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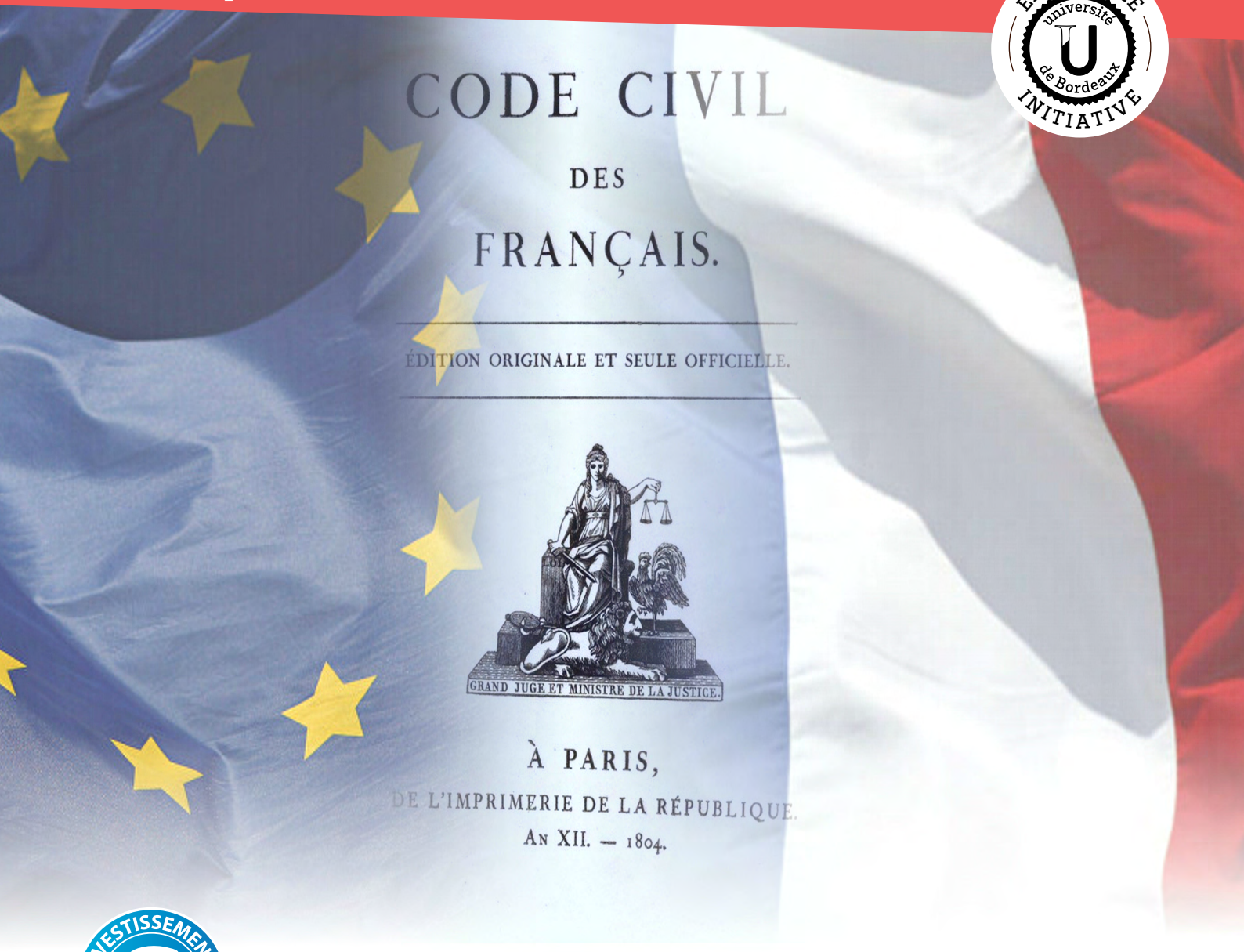

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The Characteristic Aspects of the Reform

The Contract, Definition and Classifications: Reflections in the Light of the Ordinance of 10 February 2016

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The definition of the contract and the presentation of its classifications retain their place on the frontispiece of the general theory of contract. The Ordinance adopted on 10 February 2016 devotes the first article of its introductory provisions to the concept of the contract and then, after recalling the cardinal principles governing its regime, begins the presentation of its various classifications (1). The reflection that produced these provisions does not however seem to live up to the place of honour reserved for them. Certainly, the presentation of these definitions could be seen as a stylistic device, the small practical scope of which would not require a substantial reorganization. It appears, however, that the definition of the contract and the presentation of its classifications, in that they represent the cornerstone of the contractual system, fulfil an important explanatory, even normative, function, so that they would have deserved more thorough and innovative reflection.

As one author observes, "*legal concepts are dependent on facts, which they try to express as adequately as possible, and on the values of those who construct them, the realisation of which they must ensure. The incessant mutability of the reality they are trying to express and the values they must bear make them concepts in a permanent state of reconstruction*" (2). This observation is particularly well-founded for contracts, which leaves a significant amount of initiative and creativity to contractors. As contractual practice, sometimes consolidated by case law or the legislature, innovates, it moves away from the model – in this case the private sale – that served to shape the initial definition. Unequal contracts, standard form contracts, contracts the develop their effects over time, contracts organising the pursuit of joint ventures, or even setting up groups of goods and people, contracts organising complex contractual arrangements... there are as many which, having appeared in the course of the nineteenth century, contributed to renewing the purpose of the contract and to widening the gap between the conception traditionally adopted and the reality it covers (3).

It is therefore not possible to renew contractual matters without taking up a double challenge. The first is to restore unity to the law of contracts. Built in the light of an outdated reference model, the ordinary law of contracts in France is based on a truncated vision of reality, which prevents it from coping with special rules. Hence the impression of a fragmented law having lost all coherence overall. It is therefore necessary to restore the general scope of ordinary contract law. This unification cannot be accomplished without renovating the crowning glory of the edifice: the concept of the contract. It must in fact be the reflection of one type of contract among others, but of reality as a whole, which requires that we "*go back from the multiple to the one, that is to say, represent in a single form different objects by focusing only on what they have in common*" (4). It is essential to begin by agreeing on the paradigms of the contractual matrix and on its definition criteria, if homogeneity is to be restored to French contract law. However, and as the contractual reality becomes more complex, can one persist in reasoning on the basis of a single model of contract to establish ordinary law? Conceived from the point of view of the contract taken

independently of the different characteristics which it may assume, the rules of ordinary law are stripped of their normative scope as they appear disconnected from the special regimes which are constantly ramified. This is probably the second challenge: the ordinary law of contracts must, as a whole, deal with the diversity of models and offer everyone the appropriate legal framework. Hence the idea of identifying a set of intermediate rules applying to subsets or families of special contracts. In other words, it would be a matter of fleshing out the general theory of a special ordinary law or the general theory of special contracts (5). It is thus a matter of restoring to ordinary law not so much its general scope as its normative force, the development of families of contracts making it possible to guarantee the necessary precision of rules of ordinary law. It is thus understood that *it is important to match the definition of the contract, once it has been renewed so as to cover reality as a whole, with a presentation of the categories of contracts allowing the general rules to grasp contractual reality in all its diversity.*

The extent to which the new introductory provisions devoted to the definition of the contract and its classifications make it possible to overcome this double challenge of unity and diversification of the ordinary law of contracts remains to be seen (6). Admittedly, the drafters of the Ordinance seem to have set themselves more formal than substantive objectives (7). However, by reaffirming the principle of an ordinary law of contracts (8), they did not remain indifferent to the desire to restore its influence of yesteryear. It is in this perspective that we will analyse the definition of the contract and its classifications. To that end, an inductive approach will be adopted in accordance with the method proposed by Jean Carbonnier for developing legal concepts: "*to start from the facts, in order to rise to the legal construction*" (9). More precisely, we will begin by studying the classifications of contracts and then go back to an examination of the definition of the contract. The presentation of the former can in fact serve as a valuable guide in examining the essential criteria of the latter.

In order to focus first on the exercise of contractual taxonomy, this requires that the contractual reality be carefully observed in order to identify and formalise the various distinctions in existence. When this work is conducted within the framework of ordinary law, the main difficulty lays in selecting the classifications that deserve to be represented. In this respect, two parameters would undoubtedly merit consideration. The first is theoretical and quite natural: only those classifications which serve to encompass reality in its entirely – which is generally called *summa division* – should be included in the general body of rules. To this is added a second parameter of a more practical nature: the distinction must be useful for the implementation of general rules and allow their diversification. However, as we shall see, while the Ordinance has taken a step forward in the direction of the renewal of classifications, it does not seem to have pushed it far enough.

As for the definition of the contract, its renewal requires work in terms not so much of selection but of synthesis. It is a question of identifying the essential criteria that make it possible to bring together the realities of the contract under the same banner. As we shall see, the reform is far from improving the situation, seeming instead to have made it regress. No doubt this is due to the fact that the drafters saw in the definition of the contract the starting point of their reflection where this ought to have been its zenith.

The *classifications of contracts* (I) will first be considered, and then, in the light of this clarification, the *notion of contract* (II) will be examined.

I. Classification of contracts

The classifications set forth by the drafters of the Civil Code describe the characteristics of the contract with regard to the transaction that it organises. More precisely, whether the argument is based on the opposition between the synallagmatic contract and the unilateral contract, the onerous contract and the gratuitous contract, or that of the commutative contract and the aleatory contract, it is a matter each time of indicating in the margins of the reference model - the synallagmatic commutative onerous contract to which the sale belongs - the existence of more marginal figures commanding the existence of derogatory rules. This means that the categories thus presented are not so much intended to propose several reference models as to delimit the outlines of the principal model on which basis the ordinary law has been constructed. As for the drafters of the Ordinance, whilst they have generally applied the same logic by adopting the traditional classifications they have sometimes tweaked or supplemented (A), they have also enshrined a more innovative distinction (B).

A. Traditional classifications

We thus encounter, first of all, the triptych of the Civil Code. As for the distinction between synallagmatic and unilateral contracts, its wording appears to have undergone virtually no change: the contract is synallagmatic "*where the parties undertake reciprocal obligations in favour of each other*"; it is unilateral "*where one or more persons undertake obligations in favour of one or more others without there being any reciprocal obligation on the part of the latter*"(Art. 1106). Opposition thus always rests on a strictly legal criterion, namely whether there are reciprocal obligations. The following classification, on the other hand, has been reworded. Therefore "*a contract is onerous where each of the parties receives a benefit from the other in return for what he provides*"; it is gratuitous "*where one of the parties provides a benefit to the other without expecting or receiving anything in return*" (Art. 1107). The Ordinance sought to remedy the imperfection of the earlier definitions, criticised for not sufficiently marking a distinction between the onerous contract and the synallagmatic contract, "*and to a lesser extent, between the gratuitous contract and the unilateral contract*" (10). The new definition thus rightly means that the genuine criterion for onerous and gratuitous contracts must no longer be based on the existence of reciprocal obligations but on the economic transaction and the presence or the absence of reciprocity of benefits received by the parties. One can only rue the fact that, in doing so, the drafters have continued to reason in terms of *synallagma* and presented the benefits as being necessarily received from the contracting party, which makes the distinction between synallagmatic and unilateral contracts somewhat "*artificial*" (11). It would indeed have been desirable to point out that, unlike the former distinction (the criterion for which focuses on (legal) means), the latter looks at the final purpose or (economic) result - the benefit received - regardless of the vector carrying it. And all the more so because, as we shall see, the benefits received are not always due to reciprocal obligations. Above all, this would have served to better justify the maintenance of this double contractual relationship. As for the last classification of the triptych which opposes commutative and aleatory contracts, it is undoubtedly the one that has been most amended: the contract is "*where each of the parties undertakes to provide a benefit to the other which is regarded as the equivalent of what he receives*"; "*It is aleatory where the parties agree that the effects of the contract— both as regards its resulting benefits and losses—shall depend on an uncertain event*" (Art. 1108). The definition of the commutative contract reaffirms the principle of subjective commutativity, according to which it is sufficient that the benefits have been regarded as equivalent by the parties at the time of the formation of the contract, whether or not they really are (12). The fact remains that this subjective angle does not allow the boundary to

be clearly drawn with the aleatory contract in which the advantages received, although of uncertain content, are also regarded as equivalent by the parties when they enter into a contract (13). In this respect, the definition of the aleatory contract has been profoundly altered in order to put an end to the previous ambiguity due to the presence of two approximate definitions that are difficult to reconcile (14). Reiterating the content of Article 1964 of the Civil Code, which it repeals, the Ordinance retains the criterion of aleatory result while rightly removing the stipulation whereby this result may be aleatory for one or both parties. If the purpose of the obligation of one of the parties may be uncertain, the same is not true of the result of the transaction, which is necessarily uncertain for both parties, since the uncertainty must be shared.

In the original trilogy, the Ordinance adds three further classifications discovered by French jurisprudence which, although only now entering the Civil Code, are nonetheless thoroughly traditional. The first, which dates back to Roman law, sets out three categories of contract depending on the method of their formation. While "*a contract is consensual where it is formed by the mere exchange of consents, in whatever way they may be expressed*", the contract is solemn "*where its validity is subject to form prescribed by legislation*"; or "*real where its formation is subject to the delivery of a thing*" (Art.1109). The consensual contract is only the expression of the principle of consensualism expressed in Article 1172 of the Civil Code. By way of derogation to this principle, the other two categories of contract must, in order to be formed, be subject to an additional procedure. Where the solemn contract requires the respect of legal formalities - the drafting of a document, the intervention of a third party - and this *ad validitatem*, the real contract supposes, in addition to the agreement of the parties, the delivery of a thing. The second distinction added by the drafters of the Ordinance, although more recent than the previous one, is nonetheless traditional and focuses on the duration of the effects of the contract. It thus contrasts the contract of instantaneous performance, "*whose obligations can be performed as a single act of performance*", with the contract of successive performance, "*of which the obligations of at least one of the parties are performed in a number of acts of performance over a period of time*" (Art. 1111-1). While the incorporation of the temporal dimension of the contract into the Civil Code is to be welcomed, the distinction as formulated is not satisfactory. In order to indicate that the contract produces its effects over time, two approaches are generally put forward: one which looks at the time of performance of the service according to whether it occurs instantaneously or requires the expiry of a time period; while the other looks at whether it is the performance of a single act of performance or a number of acts of performance over a period of time (15). In order to define the contract of successive performance, the Ordinance opts for the latter analysis. However, the criterion selected is not without artifice (16) - would it be tantamount to saying that contracts whose performance is a single but continuous act of performance must be regarded as contracts of instantaneous performance? - but has little practical impact (17). It would in fact probably have been better to rethink the starting point of the examination and make a more general distinction based on whether the performance of the contract is immediate or long-term, and then make a sub-distinction between performance being staggered, continuous, fixed-term, indeterminate or otherwise, which would make it possible to bring together all those contracts whose effects fall within the same category, while serving to identify more specifically the different scenarios that can be envisaged and the rules that may follow. Lastly, along the same lines, the Ordinance distinguishes the framework contract, whereby "*the parties agree the general characteristics of their future contractual relations*", and its implementing contracts which determine "*the modalities of performance*" (Art. 1111). Adopted from case law, this distinction

reflects the new Article 1164 which enshrines a rule on the unilateral determination of prices within the framework contract.

B. Innovative classifications

At the same time, while proposing a relatively traditional classification, the Ordinance changes outlook by introducing the distinction between bespoke contracts and standard-form contracts. Under the new Article 1110 of the Civil Code, "*A bespoke contract is one whose stipulations are freely negotiated by the parties. The standard-form contract is one whose general conditions are determined in advance by one of the parties without negotiation*" (18). This contrast, although formulated at the end of the 19th century by Saleille (19), breathes new life into the classifications under ordinary law. It is removed from them in that it describes not the characteristics of the contract but two ways of conceiving the element which is at the heart of the contractual act: the concordance of wills (20). While the bespoke contract is the result of two wills which, on an equal footing, produce the stipulations of the contract, "*there is (in the standard-form contract) the exclusive predominance of a will acting as a unilateral will, which dictates its law, no longer to an individual but to an unspecified group*" (21). While French jurisprudence quickly found that the model, although operating in a distinct fashion from the traditional model, remained a genuine contract, it was more reluctant to include it in ordinary contract law. Despite certain contrary opinions (22), the Ordinance decided in this sense, which seems to us to be entirely justified. On the one hand, far from being a marginal phenomenon, the model now refers to a very important part of contractual reality that shows no sign of ebbing, so much so that one might even ask whether, in not enshrining it, the Ordinance "*would still carry the ordinary law of contract*" (23). Above all, the distinction involves the essential mechanism on which all contract law has been built. Until now, the concept of a bespoke contract was unknown since it was part of the very essence of the contract, even synonymous with it. The contract under the Napoleonic Code was and could only be that in which stipulations are freely negotiated, which justified the fact that one relies entirely on the agreement in order to define the content of the contract (24). However, once one of the parties establishes the terms of the contract, the concordance of wills is no longer able to guarantee that the agreed transaction is a balance between the interests involved. It is then necessary to offer the party who has not been able to negotiate the terms of the contract additional means to defend its interests. Thus, adopting the provisions of French consumer law, the new legislation provides for two mechanisms: a rule of interpretation of the obscure contract in favour of the one who has not been able to negotiate the terms (Art. 1190 Civil Code), and a rule for the eradication of unfair terms (Art. 1171). That is to say that the change is significant, the enshrinement of this distinction among the *summa divisio* of ordinary contract law marking a new stage: that of the diversification of ordinary contract law according to whether the contract was negotiated (25).

Yet it is necessary to interpret the distinction in this perspective and to give it the scope it deserves. In particular, any contrast made must take account of the entire contractual reality, since any contract must necessarily be either bespoke or standard-form (26). There then remains the task of precisely defining the cursor. In this respect, the criteria set out in the Ordinance have already sparked several discussions. According to Article 1110 of the Civil Code, "*a standard form contract is one whose general conditions are determined in advance by one of the parties without negotiation*". Clearly, the main criterion is that the terms of the contract are determined "*without negotiation*", particularly with regard to the *ratio legis* of the legislation (27). It is because of this lack of negotiation that the agreement of the wills has not been able to play its part, and that it is

necessary to intercede in order to correct the possible imbalances. It is also necessary to specify what is meant by "*without negotiation*". The various commentators agree that the term refers to the impossibility of negotiating for one of the parties because of its co-contracting party. It is not enough that the contract has not been negotiated; the negotiation must also and above have been prevented by the contracting partner (28). This can be seen for some when there is an unbalanced power relationship between the parties (29); for others where a material, economic, social context and other factual aspects create such an impediment (30). The fact remains that, as one author has observed, the criterion is objective in nature - either there is a negotiation or there is not - since the qualification does not have to become a "catch-up session" "For those who have neglected to exercise their contractual freedom (31).

While there is little difficulty in identifying the principal criterion, the same is not true of the other two criteria. The legislation specifies that the general conditions must not be negotiated and not, as in the previous version, the essential stipulations. The reference to the "essential stipulations" had been criticised on the grounds that the text was missing its target and ignored "*the reality that the subscriber is attentive to the essential clauses, to what forms the heart of the transaction, but has no influence over the other stipulations that are for example, the clauses governing limitation periods, tacit renewal, etc.*" (32). While the wording chosen in the final version of the text is definitely striking from this point of view, which is indisputable progress - the clauses mentioned almost always being found in the general conditions - there remains the difficulty of defining precisely what is meant by "general conditions". In this respect, two opposing approaches have been proposed. While some stick to the current reading and consider them as standard clauses formally titled general conditions (33), others propose the adoption of a definition specific to the standard-form contract and consider them substantially as the "*content of the contract taken as a whole*", "*the majority of its clauses*" (34). The choice between the two approaches can raise complex practical problems that must be solved, especially when the contract is partly negotiated, and partly established without negotiation. While the proponents of the former approach require that all the terms and conditions of the contract be exempted from negotiation (35), others propose an examination of the extent to which what has been excluded from the negotiation represents an important part of the contract, particularly with regard to the interests of the parties (36) - which is to say that the wording of the legislation leaves serious uncertainties in this respect.

The text then states that the general conditions must have been "*determined in advance by one of the parties*". Again, this requirement raises questions in the event that the contract, although withdrawn from negotiations by one of the parties, has been drafted by a third party or taken from a standard model. Should this preclude the qualification of standard-form contract? Again, opinions are divided. While some see the fact that the act was pre-written by one of the parties as a necessary condition for the qualification of standard-form contract (37), others consider that it is irrelevant that the party proposing the contract has not drafted it when it appropriates it in order to impose the conclusion of the sale on the other party (38). This second approach seems most consistent with the *ratio legis* of the text: the intellectual author of the stipulations does not matter, since these have been imposed by one party on the other (39).

Lastly, and contrary to a trend which attempts to define the concept of the standard-form contract in consideration of other categories such as the consumer contract (40), the dependence contract (41) or the standard contract, it seems important to us to stick to the legal criteria, at the forefront

of which is the fact that the stipulations of the contract have been withdrawn from the negotiation (42). The addition of other criteria relating to the quality of the parties, the form or the purpose of the contract would paradoxically risk the legal framework losing its precision. It is not a question of embracing the pursuit of this or that cause of contractual justice, but of specifically remedying the fact that the concordance of wills has not been able to play its role, whatever the standing of the parties or the nature of the contract.

However, the authors of the Ordinance, while initiating the process of diversification of the general theory, have not gone far enough in this sense. Indeed, while the conventional contract was synonymous with a bespoke contract, it was also the legal reflection of an economic exchange. The traditional view is based on an antagonism of interests. As Paul Didier has clearly pointed out, the opposition of interests is due to the fact that the contract - which he terms *contrat-échange* or contract of exchange - structures a permutation, that is to say "*a zero-sum game in which everyone loses what the other gains*" (43). However, in the same way that the postulate of the bespoke contract has been undermined by the development of standard-form contracts, the assimilation of the contract to the contract of exchange has also been called into question since the growth in the number of contracts organising the pursuit of an enterprise in the common interest of the parties. While the drafters of the Civil Code had already considered the social contract in this sense, the phenomenon now largely surpasses this original case with the emergence of numerous contracts tinged with an *animus cooperandi*, which are now habitually called "*contracts of common interest*" (44). For example, there are contracts for the exploitation of copyright, integrated distribution contracts (such as the franchise agreement, the concession contract or the commercial agency contract), and many other commercial contracts in the sphere of international trade which do not organise a simple exchange but the commercial distribution of a work, products, services, the operation of a financial or construction project in the common interest of the parties (45). Given the considerable development of this new economic reality, one might have expected that the distinction between contracts which merely exchange and those which organise the pursuit of a common project would be amongst the new classifications introduced by the Ordinance. As noted by the commentators of the reform project, if contracts of common interest had been represented by a category, "*the classifications under the Civil Code, the purpose of which is to give an orderly view of contractual diversity, would be a more accurate reflection of economic reality*" (46). Yet such was not the way followed in the final draft, which remains silent on this point. Some authors even concede that "*despite the economic reality and the legal utility of this classification*... [they do] *not regret its absence from the Civil Code*", contracts of common interest "*belonging more to special law than ordinary law*" (47). For our part, on the contrary, it is deeply to be regretted that the reform did not provide an opportunity to dissociate contracts from exchanges by representing the diversity of economic models that they can encompass. The phenomenon of contracts of common interest is not limited to the recognition of new special contracts but calls for consideration of an economic model separate from that which has hitherto underpinned all contract law, be it ordinary law or special law. This means that we are not talking about a new "special contract" but a new "contractual type". As the ordinary law of contracts has been conceived in the light of exchange and therefore with a view to resolving a conflict of interests, it is difficult to understand the synergistic models and the common interest which underpins them (48). Thus, if the paradigms of the reference model are not changed, contracts of common interest are necessarily ejected outside the bounds of ordinary law, as would standard-form contracts in the event of the Ordinance's silence on this. However, this cannot be

admitted on pain of altering the unity of the ordinary law, as the phenomenon now refers to a large part of the contractual reality which is in full expansion.

Moreover it is for these models, the special rules of which are sometimes only in draft form, that the application of the ordinary law finds its full utility. That is to say that the distinction between the contract of exchange and contracts of common interest, far from concerning only special law, deserves to be at the heart of ordinary law. This does not mean, however, that it is regrettable that ordinary law has not regulated these contracts in detail. It is preferable, as one author has pointed out, to remain cautious, "*the novelty of the phenomenon calling for legal precedent and then the law of special contracts to provide a sufficiently complete framework, serving then to reveal the need for regulation*" (49). Yet it would have been appropriate to lay the foundations of the distinction in order to incite case law, relayed by the law, to gradually operate this diversification.

Instead, the Ordinance not only ignored the distinction but shaped the ordinary law of contracts, more than the drafters of the Civil Code had done, based on the model of exchange (50) .This is confirmed by the revised definition of the onerous contract. According to the new Article 1107 of the Civil Code, an onerous contract is presented as the contract by which each of the parties receives a benefit from the other, i.e. as a permutation by virtue of which each gives the other the value he expects. However, this method of definition, whilst accounting for the economy of the contract of exchange, does not make it possible to grasp that of contracts of common interest. Rather, the parties undertake to contribute to a common project with a view to profiting from it, so that they acquire not the advantage they seek but the means of obtaining it. That is to say whether it would have been preferable to separate the onerous contract from the model of exchange by defining it more neutrally as the contract under which each party receives an advantage. This would have made it possible to identify two models depending on whether the onerous contract is an contract of exchange (each party provides the other with the benefit which it pursues) or a contract of common interest (the parties contribute to a project from which they derive an economic advantage) (51). It would, however, still be necessary for the rules of the general theory to be formulated in a sufficiently general way as to encompass the various models. Again, the Ordinance goes against this by laying down some jurisprudential solutions specific to the contract of exchange (52). That is to say, contrary to what one author maintains, the opportunity to diversify economic models has not only been missed but, far from it being possible to grasp it, seems to have been missed once and for all (53).

In short, while the Ordinance attempted to give the classifications a new lease of life by reviving the statement of classical distinctions and, above all, by opening the way to a diversification of contractual models, the matter of whether it has gone far enough in this sense is debatable, since it ignores major economic models which are now part of the contractual reality. The extent to which these divisions are an invitation to renew the very notion of contract remains to be seen.

II. The concept of contract

The Ordinance amended the definition of contract set out at Article 1101 of the Civil Code. It is no longer a question of "*the agreement by which one or more persons bind one or more persons to give, do or not do something*" but "*concordance of wills of two or more persons intended to create, modify, transfer or extinguish obligations*".

In fact, where the contract was traditionally perceived as a convention more specifically creating obligations, the Ordinance views it also as capable of modifying, transmitting, extinguishing obligations. This means that if the contract continues to operate exclusively on obligations, it no longer has the sole effect of creating them. The legislation thus amends the dividing line which traditionally existed between the contract and the agreement without the new distinguishing criterion appearing very clearly: the contract would have the effect of any transaction relating to obligations where the agreement produces all the effects not having the purpose of these obligations. That being so, it is difficult to see progress in this amendment from the point of view of the contract or the agreement. As for the contract, it has and will continue to have, in spite of the new wording, an effect essentially creating obligations (54). This extensive approach therefore leads to a blurring of the lines for no reason. As for the agreement, and assuming that it subsists as the genus of the contract, it has only a residual autonomous existence, the interest of which is difficult to identify (55). Even if it were to extend the effects of the contract, one might wonder whether it would not have been better for the contract to fully absorb the agreement as provided for in the draft Ordinance.

It is all the more regrettable that the definition has remained unchanged where it would doubtless have deserved to evolve. The emergence of the new categories of contracts mentioned above prompted a change in the criteria for defining the contract, whereas the new Article 1101 of the Civil Code merely reiterated them. However, the renewal of the *criteria for defining* the contract (B) assumed that a shift in the *paradigms of analysis* (A) would be made beforehand.

A. A paradigm shift in contract analysis

Thus, in order to present the contract, the Ordinance retains the paradigms of a traditional analysis and puts forward two dimensions: as to its source, the contract would proceed from a concordance of wills; as to its effects, it would impact on obligations. While it has the merit of clarity when it comes to making second-year students understand what the contract is, this method of analysis contains, on the contrary, many grey areas as soon as the aim is to go deeper into the concept technically covers. Of course, the criterion of the concordance of wills is so deeply rooted in the mind that one can hardly imagine defining the contract without referring to it. The contract, like any legal act, would in essence require the involvement of several wills that meet and agree. However, beyond its suggestive force, the formula contains numerous approximations and inaccuracies. Above all, it does not provide an operational criterion for defining what the contract is. As one author has rightly pointed out, the notion of concordance of wills is based on confusion between the “contract” - the contractual procedure - and the "contracted" - the product of this concordance, i.e. the agreed standard (56). The traditional proactive approach considers the contract from the point of view of the former approach, from the point of view of “contracting”. The contract is thus defined as a linear process by which wills meet and generate obligations. And the Ordinance maintains this perspective when presenting the agreement as “intended to” produce legal effects, implying that the agreement plays a causal role in the production of obligations. Admittedly, no one would dare to interpret this text today as enshrining the creative force of the will on the same basis as the law, as it is now accepted that only objective law is able to attribute the necessary legal force to the agreement of the parties (57). However, the wording used does not help to remove the ambiguity.

Above all, it is regrettable that the legislation continues to position itself in terms of contracting and to present the contract as a linear process when a shift in the paradigms of analysis appears

necessary. In this sense, it can be argued that the agreement understood as the process refers more to one aspect of the contractual system – its formation – than to a notional criterion. The notion of contract must be related to a legal reality. However, it is only once the agreement has been reached that the contract exists legally, which invites reasoning from the point of view of the "contracted". Above all, as the study of the new categories of contracts reveals, the concordance of wills no longer lays at the heart of the contractual process. The model of the bespoke contract in the light of which the drafters of the Civil Code have built the contract must in fact deal henceforth with standard-form contracts in which one cannot reconstitute a true concordance of wills. Admittedly, the standard-form contract is formed after a double consent. However, as we may rightly point out, consent here is more an expression of an act of subjugation than of participation in a concordance of wills (58), and relates more to the contractor than to the contract. For all these reasons, it is necessary to change the lens and define the contract, not with regard to the way in which it is formed, but with regard to what it is once formed.

B. Renewing the criteria of a contract

When it comes to accounting for the agreement in terms of its result, the presentation in terms of wills shows its limits and draws jurisprudence into speculation with little to do with law, be it a question of merger, combination or reflexivity of wills (59). Because it necessarily refers to an internal psychological phenomenon, the will not only eludes the law but operates ahead of the formation of the agreement, so that it cannot provide a criterion for understanding what the contract is, once there is a concordance of wills, namely a concrete transaction. However, we cannot view the contract from an exclusively objective angle and separate its definition from any link with the wills. As jurisprudence has long tried to demonstrate, the contract is a composite of subjective and objective elements, intrinsically linked (60). In fact, the contract refers not to any transaction but to the transaction agreed upon by the parties. To indicate this, one can appeal to the notion of interest, i.e. to the need that each party seeks to satisfy when contracting (61). The reference to interest makes it possible to account for the will applied to the concrete transaction. The contractual transaction is not any old economic exchange but the one that will serve to meet the needs for which the parties are seeking satisfaction, being that which they have agreed upon. It is, in this respect, the transaction which makes it possible to bind the interests of the parties. Moreover, viewing matters through this lens serves to dissociate the notion of contract from that of the exchange and provides a criterion that can account for different economic models. Thus, as we have seen, the contract binds interests differently according to the type of economic transaction that it organises. While the contract, when its purpose is an exchange, reconciles the opposing interests of the parties, it unites their converging interests as soon as it seeks to realise a synergy effect within the framework of a common project.

However, we need to go further and incorporate the mandatory effect into the definition. Again, the Ordinance retains a classical approach and views the contract as having obligations as its effect. Yet this analysis would appear to be too restrictive, even without the deletion of the reference to the trilogy of obligations to do, give and not to change. This can be seen in two respects.

First of all, the contract produces a binding legal effect which goes beyond mere obligations. This is not to say that the contract may give rise to other real and personal effects accompanying the obligations (62), which is now obvious, but rather that it is intended to produce an overall binding effect which exceeds the sum of the obligations, since it is intended to bind them to one another.

The traditional presentation reduces the obligatory effect of the contract to the obligation, and is explained by the fact that the contract was designed in the light of the exchange. Now, in the model of the contract of exchange, the birth of two reciprocal obligations suffices to organise the transaction. And the bond that binds together obligations - a simple interdependent relationship - is reduced to its lowest expression in such a way that little is known about the contract's existence beyond that of obligations (63). However, when one moves away from the model of exchange in an attempt to understand contracts of common interest, obligations are linked in a much more substantial way so that one realises that the contract has an overall consistency that exceeds the obligations taken individually (64). The effect of the contract thus consists not so much in the production of obligations as in imposing on the parties the respect of a more general standard, in this case the realisation of the joint project. But again, the reference to the idea of standard must not mislead. It is not a matter of considering that the contract is an objective standard severed from any connection with wills but merely showing that the binding effect of the contract, if based on obligations, exceeds it and takes on an overall unity.

Second, the contractual standard should not be viewed as an end in itself but as a means of linking the interests pursued by the parties (65). In short, the contract remains marked by the seal of the wills and covers the mandatory legal bond established between the interests of the parties. Here again the inaccuracy of the traditional analysis is due to the fact that in the contract organising a simple exchange, each of the obligations expresses the interest of the creditor, who may require its performance. Thus, by ellipsis, the contract has always been seen as a simple instrument for "giving birth" to obligations (66). However, once this model is abandoned to analyse contracts of common interest, it appears that the presentation is no longer tenable. In this case, it is the interrelated obligations that satisfy the interests of the parties. And in fact, the essence of the contract now lays less in an concordance of wills from which the obligations arise than it does in the bond of obligations established between the interests of the parties.

In conclusion, the new introductory clauses on the definition of the contract and its categories give rise to a feeling of disappointment. Admittedly, the Ordinance attempted to renew the old provisions, as evidenced by the formal alterations and the addition of new categories. However, the changes made remain insufficient to renew the ordinary law. They do not make it possible to reinvigorate the contract and bring it into line with the contractual reality. On the contrary, they crystallise an outdated conception of the notion of contract which only accounts for a truncated part of reality. Far from remedying the gap between ordinary law and living law, the Ordinance seems to have endorsed, even enhanced it.

Notes

(1) *Ordonnance n°2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* (Ordinance No. 2016-131 of 10 February 2016 reforming the law of contract, the general regime of obligations and proof of obligations).
(2) M.-O. BARBAUD, *La notion de contrat unilatéral : analyse fonctionnelle,* préf. B. Teyssié, LGDJ, n°9, p. 9.
(3) For such a statement, see in particular G. CORNU, « Regards sur le Titre III du Livre III du Code civil » (Essai de lecture d'un titre du Code), Les cours de droit 1976-1977.
(4) M.-O. BARBAUD, *La notion de contrat unilatéral : analyse fonctionnelle*, thesis cited above, n ° 10, p. 10.

(5) In this sense, in particular A. BELLOIR, *Théorie générale des contrats spéciaux,* PhD thesis, Paris II, 2002; J. RAYNARD, F. COLLART DUTILLEUL, P.-Y. GAUTIER, D. MAINGUY, J.-J. BARBIÈRI, « Une théorie générale des contrats spéciaux ? », RDC 2006/2, Débats, p. 597 et seq; P. PUIG, « Pour un droit commun spécial des contrats spéciaux », in *Le monde du droit : Écrits rédigés en l'honneur de J. Foyer*, Economica, 2007.

(6) For a general discussion of these provisions, see G. CHANTEPIE, M. LATINA, *La réforme du droit des obligations, commentaire théorique et pratique dans l'ordre du Code civil*, Dalloz, 2016, p. 70 et seq., p. 106 et seq.; 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*, Lexis Nexis, 2016, p. 43 et seq., p. 54 et seq.; Fr. CHÉNEDÉ, *Le nouveau droit des contrats et des obligations*, Dalloz 2016, p. 17 et seq.; « Les classifications des contrats », *Droit et Patrimoine* 2016, Dossier Le nouveau droit des obligations, n°258, p. 46; L. ANDREU, N. THOMASSIN, *Cours de droit des obligations,* Gualino, 1ère éd., 2016, p. 54 et seq., p. 83 et seq.

(7) Thus, the Report submitted to the President of the Republic at the time of publication of the Ordinance refers to the objectives pursued by the reform. Insisting on the improvement of legal certainty, the report considers it only through the accessibility of the law and not the foreseeability of its mechanisms. Likewise, the Report mentions the requirement of modernisation. But here again, modernisation is presented as a formal codification exercise in order to "*facilitate the accessibility and readability*" of contract law.

(8) According to Article 1105 para.1, "*Whether or not they have their own denomination, contracts are subject to general rules, which are the subject of this sub-title*".

(9) J. CARBONNIER, « Le régime matrimonial, sa nature juridique sous le rapport des notions de société et d'association, Introduction », reprinted in *Jean Carbonnier, 1908-2003, Ecrits*, PUF, 2008, p. 47 et seq., specifically p. 54.

(10) Fr. CHÉNEDÉ, « Les classifications des contrats », cited above.

(11) Fr. CHÉNEDÉ, « Les classifications des contrats », cited above.

(12) Fr. CHÉNEDÉ, « Les classifications des contrats », cited above.

(13) For example, in insurance contracts, the coverage offered by the insurer is regarded as the equivalent of the premiums paid by the insured person and vice versa.

(14) Thus Article 1108 of the Civil Code, stating that the contract "*is aleatory where the parties agree that the effects of the contract— both as regards its resulting benefits and losses—shall depend on an uncertain event*", implying that the purpose of each party's obligation must have depended on an uncertain event. Now, precisely, the qualification of an aleatory contract can be conceived even when the purpose of the obligation of one of the parties is determined. As to the other text, namely article 1964 of the Civil Code, it had the advantage of emphasising the result, considering that the contract was aleatory "*when the parties agree to make the effects of the contract depend on the expected benefits and losses of an uncertain event*". However, the provision was also defective inasmuch as it seemed to indicate that the result of the contract could be uncertain for only one of the parties, whereas it should be for both.

(15) For a discussion of these examinations, see G. CHANTEPIE, M. LATINA, *La réforme du droit des obligations*, *op. cit.*, n°. 159.

(16) See in this sense, G. CHANTEPIE, M. LATINA, *op. cit.* No. 160.

(17) *Ibid.*

(18) On introducing the distinction between standard-form contracts and bespoke contracts in the Civil Code, see, in particular, Fr. CHÉNEDÉ, « Le contrat d'adhésion dans le projet de réforme », Dalloz 2015, p. 1226; Th. REVÊT, « Le projet de réforme et les contrats structurellement déséquilibrés », Dalloz 2015, p. 1217; G. CHANTEPIE, M. LATINA, *op. cit.*, p. 125 et seq.

(19) R. SALEILLES, *De la déclaration de volonté, Contribution à l'étude de l'acte juridique dans le Code civil allemand*, Pichon, 1901.
(20) Th. REVET, « Les critères du contrat d'adhésion », Dalloz 2016, n ° 4, p. 1772.
(21) R. SALEILLES, *op. cit.*, p. 229.
(22) Fr. CHÉNEDÉ, « Raymond Saleilles, Le contrat d'adhésion », *RDC* 2012, p. 1017 et seq.
(23) Th. REVET, cited above, No. 3, p. 1772.
(24) Th. REVET, cited above, No. 1, p. 1771.
(25) Th. REVET, cited above.
(26) Th. REVET, cited above, No. 10, p. 1775.
(27) Th. REVET, cited above, n° 7, p. 1773; Fr. CHÉNEDÉ, « Le contrat d'adhésion dans le projet de réforme », Dalloz 2015, p. 1226; G. CHANTEPIE, M. LATINA, *op. cit* ., p. 125 et seq.; O. DESHAYES, Th. GENICON, Y.-M. LAITHIER, *op. cit.*, p. 63 et seq.
(28) In this sense, Th. REVET, cited above, n° 11, p. 1775; O. DESHAYES, Th. GENICON, Y.-M. LAITHIER, *op. cit.*, p. 66.
(29) O. DESHAYES, Th. GENICON, Y.-M. LAITHIER, *op. cit.*, p. 66.
(30) Th. REVET, Art. 12, p. 1775.
(31) O. DESHAYES, Th. GENICON, Y.-M. LAITHIER, *op. cit.*, p. 66.
(32) O. DESHAYES, Th. GENICON, Y.-M. LAITHIER, *op. cit.*, p. 65; Fr. CHENEDÉ, cited above, n°3.
(33) O. DESHAYES, Th. GENICON, Y.-M. LAITHIER, *op. cit.*, p. 65.
(34) Th. REVET, cited above, n°8, p. 1774.
(35) O. DESHAYES, Th. GENICON, Y.-M. LAITHIER, *op. cit.*, p. 67.
(36) Th. REVET, cited above, n°14, p. 1776.
(37) O. DESHAYES, Th. GENICON, Y.-M. LAITHIER, *op. cit.*, p. 66.
(38) Th. REVET, cited above, n° 19, p. 1778.
(39) It is also necessary to reserve the scenario in which the use of a particular form is imposed by law to defend certain best interests. In this case, the qualification of standard-form contract cannot short-circuit the legal mechanism which is already supposed to ensure the protection of the subscriber's interests (Th. REVET, cited above, n° 18, p. 1777).
(40) Fr. CHENEDÉ, cited above, n°3.
(41) G. CHANTEPIE, M. LATINA, *op. cit.*, n° 148, p. 128.
(42) Th. REVET, cited above, n°10, p. 1774
(43) P. DIDIER, « Brèves notes sur le contrat-organisation », in *L'avenir du droit, Mélanges en hommage à F. Terré*, Dalloz, PUF, Juris-classeur, 1999, p. 635.
(44) Originally developed by case law to account for a particular type of mandate - the common interest mandate - (Cass.Civ., 13 May 1885, *DP* 1885.1. 350), the term was subsequently extended to many other models. On these contracts, see particularly S. LEQUETTE, *Le contrat-coopération, contribution à la théorie générale du contrat,* préf. C. Brenner, Economica, 2010 ; rappr. Fr. CHÉNEDÉ, *Les commutations en droit privé,* préf. A. Ghozi, Economica, 2008 ; J.-Fr. HAMELIN, *Le contrat-alliance,* préf. N. Molfessis, Economica, 2012.
(45) On this question, see particularly E. COMBE, « Pourquoi les firmes s'allient-elles ? Un état de l'art », in *Rev. écon. Pol.* 1998, pp. 433-475 ; J. NORMAND, « Pourquoi et comment les entreprises se rapprochent-elles ? Formes et modalité de coopération entre entreprises », in *La coopération entre entreprises, expériences et problèmes*, Coll. Sciences sociales et administration des affaires, t.11, Institut de sociologie de l'Université de Liège, 1968, p. 25.
(46) *Projet de réforme du droit des contrats, du régime général et de la preuve des obligations, analyses et propositions, op. cit.,* p. 7 ; rappr. N. DISSAUX, Ch. JAMIN, op. cit., p. 8.
(47) Fr. CHÉNEDÉ, « Les classifications des contrats », cited above, p. 260

(48) For a demonstration to this effect, see S. LEQUETTE, cited above; comp. Fr. CHÉNEDÉ, cited above ; J.-Fr. HAMELIN, cited above.
(49) R. Libchaber, « Regrets liés à l'avant- projet de réforme du droit des contrats - Le sort des engagements non bilatéraux », *RDC* 2015, p. 634, specifically pp. 636-637.
(50) For a detailed demonstration to this effect, see S. LEQUETTE, « Réforme du droit commun des contrats et contrats d'intérêt commun », Dalloz 2016, p. 1148.
(51) Rappr. *Projet de réforme du droit des contrats, du régime général et de la preuve des obligations, analyses et proposition,* p.7, which proposed the following definitions: a contract is "*onerous when each of the parties receives a benefit in exchange for that which it provides*"; "*it is mutual when each of the parties receives a benefit procured through the exercise of a common activity*".
(52) S. LEQUETTE, « Réforme du droit commun des contrats et contrats d'intérêt commun », cited above.
(53) J.-Fr. HAMELIN, « Le contrat de société », *Actes pratiques et ingénierie sociétaire* mai 2016*, Dossier : le droit des sociétés et la réforme du droit des contrats*, n°147, p. 3.
(54) O. DESHAYES, Th. GENICON, Y.-M. LAITHIER, *op. cit.*, p. 44.
(55) G. CHANTEPIE, M. LATINA, *op. cit.*, n° 80, p. 73.
(56) G. ROUHETTE, *Contribution à l'étude critique de la notion de contrat,* thèse dactyl.*,* 1965.
(57) R. LIBCHABER, « Regrets liés à l'avant- projet de réforme du droit des contrats - Le sort des engagements non bilatéraux », cited above, n°3.
(58) Th. REVET, « Le projet de réforme et les contrats structurellement déséquilibrés », n°8, p. 1220.
(59) G. ROUHETTE, cited above; R. LIBCHABER, cited above, n°6.
(60) P. HÉBRAUD, « Rôle respectif de la volonté et des éléments objectifs dans les actes juridiques », *Mélanges Maury*, tome 2, 1960, p. 419 et seq.; J. HAUSER, *Objectivisme et subjectivisme dans l'acte juridique : contribution à la théorie générale de l'acte juridique*, préf. P. Raynaud, LGDJ, 1971; G. WICKER, *Les fictions juridiques : contribution à l'analyse de l'acte juridique*, préf., A. Donat, LGDJ, 1997, n°40 et seq., p. 50 et seq.
(61) J. HAUSER, cited above; G. WICKER, cited above.
(62) P. ANCEL, « Force obligatoire et contenu obligationnel du contrat », *RTD civ.* 1999, p. 771.
(63) R. LIBCHABER, cited above, n°11.
(64) R. LIBCHABER, cited above, n°21; S. LEQUETTE, cited above, n°181 et seq., p. 129 et seq., n°422 et seq., p. 335 et seq.
(65) S. LEQUETTE, cited above, n°191, p. 135.
(66) R. LIBCHABER, cited above, n°4.