, therefore, only be relativised. We shall again distinguish between the circulation of the obligation (both in its active aspect and in its passive aspect) and the contract in order to demonstrate the persistence of personal relations on assignment of the contractual bond.

A. Circulation of obligations and subjectivism

a. Assignment of rights

It is in the assignment of rights that the objectification of undertakings is strongest. Indeed, the consent of the debtor is not a condition of the assignment. In addition, the issue of the assignor's discharge does not arise, contrary to what is owed to the debtor or to the contract. But personal ties on the debtor's side persist at several levels, first of all as regards the enforceability of defences. The debtor, in addition to all defences affecting the contract from which the assigned right arises ("*defences inherent in the debt itself, such as nullity, the defence of non-performance, termination or the right to set off related debts*"), i.e. those relating to the act or event giving rise to the right, "*may also set up defences which arose from the relations with the assignor before the*

assignment became enforceable against him, such as the grant of a deferral, the release of a debt, or the set-off of debts which are not related" (Article 1324, paragraph 2, of the Civil Code) (25). This means that, at least as regards the defences relating to the discharge of the debtor and on grounds of fairness to him, the relationship between the debtor and the first creditor does not disappear despite the transfer of the obligation; a protection of the person subject to assignment offset by the obligation of the assignor in respect of the assignment (Article 1326, Civil Code). Secondly, "*the assignor and the assignee are jointly and severally liable for any additional costs arising from the assignment which the debtor did not have to advance*" (Article 1324, para. 3, Civil Code). Therefore, the additional cost of the assignment will not weigh on the debtor. Similarly, the debtor may stipulate that a right cannot be assigned, pursuant to the principle of contractual freedom, in which case the debtor's consent becomes necessary (26): "*the assertion of the validity of such a non-assignment clause brings a sharp denial that the person of the creditor would systematically be a secondary matter in the eyes of the debtor*" (27). Lastly, the right of withdrawal offered to the debtor in the event of the assignment of a disputed right is maintained (Article 1699 of the Civil Code). The subjective side of the obligation lasts as long as the debtor's contractual expectations deserve protection.

b. Assignment of debt

The debt being the undertaking of a person executed on his assets, its *intuitu personae* nature for the creditor cannot be ignored. In the assignment of debt, the creditor's agreement is conceived as a condition for the assignment of debt. It is therefore a brake on a complete objectification of the undertaking to assign the obligation (28). There must be three declarations of will for a genuine assignment of debt to be validly concluded. In addition, the discharge of the assignor must be the subject of the express consent of the creditor, which adds a declaration of will, only here it is express. The subjective aspect of the undertaking also endures in terms of the enforceability of the defences: "*the substituted debtor, and the original debtor if he remains liable, may set up against the creditor*", alongside the "*defences inherent in the debt, such as nullity, the defence of non-performance, termination or the right to set off related debts. Each may also set up defences which are personal to him*" (Article 1328, Civil Code). Where the creditor has not expressly agreed to discharge the first debtor, the contractual relationship with the debtor is retained. Its duplication with respect to the new debtor then creates a new subjective and relative obligation which is none other than the duplication of the former with a change of debtor (29). In the case where the transfer of the debt is not completely transferable, the patrimonialisation of the debtor's obligation does not remove the subjective relationship existing between the creditor and each of the debtors. This is also confirmed by the rule concerning the security of third parties whose subjective aspect (confidence in the debtor) prevents their transfer without their consent (Article 1328-1 of the Civil Code).

B. Circulation of contracts and subjectivism

a. Assignment of contract.

While the contractual process may seem to illustrate the objectification of the undertaking, some authors argue that the contract is "*a lasting link, the stability of which must be ensured*" (30). However, the persistence of personal ties is noticeable in several respects. First, with regard to the contracting party subject to assignment, whose consent has always been required by case law (31), a requirement set out at Article 1216 para. 1 of the Civil Code. Thus, "*the principle of assignability of the contract is balanced by the need for the agreement of the person subject to assignment. Failing that, the assignment would be ineffective*" (32). One must question the strength of this

subjectivity by wondering whether the refusal of the person subject to assignment to give his agreement could be deemed unfair. Considering consent to the assignment of a contract as a discretionary right also amounts to recognising a high degree of force in the subjective obligation. On the contrary, to conceive that the refusal may be unfair, while admitting an approval clause (33), means that the subjectivity of the undertaking is tempered for the practical needs of the survival of the contract. In other words, the agreement of the person subject to assignment is only intended to verify that the assignment of the contract does not conflict with his legitimate interests (34). Tempering the subjectivism revealed by the agreement of the person subject to assignment, commentators consider that it "*is only a modality for realising the assignment, not a substantive condition, so that the parties can freely adjust the regime, and even abandon it in advance*" (35), that "the consent of the person subject to assignment is not "consent but authorisation to protect those interests that the assignment would endanger" (36), that abuse must therefore be capable of being judicially reviewed (37).

Similarly, Article 1216-1 para. 1 of the Civil Code imposes the express consent of the person subject to assignment so that the discharge of the assignor "*for the future*" takes place (38); "*in its absence, and subject to any term to the contrary, the assignor is liable jointly and severally to the performance of the contract*". In the absence of the consent of the person subject to assignment, the assignment of the status of party to the contract creates a new bond of obligation which more closely resembles a kind of personal security (39) and excludes a transfer of ownership. Secondly, the principle of assignability of the contract includes contractual and, as such, subjective defences (non-assignment clause, assignee approval clause), as well as the equally subjective defence related to the *intuitu personae* nature of the assignment. But this last one raises questions: is it necessary to defend a broad or strict meaning of *intuitu personae*, which is appropriate to reduce or on the contrary reinforce the circulation of contracts? Lastly, in the case of enforceable defences, if the assignee can only set up the defences inherent in the debt (nullity, defence of non-performance, termination, the right to set-off related debts) against the person subject to assignment, without being able to set up personal defences against the assignor (since "*the assignee does not continue the person of the assignor*" (40)), "*the person subject to assignment may set up against the assignee all the defences which he could have been able to set up against the assignor*" (Article 1216-2 of the Civil Code); the contractual relationship remains unchanged. Again, the subjective aspect of the undertaking is indelible.

Conclusion

To reflect on the objective and subjective parts in the undertaking is to strike the right balance between the subjective dimension of the obligation (the legitimate expectations and the security of the contractual partners) and its economic dimension, which contractual freedom is to guarantee. To say that "*the assignment of a right is not only that of an asset, it is that of a relationship between two persons, that is, between the creditor and the debtor*" (41), is also valid for the assignment of debt and the assignment of a contract. Far from wanting to reify personal rights, the reform of February 2016 has sought to organise the respective regimes of assignment of rights, debt and contracts in order to make them effective instruments in the hands of the parties without sacrificing the interests of the person subject to assignment.

Notes

(1) On the question of the juridical act: J. Hauser, *Objectivisme et subjectivisme dans l'acte juridique*, Préf. P. Raynaud, LGDJ, 1971.

(2) G. Marty, P. Raynaud, P. Jestaz, *Les obligations*, 2ème éd., Tome 2, Le régime, Sirey, 1989, n° 350.

(3) E. Gaudemet, *Etude sur le transport de dettes à titre particulier,* Paris, 1898, Arthur Rousseau éditeur, rééd. Panthéon-Assas, Avant-propos A. Ghozi, 2014, p. 537 ; F. Chénédé, RTDC 2015, pp. 238 : Eugène Gaudemet, *Etude sur le transport de dettes à titre particulier*, Avant-propos A. Ghozi, éd. Panthéon-Assas, 2014 ; F. Chénédé, *Un auteur, une idée, Eugène Gaudemet, le transport de dettes* : RDC 2010/1, pp. 363 et seq. ; F. Gény, *Une théorie française du transport des dettes d'après un livre récent, Revue critique de législation et de jurisprudence*, 1899, pp. 450 et seq. ; R. Saleilles, *De la cession de dettes*, in : Annales de droit commercial, 1890, pp. 1 et seq.

(4) E. Gaudemet, *Etude sur le transport de dettes à titre particulier, op. cit.*, p. 537.

(5) J. Carbonnier, *Les obligations*, Tome 4, 22 éd., PUF, 2000, n° 318.

(6) M. Julienne, *Cession de créance : transfert d'un bien ou changement de créancier ?* Droit et patrimoine, juillet/août 2015, p. 69.

(7). Hence the value of comparing with the abstract character of the bill of exchange or the unenforceability of defences where the assignment of trade debts under the *loi Dailly* is accepted by the person subject to assignment.

(8) The reform affects only credits or rights and leaves untouched the provisions on sales for other intangible rights (Article 1689 et seq.)

(9) On the sensitive issue of possible claims: G. Marty, P. Raynaud, P. Jestaz, *Les obligations*, *op. cit.*, n° 354; the debt must have sufficient consistency; equally: P. Malaurie, L. Aynès et P. Stoffel-Munck, Les obligations, 8ème éd., LGDJ Lextenso, 2016, n° 1410. As one author put it, "how much precision will have to satisfied?" knowing that the assignor and the assignee "must be aware of the scope of their undertaking": C. Gijsbert, *Le nouveau visage de la cession de créance*, Droit et patrimoine, juillet/août 2016, p. 50. Even hypothetical or potential, the debt must be identifiable and individualised. As provided at Article 1326 Civil Code, it is possible for the assignee to acquire a hypothetical right at his own risk.

(10) M. Julienne, *Cession de créance : transfert d'un bien ou changement de créancier ?*, *op. cit.*, p. 71; in this sense also: C. Gijsbert, Le nouveau visage de la cession de créance, *op. cit.*, pp. 49-50.

(11) J. Carbonnier, *Les obligations*, *op. cit.*, n° 321 ; G. Marty, P. Raynaud, P. Jestaz, *Les obligations*, *op. cit.*, n° 357..

(12) M. Julienne, *Cession de créance : transfert d'un bien ou changement de créancier ?*, *op. cit.*, p. 70.

(13) G. Marty, P. Raynaud, P. Jestaz, *Les obligations*, *op. cit.* , n°. 404 et seq.

(14) V. Lasserre, La cession de dette consacrée par le code civil à la lumière du droit allemand, Rec. Dalloz 2016, pp. 1578 et seq.

(15) *La réforme du droit des contrats*, dir. T. Douville, Gualino, 2016, p. 316 (O. Salvat).

(16) P. Malaurie, L. Aynès et P. Stoffel-Munck, Les obligations, 7ème éd., Defrénois 2015, n° 1435 et 1444 ; J. François, Traité de droit civil. Les obligations. Régime général, 3ème, Economica, 2013, n° 495 s.; L. Aynès, La cession de contrat et les opérations juridiques à trois personnes, préf. P. Malaurie, Economica, 1984.

(17) What changes is that "the non-assignability becomes exceptional": L. Aynès, La cession de contrat, Droit et patrimoine, juillet/août 2016, p. 65.

(18) On the issue of a disqualification on assignment of debt with a purely internal debt assignment, in the absence of a contract assignment agreement: no, because "the assignment of a

contract is an institution by nature different from assignment of rights or the assignment of debt": P. Malaurie, L. Aynès et P. Stoffel-Munck, Les obligations, *op. cit.*, n° 862 ; L. Aynès, La cession de contrat, Droit et patrimoine, juillet/août 2015, p. 73.

(19) L. Aynès, La cession de contrat, Droit et patrimoine, juillet/août 2016, p. 64. For the author, the assignment of a contract is based on the compulsory force of the contract: p. 64; for an opposite opinion: P. Simler, « Cession de créance, cession de dette, cession de contrat », CCC mai 2016, dossier 8, n° 14 (the diagram and the formulas used are essentially the reproduction of the mechanism relative to the assignment of debt).

(20) P. Malaurie, L. Aynès and P. Stoffel-Munck, *Les obligations*, *op. cit.* , n° 850.

(21) *Ibid*. , n° 860.

(22) It will be necessary to consider the purpose of this sanction in order to determine whether it is possible to derogate from it: *Ibid.* , n° 863.

(23) *Ibid.* , n° 850.

(24) L. Aynès, La cession de contrat, Droit et patrimoine, juillet/août 2016, pp. 65-66; For a separate opinion: P. Simler, « Cession de créance, cession de dette, cession de contrat », CCC mai 2016, dossier 8, n° 19 (nullity in default of agreement).

(25) To which should be added payment and extinctive prescription: C. Gijsbert, Le nouveau visage de la cession de créance, *op. cit.*, p. 55.

(26) For C. Gijsbert, the enforceability of the lock-in clause against the assignee presupposes his bad faith: Le nouveau visage de la cession de créance, *op. cit.*, p. 55. This is not provided in the new legislation. For one author, "*in the absence of an* intuitu personae *attached to the characteristic obligation of the contract, and thus especially in the whole field of monetary obligations, the non-assignment clause could constitute an abuse of rights (or infringement of the principle of good faith). In commercial matters, it seems abnormal that a creditor should be deprived of the power to mobilise the assets that are part of his wealth. Moreover, it must be borne in mind that, as regards restrictive practices, Article L 442-6 II c of the Commercial Code imposes a nullity on the clause which prohibits the contracting party from assigning the debts held against it to a third party* ": *La réforme du droit des contrats*, *op. cit.*, p. 309 (O. Salvat); F.-X. Licari, L'incessibilité conventionnelle de la créance, RJcom 2012, p. 65.

(27) C. Gijsbert, Le nouveau visage de la cession de créance, *op. cit.*, p. 54.

(28) Debate on the question of the nature of the creditor's agreement between consent as a condition of validity of the assignment of debt or as a mere modality of enforceability: M. Julienne, La cession de dette : une théorie inachevée, Droit et patrimoine juillet-août 2016, p. 59. For the author, it is rather a form of enforceability. Contra: P. Simler, « Cession de créance, cession de dette, cession de contrat », CCC mai 2016, dossier 8, n° 8.

(29) "*A strange assignment which does not substitute, but rather adds a debtor. This is all the ambiguity - the incongruity - of the so-called "cumulative" assignment*": (F. Chénédé, Le nouveau droit des obligations et de contrats, Dalloz, 2016, 42.153 ; « opération translative ou duplicative de la dette ancienne » (*Ibid.*) ; « cession de dette imparfaite ou cumulative » / « parfaite ou substitutive » (*Ibid.*, 42.156).

(30) L. Aynès, La cession de contrat, Droit et patrimoine, juillet/août 2016, p. 65.

(31) Cass. Com 6 May 1997, Bull IV, n° 117.

(32) P. Malaurie, L. Aynès et P. Stoffel-Munck, Les obligations, *op. cit.*, n° 862.

(33) In this sense: L. Aynès La cession de contrat et les opérations juridiques à trois personnes, Economica ; L. Aynès, La cession de contrat Droit et patrimoine, juillet/août 2015, p. 74: it is not a discretionary consent, but a controlling authorisation, in order not to ruin the principle of contractual assignability.

(34) L. Aynès, La cession de contrat, Droit et patrimoine, juillet/août 2016, p. 66.
(35) P. Malaurie, L. Aynès et P. Stoffel-Munck, Les obligations, *op. cit.*, n° 862; L. Aynès, La cession de contrat, Droit et patrimoine, juillet/août 2016, p. 65.
(36) P. Malaurie, L. Aynès et P. Stoffel-Munck, Les obligations, *op. cit.*, n° 862.
(37) *Ibid.*, n° 862.
(38) This is logical if the contract is to be performed successively, but not if the contract is performed instantaneously with deferred effects, in which case the assignee collects the rights and obligations arising and to arise from the contract.
(39) D. Houtcieff, Changement de débiteur, changement de contractant, in : La réforme du régime général des obligations, dir. L. Andreu, Dalloz, 2011, p. 113.
(40) L. Aynès, La cession de contrat, Droit et patrimoine, juillet/août 2016, p. 67. The author recalls the conflicts of boundaries.
(41) G. Marty, P. Raynaud, P. Jestaz, Les obligations, *op. cit.*, n° 365.