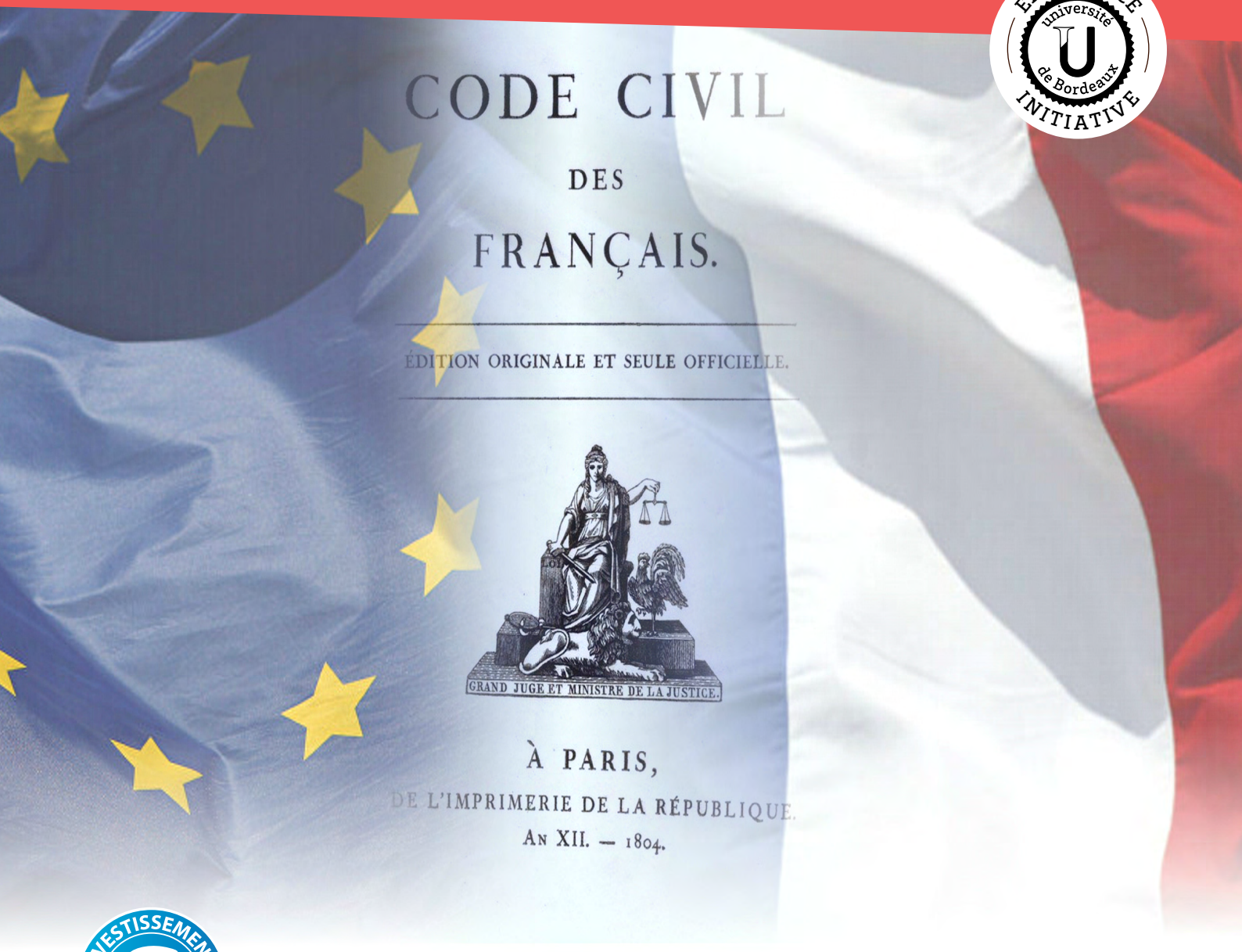
Issue | December 2017
No. 6 | Special Issue: The Reform of French Contract Law

Montesquieu Law Review

The scope of the principles of contractual freedom, certainty and good faith
Denis Mazeaud



Program supported by the ANR
n°ANR-10-IDEX-03-02

Faculté de droit et science politique

université de BORDEAUX

The Characteristic Aspects of the Reform

What is the Scope of the Principles of Contractual Freedom, Certainty and Good Faith?

By Denis Mazeaud , Professor of law, University Paris II (Panthéon-Assas)

There is no doubt that one of the major innovations in the reform of French contract law is the incorporation of guiding principles in our Civil Code. Now, in Chapter 1, titled "Preliminary provisions", there is an Article 1102, paragraph 1, which provides that "*Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation*"; Article 1103, which states that "*Contracts which are lawfully formed have the binding force of legislation for those who have made them*" and Article 1104, paragraph 1, pursuant to which "*Contracts must be negotiated, formed and performed in good faith* ".

In truth, the wording of these texts is less surprising than the place reserved for them in the new contractual opus. Placed ahead of the other rules, they have all the trappings of guidelines, even though this formal label has not been enshrined in the reform; this is hardly surprising if we are to remember that the possible presence of guiding principles of contract law is a point that has stirred controversy and passions in French case law throughout the reform's gestation period.

It is true that in the academic and governmental preliminary drafts, which preceded the reform of 10 February 2016, there was a great deal of variety on this point. Thus, no trace of such principles can be found in the *Avant-projet Catala* or in the Draft European Code of Contract Law (better known as the Gandolfi Project). In the Draft Common Frame of Reference (DCFR), drawn up by a network of European scholars under the stewardship of Christian Von Bar, the Principles are well-suited to special contractual rules, but the formal label of "guiding principles" is not bestowed upon them. The same is true of the *Avant-projet Terré*, which contains "*general principles relating to contract law*"; and the Principles of European Contract Law, which do not formally contain guiding principles; but this text opens with a Chapter 1 titled "General provisions" which include, *inter alia*, rules that identify the contractual ideology behind them. Only the *Avant-projet gouvernemental* and the *Principes contractuels communs*, drafted under the aegis of the Henri Capitant Association and the *Société de législation comparée* formally incorporate such principles.

The authors of the reform have thus decided: the aforementioned rules are not described as "guiding principles". For all that, if this is the case, no one is fooled: the authors of the text gave in to the jurisprudential criticisms voiced by those scholars who were alarmed by the intrusion of this notion into our Civil Code, even on the occasion of a sweeping reform, full stop. It can therefore be argued, without taking the risk of betraying the spirit of our new contract law, that it now contains guiding principles which constitute the essence of our new contractual model. In short, our contractual motto is "freedom, certainty, fairness"!

Since we must henceforth project ourselves into the future, an assessment of the scope of these

guiding principles presupposes that it is first conducted in a general way, before proceeding to examine each separately.

I. The scope of the guiding principles, in general

With that in mind, the practical, normative and policy implications of the guiding principles will be discussed in turn.

a) The practical scope of the guiding principles

On the one hand, these principles can be a very useful guide for contractors and drafters of contracts, at the conclusion of agreements stage.

On the other hand, and above all, they will be of great interest to the courts in their task of interpreting and applying the various "special" rules, as well as in that which compels them to settle contractual disputes, either in the absence of a clear and precise law, in the absence of any law, or in the presence of an incomplete law. In this diversity of perspectives, the guiding principles will constitute a decisive guide insofar as they concentrate within them the spirit which permeates and shapes French contract law.

However, many are concerned by the devastating effects of a guiding principle of good faith from a legal certainty perspective. This is what emerges from the criticisms voiced by Ghozi and Lequette when they assert that "*these guiding principles, with their transversal scope, are in the hands of the courts* (...).*The agreements reached no longer belong fully to the parties; they must fit within the framework of the principles as the courts will shape them* (...). *The contract is no longer fully a legal matter; it becomes a judicial matter... The good will requirement further amplifies these issues* ". One gets a sense of the main flaw within this guiding principle: namely the flaw that is the judicialisation of contract law.

However, an examination of positive law reveals that case law has always confined the scope of the duty of good faith within reasonable limits, even while gradually and substantially extending the scope of its application. For the record, it should first be pointed out that the bad faith of the purchaser of a property who does not inform the seller of the error that the latter commits on the price of the property sold does not render the contract null and void (1). In another case (2), the Court of Cassation limited the temporal scope of the good will requirement, ruling that "*the duty of good faith presupposes the existence of contractual ties*" and the maintenance of the contract previously concluded between the parties, and thus excluded the existence of post-contractual good faith. Lastly, the Court of Cassation recently denied the courts the power to review the contract in the name of the duty of good faith by undermining the very substance of the rights and obligations legally agreed upon by the parties, i.e. by amending the compulsory content of the contract to the detriment of the contractor whose bad faith is proven (3). Only the effectiveness of the contractual prerogatives, in which the bad faith contractor was contractually invested, may be affected by court sanctioning the unfair conduct in question.

In short, the contract does not inevitably suffer from unforeseeability, uncertainty or judicialisation, even though the duty of good faith applies at all stages of the contractual process. And we do not see why it would be otherwise because of the label of guiding principle which it has now been given. Today, as before, the prudence and wisdom of the courts are capable of confining this principle within the bounds of reason.

b) The normative scope of the guidelines

In the jurisprudential dispute over the principal legitimacy of the adoption of guiding principles which preceded the reform, some criticised their lack of normative scope, which was apparently due to their excessive general nature or their simply being empty words, ineffective and therefore useless. The argument is not conclusive; it amounts to confusing the scope of the *principle* (which may indeed be rather general) and the scope of the *rule*, which would be worded in the form of a principle without, however, being devoid of binding force.

Furthermore, the redundancy of such principles has been decried in the light of certain special rules. In short, such principles would be useless because they would then be declared in the corpus of the special rules and would then constitute mere announcements of rules subsequently enacted, which would suffice on their own. Again, the argument does not appear to be conclusive: the co-existence of guiding principles and special rules having the same purpose is not necessarily superfluous, the latter specifying the implementation of the principle in the field that they are intended to govern.

Moreover, there was some concern in French jurisprudence as to whether the label of guiding principle conferred a higher hierarchical rank in the contractual legal order under the special rules and whether it necessarily made it a public policy matter, forbidding the contracting parties to adapt them and, *a fortiori*, derogate from them.

Like Dominique Fenouillet, one can reply that *"the grouping together of these principles in the first chapter after the definitions and under the heading of "guiding principles" is not intended to give them a hierarchical place or an imperative scope. The question of their possible hierarchical place falls to other laws - it falls in particular to constitutional law to give credibility to one or other of them. And their imperative character cannot be regulated "as a whole" as a mere automatic consequence of their nature as "guiding principles""* (4). Henceforth, freedom of contract is a principle of constitutional value and the legislature can therefore only infringe it if sufficient public interest justifies it, on the understanding that the infringement must then be proportional to the objective pursued.

In this respect it should be recalled, on the one hand, that on 19 December 2000 "*the Constitutional Council* (conferred) *constitutional value directly on contractual freedom* " (5) on the basis of Article 4 of the Declaration of the Rights of Man and of the Citizen, which states that "*Liberty consists in being able to do anything that does not harm others* ". On the other hand, while good faith is a matter of public policy under Article 1104 paragraph 2, this is not the case for the contractual freedom which special agreements may set down (6).

c) The political scope of the guiding principles

On a purely internal level, the guiding principles make it possible to identify the values that permeate the new French contractual model, its foundations, its lifeblood. This first contribution is by no means negligible, inasmuch as previously there were many discussions and controversies on the nature of this model, in which opinions were divided to say the least. This contractual charter thus carved into the stone of the law would make it possible to decide, or to reconcile, the proponents of a liberal approach and those who support a more social view of our contract law.

Moreover, in a context of very strong competition between legal systems (in Europe in particular) which are the civil law and common law traditions, the insertion of guiding principles in the Civil Code would make it possible to mark the specificity of the French contractual model, to display its uniqueness and reinforce its attractiveness. As Muriel Fabre Magnan very rightly writes: "*If French influence still has a chance to be felt, it is through these guiding principles.* (...) *Restricting Europe to an ideal of a functioning market economy can only fuel Euroscepticism* (...). *We must give it a new lease of life. France has a card to play in Europe, in order to make another voice heard and instill other values into the world today. In this regard, the declaration of the fundamental values of freedom, good faith and keeping one's word is a particularly strong sign*" (7). For all those who are concerned about the evolution of Europe, the primacy of the market over social issues, the economy over ethics, the imperatives of economic efficiency over the demand for social justice; for those who fear that the moral values and the humanist basis of French law are, if not obscured, at least forced to take second place, it may be argued that if French influence still stands a chance of being maintained, it is through these guiding principles.

Having assessed the scope of the guiding principles in general, an examination may now be conducted principle by principle.

II. The scope of the guiding principles, considered in one by one

The scope of the guiding principles, considered in isolation, will lead us to consider successively on freedom, certainty and good faith in the light of the provisions of the reform.

a) Contractual freedom

In order properly to grasp the scope of the guiding principle of contractual freedom in the reform, its authors should have accepted the idea that there are now two spheres of a palpably distinct nature in our contractual universe. The former, embodied in the conventional contractual figure of the bespoke contract defined by Article 1110, paragraph 1 of the Civil Code as "*one whose stipulations are freely negotiated by the parties*". In the latter, the contract is the fruit of the freedom and equality of the contracting parties and is therefore necessarily just; justice rests on the contract and the court's involvement in the contract is, in principle, excluded: "*the value of the free undertaking must prevail even over the imbalance of the contract*" (8), the imbalance is the price to pay for freedom and equality. The second contemporary contractual sphere is embodied in the figure of the standard form contract, which the second paragraph of the aforementioned Article defines as "*whose general conditions are determined in advance by one of the parties without negotiation* ". This sphere's centre of gravity lies in the impossibility of negotiating the contract. As contract law is sometimes a reflection of unilateral liberty and inequality at the time of its conception and the source of an injustice which is translated into misuse and excess – in short, by a manifestly unbalanced contract – the court's intervention is then legitimate in correcting such obvious contractual disparities.

In the reform, contractual freedom is obviously the theme in the form of rules based on the figure of the bespoke contract. Amongst many other examples, we will first consider Article 1168, which provides that "*in synallagmatic contracts, a lack of equivalence in the acts of performance of the parties is not a ground of nullity of the contract* ". Although the contractual benefits are objectively manifestly unbalanced, the contract is valid, effective and intangible. Potential contractual injustice matters little, its alibi being a contract freely concluded by equal contractors. Secondly, it should be noted that this principle weighs heavily on the rules governing the negotiation of the contract,

offer, acceptance, the date of formation of the contract and the preparatory contracts. In particular, and as a tribute to the freedom not to contract, the unfair disruption of the talks and the abusive retraction of an offer are not punished by the forced formation of the contract. At the contractual validity stage, contractual freedom finds its natural extension in the principle of consensualism, clearly the freedom of form notably affirmed by Article 1172, with its classic tempering and exceptions. The rules governing the effects of the contract are also placed under the power of contractual freedom. Thus, the freedom to no longer contract underpins the legal rules relating to the term of the contract. Similarly, contractual freedom is the centre of gravity of the rules on unforeseeability. Whereas previously it was a remedy against the impossibility for the court to revise the contract on grounds of unforeseeability, it now constitutes a bulwark against the court's powers of review, since the effects of the legal mechanism which can lead, ultimately, to judicial revision on grounds of unforeseeability, may be set aside by a clause under which contractors agree to assume the risk of unforeseeability.

While the scope of contractual freedom is remarkable, there remains a framework for this guiding principle. Article 1102 paragraph 2 provides that "*contractual freedom does not allow derogation from rules which are an expression of public policy*". As for textual public order, there is not much in the reform: the provisions relating to the duty of good faith, the pre-contractual duty to inform and the power of the courts to revise manifestly excessive or derisory flat-rate compensation clauses. As for virtual public order, it is by nature more evanescent and will therefore depend on the legal policy led in future by the Court of Cassation. One might imagine, for example, that the rule laid down by Article 1170 of the Civil Code, which provides that "*any contract term which deprives a debtor's essential obligation of its substance is deemed not written*" might be considered as being an expression of public policy. This legal rule refers to the case-law rule set out in the *Chronopost* (9) and *Faurecia II* (10) decisions, which gave the courts the power to rule as unwritten those liability clauses that contradict the scope of the debtor's essential obligation. The legal rule which, when its conditions of application are met, is intended to temper contractual freedom not only in standard-form contracts but also in bespoke contracts, will neutralise all those clauses which contain flagrant incoherence within the contract because they allow a contractor to take on an apparently essential but in fact illusory obligation because its non-performance will not be sanctioned or because it will be extremely difficult to require performance, or because it allows the debtor to escape purely and simply from his undertaking.

However, it is above all with regard to the consideration by the authors of the reform that the contract is sometimes the product of contractual inequality and the ferment of misuse and excess, that contractual freedom is significantly tempered. Two especially significant examples will be mentioned here. On the one hand, the one enacted by Article 1143 which provides that "*There is also duress where one contracting party exploits the other's state of dependence and obtains an undertaking to which the latter would not have agreed in the absence of such constraint, and gains from it a manifestly excessive advantage*". The court now has the power to cancel contracts which are an expression of dependence and the advantages of which are excessively unbalanced, an absolute exception to the fundamental principle of our contract law under which the contracts, although flawed, are valid, effective and intangible. On the other hand, Article 1171 paragraph. 1 states: "*Any term of a standard form contract which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written*". This rule thus allows the court to remove the unfair terms stipulated in certain contracts which fall within the scope of the Civil Code. While the court's involvement is strictly confined - since it is restricted only to the

unfair terms stipulated in a standard-form contract and is 'deactivated' if the disputed clause concerns the main purpose of the contract or the adequacy of the price for the service offered - the fact remains that contractual freedom can no longer be deployed in the form of clauses which contain contractual disproportionality when the contract was composed by one of the contracting parties and imposed on the other contracting party.

b) Contractual certainty

Contractual certainty is therefore the second guiding principle of the law of contract. It expresses the traditional and fundamental principle of the binding force of the contract, on the one hand, that a contractor cannot unilaterally release himself from a contractual undertaking; and, on the other hand, a contractor cannot singlehandedly amend the content, and the court does not have the power to do so. This guiding principle is only a reflection of the moral principle of keeping one's word that constitutes the DNA of the French contractual model: the word contractually given is of such value that it has no price. It is not morally possible for a debtor to relinquish the contract and avoid his contractual obligation by paying his creditor damages; they must faithfully perform the contract as it has been freely entered into and conceived.

As a direct extension of this guiding principle, insofar as the right to performance is the direct effect of the principle of binding force, the rule of performance in kind of contractual obligations is now enshrined in the Civil Code at Article 1221. It is performance in kind that "*gives the credit its ultimate purpose*" (11), which the award of damages - or, if preferred, equivalent performance - cannot remove to the benefit of the creditor.

The new law of contract includes, *inter alia*, two remarkable applications of the guiding principle of contractual certainty, understood as the right of the creditor to performance in kind. On the one hand, codifying a judgment handed down on 26 May 2006 (12), Article 1123 paragraph. 3 states that where the promisor has breached his undertaking, the beneficiary of the pre-emption agreement may, on condition that he proves that the third party in bad faith not only requests the nullity of the contract concluded in breach of the pact, but also its substitution in the rights of that third party. On the one hand, the case law "repeals" the case law of the Court of Cassation, whereby the promisor could only be ordered to pay damages when in breach of his own undertaking in a unilateral promise of the contract. Pursuant to Article 1124, paragraph 2, "*revocation of the promise during the period allowed to the beneficiary to exercise the option does not prevent the formation of the contract which was promised*". This marks a strong comeback for the binding force of preparatory contracts and, therefore, constitutes a vibrant tribute to the principle of contractual certainty.

Despite its importance, the principle of contractual certainty and its corollaries are tempered to a certain extent.

Firstly, it is tempered by the new law, in particular by virtue of Article 1221, which provides that the right of the creditor to performance in kind shall be waived where "*performance is impossible*" - which is not new - and "*if there is a manifest disproportion between its cost to the debtor and its interest for the creditor*". This second tempering has caused much ink to be split in French jurisprudence. Many criticise it for sacrificing the principle of binding force on the altar of a utilitarian view of the contract, to infringe the principle of keeping one's word in the name of the economic analysis of the law (13). In short, the new rule inadvertently undermines the guiding

principle of contractual certainty, or even renders it less important. It is possible not to share these concerns and to consider that as a right, power or prerogative, the right to performance in kind is also tempered by the traditional *réserve d'abus* (misuse/misconduct exception) which constitutes a marker of France's civil law tradition.

Secondly, because it is not a matter of public policy, the guiding principle of legal certainty will have to deal with the other principle of freedom of contract, on the understanding that clauses valid in a bespoke contract will not be in a standard-form contract, if they carry a significant contractual imbalance.

That being said, it is more than probable that a clause which, in the event of a breach of contract, would exclude the penalty of enforced performance and substitute a mere performance by equivalent or one of the other penalties provided at Article 1217 would be perfectly valid. In particular, a clause disallowing the beneficiary's right to enforce the unilateral promise to contract would most likely be effective. Some doubt this "*because the reform is clearly intended to preclude the* Consorts Cruz *precedent*" (14). Yet contractual freedom should be unfettered, where the promise has been freely negotiated.

It remains to be seen whether a clause could also exclude the manifest disproportion exception, set down at Article 1221, in order to preclude the right of the creditor to force performance on his debtor. While some think as much because it is merely a "*means of distributing and accepting risk or a means of counteracting* "faute lucrative"*, or, more generally, an indicator of value or subjective importance that the creditor shall attach to the performance in kind expected and which is (or may have been) the purpose of his undertaking*" (15), others are more sceptical because it would give the creditor the power to guarantee himself the unreasonable exercise of a right within the agreement.

c) The guiding principle of good faith

The third guiding principle of contract law adopted by the authors of the reform is the duty of good faith.

This arouses more surprise than the two preceding principles which have long been the existential principles of the French contractual model. On the one hand, this is because it was hitherto viewed merely as a supplementary force at the courts' disposal to channel the excesses of contractual freedom and temper too narrow or rigid a view of binding force. On the other hand, it is because, as has already been mentioned, the duty of good faith is an inexhaustible subject of controversy in jurisprudence between the partisans of liberalism, the supporters of classicism and those who defend a more social, if not a "solidarist", view of the contract. Some consider that this duty must enter the law of contracts only in "homeopathic" doses, while others would have the contract system substantially imbued with the imperative of contractual ethics, of which this duty is the conceptual embodiment.

Whatever the jurisprudential dispute, it is appropriate, in assessing the scope of the duty of good faith in the reform, to conduct a brief review of the past and tarry somewhat on its scope in French contract law prior to the reform.

Before the entry into force, the duty of good faith was, in spite of the letter of the Civil Code and thanks (or due) to the Court of Cassation, imposed at all stages of the contractual process: it was,

firstly, by the effect of the law (Article 1134, paragraph 3 of the Civil Code), at the stage of the performance of the contract; it was then, by the effect of the case law of the Court of Cassation, during the other phases of the life of the contract, from its negotiation to its termination. Thus the duty of good faith was exploited by case law to temper contractual freedom in the negotiation of the contract; to establish the pre-contractual duty of information and nullity for fraudulent non-disclosure; to neutralise the powers of a contractual creditor; the obligation of the debtor to suspend an obligation subject to a condition precedent; to sanction a contractor's refusal to renegotiate the contract in the event of performance difficulties arising in the performance of the contract as a result of a change in circumstances; to channel the right to terminate an open-ended contract; to frame the set of express cancellation clauses; etc.

Sticking to the letter of the Ordinance of 10 February 2016, the various forms of the guiding principle of good faith are ultimately not legion.

First, if, as we remember, contractual freedom prevails in the opening, the unfolding and the breaking of contractual negotiations, the duty of good faith is nevertheless imposed on the negotiators, in particular obliging them to be informed respectively in accordance with the conditions set out in Article 1112-1; and it may lead, if breached, and particularly in the event of a breach of the negotiations, to a negotiator in bad faith incurring extracontractual liability.

Moreover, the duty of good faith leads to the sanctioning of third parties who are complicit in the non-performance of a preparatory contract and to the imposition of penalties which may be claimed by the beneficiary of a pre-emption agreement or a unilateral promise to contract.

Secondly, the duty of good faith is the yeast of the sanctions which apply in cases of fraudulent non-disclosure, that is to say, the intentional silence of a contracting party which causes a decisive error in the consent of the other party, irrespective of the subject of the error in question.
Lastly, when a single seller sells a single building to two successive purchasers, the purchaser who becomes the owner is the one who publishes his title first, except where he acts in bad faith.

The balance sheet is therefore not very heavy or not sufficiently so depending on whether one has succumbed to the delights of good faith.

Moreover, it should be pointed out that, while one of the most frequently-encountered scenarios in which French case law has applied this duty is that relating to the cancellation clause; the Ordinance, which nevertheless codifies termination and establishes a system of rules, does not make the slightest allusion to the duty of good faith which is imposed on the creditor who implements it.

"Worse still", where previously the refusal of a contractor to renegotiate the contract was sanctioned by bringing the liability of the latter into play in the name of the duty of good faith, Article 1195, paragraph 2, now authorises such refusal.

It remains to be seen, however, whether the fact that the duty of good faith is now a general principle will not, despite the small number of special rules which impose it, result in an invasion of too many judicial good intentions which will result in chronic contractual instability or, simply, in a reasonable amount of contractual ethics in France’s new contract law. Time alone will tell, on

the understanding that in this field as in others, the courts – co-authors of the new law – will inevitably have the last word.

Notes

(1) Cass. civ. 3ème, 17 January 2007 : *Contrats, conc., consomm.,* 2007, comm. n°117, obs. L. Leveneur; Dalloz 2007, 1051, note D. Mazeaud & Ph. Stoffel-Munck; *ibid*, panorama, 2969, obs. S. Amrani-Mekki; *Defrénois,* 2007, 443, obs. E. Savaux; *JCP* 2007.II.10042, obs. Ch. Jamin; *RDC* 2007, 703, obs. Y.-M. Laithier; *RTDciv*. 2007, 335, obs. J. Mestre & B. Fages.

(2) Cass. civ. 3ème, 14 Septbember 2005: *Contrats, conc., consomm.,* 2006, comm. n°1, obs. L. Leveneur; Dalloz 2006, 761, note D. Mazeaud; *JCP* 2005.II.10173, obs. G. Loiseau; *RTDciv.* 2005,776, obs. J. Mestre & B. Fages.

(3) Cass. com., 10 July 2007: Dalloz 2007, 2839, notes P.-Y. Gautier & Ph. Stoffel-Munck; *ibid,* panorama, 2972, obs. B. Fauvarque-Cosson; *Droit & Patrimoine* 2007, 94, obs. Ph. Stoffel-Munck; *JCP* 2007.II.10154, obs. D. Houtcieff; *RDC*2007, 1107, obs. L. Aynès and 1110, obs. D. Mazeaud.

(4) « Regards sur un projet en quête de nouveaux équilibres. Présentation des dispositions du projet de réforme du droit des contrats relatives à la formation et à la validité du contrat », *RDC* 2009/1 (forthcoming).

(5) M. Fabre-Magnan, *Droit des obligations, I – Contrat et engagement unilatéral,* PUF, 2016, sp. n°72.

(6) Thus, among many others, the freedom to choose one's co-contracting party can be managed by a pre-emption agreement. As for the principle of legal certainty, this may be disregarded by a forfeiture clause.

(7) M. Fabre-Magnan, *eod. loc.*, specifically p. 2.

(8) R. Savatier, *Les métamorphoses économiques du droit civil d'aujourd'hui,* 2ème série, Dalloz, 1950, sp. n°12.

(9) Cass. com., 22 October 1996: *Contrats, conc., consomm.* 1997, comm. n° 24, obs. L. Leveneur; Dalloz 1997, p. 121, note A. Sériaux, and p. 175, obs. P. Delebecque; *Defrénois* 1997, 333, obs. D. Mazeaud; *JCP* 1997. I. 4002, obs. M. Fabre-Magnan and 4025, obs. G. Viney and II, 22881, obs. D. Cohen; *RTD civ.* 1997, p. 418, obs. J. Mestre.

(10) Cass. com., 29 June 2010: *Contrats, conc., consomm.,* 2010, comm. n°220, obs. L. Leveneur; Dalloz 2010, 1832, note D. Mazeaud; *JCP* E 2010, 1790, obs. Ph. Stoffel-Munck; *RDC* 2010, 1254, obs. O. Deshayes; *RTDciv* 2010, 555, obs. B. Fages.

(11) *Op. cit.* specifically n° 365.

(12) Cass. Ch. Mixte, 26 May 2006: Dalloz 2006, 1861, note P.-Y. Gautier et D. Mainguy; *ibid.* Pan. 2644, obs. B. Fauvarque-Cosson; *Defrénois,* 2006, 1206, obs. E. Savaux; *JCP* 2006.II.10142, obs. L. Leveneur; *RDC* 2006, 1080, obs. D. Mazeaud; *RTDciv.* 2006, 550, obs. J. Mestre & B. Fages.

(13) In this sense, see M. Fabre-Magnan, *op. cit.,* sp. n°680; H.Lecuyer, *eod. loc.*, n°12; Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *op. cit.*, specifically n°880.

(14) C. Pérès, « Règles impératives et supplétives dans le nouveau droit des contrats », *JCP* 2016, p. 770 et seq., specifically p. 772.

(15) *RDC* 2016, specifically p. 42.