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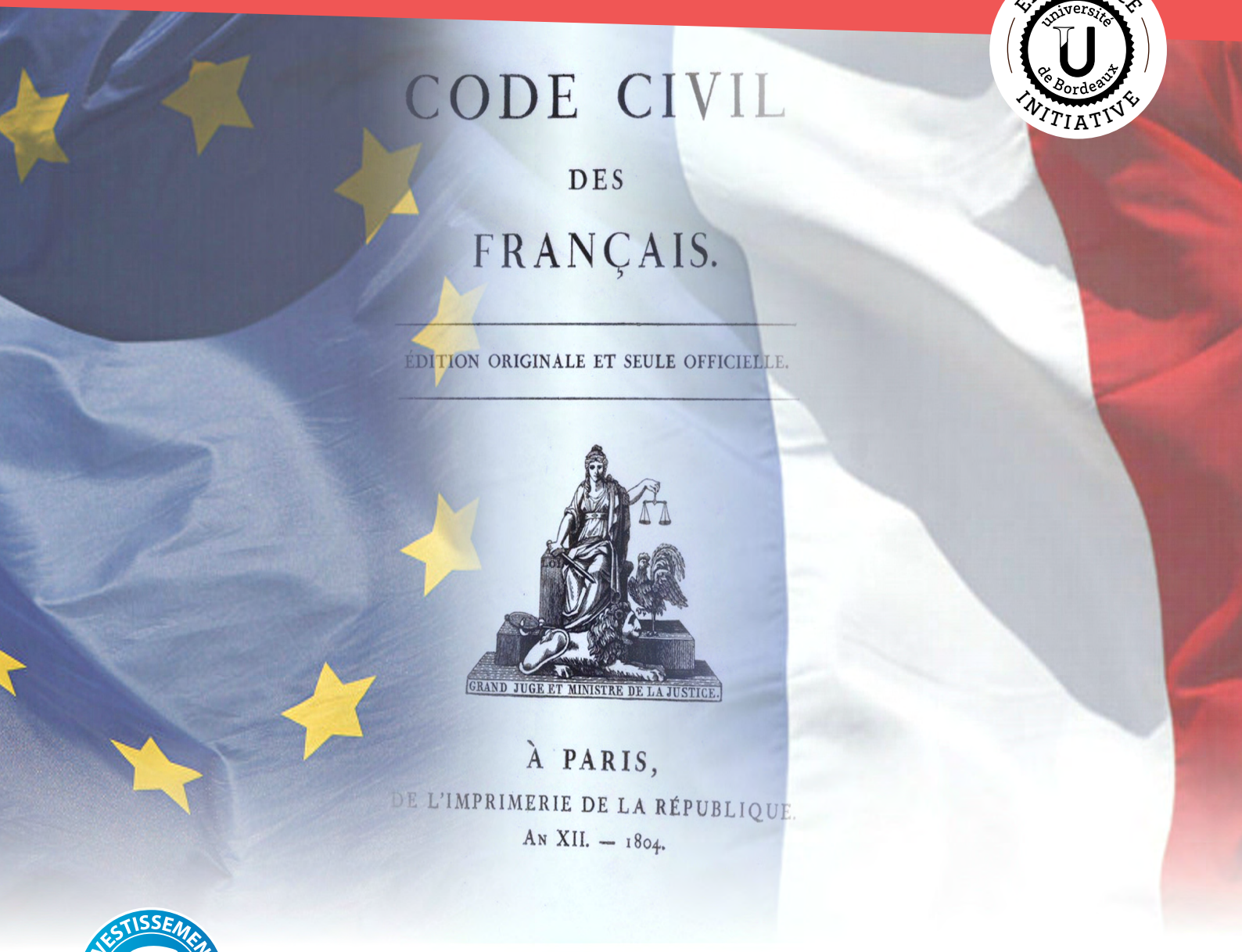

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The Characteristic Aspects of the Reform

The Abolition of the Cause: a Clean Slate and New Bases for the Court's Intervention (Standard-Form Contracts, Dependence, Error)?

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As a result of the reform of French contract law under Ordinance No. 2016-131 of 10 February 2016, Sub-section 3 devoted to the "Content of the contract", which takes its place amongst the conditions of validity under Chapter II – at Section 2 – devoted to the "Formation of the contract", contains Articles 1162, 1169 and 1170 of the Civil Code. These provisions take up part of the requirements associated with the imperatives of existence and lawfulness of a cause, extrapolated by jurisprudence and case law on the basis of former Articles 1131 to 1133 of the 1804 Civil Code (andparticularly the first of these, under which "*an obligation without a cause or with a false cause or with an unlawful cause cannot have any effect*"). The great difference, widely noted as one of the major upheavals introduced by the reform (1) is that, contrary to the former Article 1108, the cause is no longer expressly mentioned as a separate concept and a condition for the validity of the contract (like the purpose). Henceforth, the new Article 1128 states that the "only" the following are required for the validity of contracts: "*1. the consent of the parties; 2. their capacity to contract; 3. content which is lawful and certain*". The purpose and the cause are thus replaced by the notion of the "content" of the contract.

The reasons for this change were stated as being the simplification of French contract law; improved foreseeability/predictability; and European compliance. On the one hand, according to its detractors, the cause allowed the courts, especially from the 1990s onwards, to undermine legal certainty by opening the door to the cancellation of contracts through new and innovative applications: the elimination of clauses in breach of the "essential obligation", as the nullity of the contracts does not serve, from the time of the conclusion of the contract, in achieving the agreed objective, for example to realise certain promises of profitability from the assets sold or leased, etc. On the other hand, other countries would not be aware of this requirement, as evidenced by the various European contract law projects and, in particular, Article 2.101 (1) of the Principles of European Contract Law, according to which a "*sufficient agreement*" alone is required, or Article II-4:101 of the Draft Common Frame of Reference (2).

Nevertheless and notwithstanding these explicit ends and deletion, the Report to the President of the Republic accompanying the aforementioned Ordinance states that while "(t)he contribution of the reform on this point consists ... in the deletion of the reference to the cause", the law intended to consolidate "*all the functions assigned to it by case law*". Is the change merely semantic? The question is an important one because the application of the new legislation by the courts will depend on the the answer that will be given to that question. However, it is not clear why case law would wipe the slate clean and divest itself of the achievements of the old concept, after having built them up in collaboration with jurisprudence (3) (I below). Nevertheless, arguments based on the old concept of the cause may find themselves competing with new controls/reviews, available in cases involving standard-form contracts or the dependence of one of the contracting parties. On the other hand, the broad view taken of the concept of error could mitigate the reduction in

scope of the former review based on the existence of a cause. Consequently, situations formerly handled on the basis of cause may in future be handled on other bases (4) (II below).

I. The continuity of the cause: nothing changes?

On the surface, the notion of cause has been removed. In fact, and as has been amply noted, removal affects the general notion but leaves the main applications of the latter in place (A). Nevertheless, there remain grey areas, left outside the precise perimeters drawn by the new articles (B).

A. The reiterations

It will be recalled, in simple terms (5), that the judicial review developed prior to the 2016 reform had split into two, under the so-called "*functional dichotomy of causes*": the first was the review of the existence of the cause; the second, that of its lawfulness. In order to implement the first, the court examined the consideration for which the contract provides to the benefit of each contractor (at least in onerous synallagmatic contracts. The cause was said to be "objective", as objectively assessed in view of the structure of the exchange: in a sale, for example, a price had to be provided for the seller; A transfer of ownership of a good had to occur for the buyer. If one of these elements were missing, there was no cause. In order to conduct the second review, the courts attempted to grasp the more distant aims that had governed the entry of each person into the contract (for example, the purposes for which an asset or good was to be acquired). This was referred to as a subjective cause, as a reference to this assessment of motives, and its compliance with public order and good morals. There is every reason to believe that the reviews thus outlined, like their more recent extensions, will continue after the reform.

This may be seen, first and foremost, in the maintenance at Article 1162 of a review of the lawfulness of the "purpose" of the contract: the contract cannot “either by its stipulations or by its purpose” breach public order, whether or not the illegal aim “was known by all the parties”. This is a reiteration of existing case law, the difference being that compliance with good morals – less and less reviewed by courts hesitating to venture into the territory of sexual morality and family values (6) – has disappeared (and that the "unlawful" purpose will now be tied to the "stipulations" of the contract). Penalties sanctioning unlawful purposes will continue to be found, corresponding to what the courts previously pronounced on the basis of the former Article 1133 and on the penalty for unlawful subjective cause (7).

Secondly, and as further proof of the same stability, there is the requirement laid down by Article 1169 in respect of the onerous contract, according to which it will be “*a nullity where, at the moment of its formation, what is agreed in return for the benefit of the person undertaking an obligation is illusory or derisory*”. This provision does in fact present links to previous solutions.

First and foremost, it attests to the fact that the reform has maintained the review of what each party gets in return for his undertaking, which is greatly to be welcomed. In this, the legislation testifies to a fidelity to the rationalist and utilitarian foundations of the Civil Code: the wills that govern the formation of the contract must be driven by an interest or, in other words, by a cause (Article 86 of the *avant-projet* published in 2008 by the Chancellery clearly expressed the link between cause and interest). It could have been different: in eliminating the notion of cause, the consideration requirement could also have been removed. For many authors – from de Planiol (8) to leading modern voices (9) – it is pointless and can even prove dangerous: pointless in that the

meeting of independent wills, of contractors of equal negotiating power, naturally leads to the construction of a mutually beneficial agreement, except where consent is vitiated and the sanction of the defects of the consent is sufficiently reduced; dangerous in that it offers the judicial branch - conceived in the nineteenth century as the “great disturber” of contractual provisions, an idea received by current criticisms - a lever to interfere in the agreement and conduct an external assessment of the exchange realised, unfettered by the wishes of the parties.

Secondly, as regards the reference to the "*what is agreed in return*", the text also incorporates the achievements of the case-law construct. There are two methods of assessing the existence of consideration. According to a first - "objective" - method, the court endeavours to examine the stated exchange: it proceeds to an external examination of the agreement and grasps the elements of the exchange - the consideration - as they appear immediately: in our example of a sale, the price versus the transfer of ownership. The court therefore sticks to the examination of an immediate and abstract purpose, normally attached to the type of contract considered, and does not venture to conduct an examination of the parties' deeper intentions (the reasons why this consideration is sought or consideration defined individually by the parties to the contract).

According to a second method, in which the emphasis is on the analysis of the actual will of the parties, the court can examine a consideration specifically defined by the parties: a "subjective" consideration. The court examines the individual motives driving each party, which differ from one contractor to another. The condition of this consideration lies in the fact that these motives have entered the contractual field either by an express stipulation of the agreement - for example, the transfer of ownership is included as the first step in a (lawful) tax exemption process (for example, the publicity of one of the contractors emphasises a specific advantage to be expected from the agreement, such the profitability to be expected from goods whose ownership is transferred (10)).

While for reasons of limiting judicial control by respecting the autonomy of the will and legal certainty, the systematisation of the notion of "cause" by Domat and then the "classical" theory of the cause in the nineteenth century fell within the remit of the former method, case-law turned towards the latter method from the 1990s onwards: it was increasingly widely acceptable to consider, in the examination of the expected consideration, that which had been specifically sought by the parties where they had specified the counterparty; hence the emergence of this notion of "agreed" consideration, referring to all the reasons justifying the undertaking of each contractor, provided that they are known to both parties, i.e., entered into the “contractual field” (11). This is what has been called the "subjectivisation of cause" trend, which has allowed case law to take into consideration the *ab initio* absence of the possibility of completing a "sale" by achieving the adjoining fiscal purpose, or of benefiting (still *ab initio*) from a certain profitability from leased or acquired goods. A founding decision of 3 July 1996, *Point-club vidéo*, stated that "*with regard to the leasing of video tapes for the operation of a business* [motives in the contractual field]*, the performance of the contract in accordance with the* economy desired *by the parties was impossible*” *ab initio* (12). Further decisions judgments have subsequently recognised as "consideration" the will to "take control" of a company, beyond the transfer of ownership of shares (13); the interest of another contract (14) or the recruitment of an employee, justifying the insertion of a so-called "golden parachute" clause (15); etc. The change of direction was strongly attacked by the majority view in jurisprudence, in such a way that the Court of Cassation may have appeared to close the door of this extension (16). It could, however, be supported for the recognition of the reality of the process of giving reasons and see, in the tilting of the scales, only

the examination (on a case by case basis) of the true consideration, as well as an increase in the requirements for proof of its knowledge by both parties (17). It is therefore not clear what would prevent this development from continuing under this new formula of "*what is agreed in return*" at Article 1169 (18).

A further factor of continuity is provided by the review standards set out in Article 1169 (in addition to penalties, relative nullity (19)). Referring to the examination of illusory or derisory aspects of the consideration, they may seem to take up the two categories of review. There is room for doubt nonetheless. Not so much with regard to the derisory aspect, on the one hand: it should continue to refer to an "all or nothing" review, i.e. non-existent or negligible consideration (and not a review of equivalence or proportionality) (20). In the same vein, the nuances that accompany this review should also endure. On the one hand, a genuine " agreed" consideration can be masked by the ridiculous: a derisory price - for example a symbolic or negative euro - may hide other elements considered as giving a *raison d'être* to the creditor's undertaking, such as taking over a liability, taking control, retaining a job, and so on (21). On the other hand, the assessment of the ridiculous has been widened: since the 1990s, as part of a "concretisation" trend, the courts have no longer contented themselves with reviewing the formal existence of a consideration; they check the usefulness, for each contractor, of the various elements of the exchange (the "real" or "serious" consideration). In so doing, they can - and may still be subject to the "*what is agreed in return*" requirement - rule that a consideration is derisory not because it does not exist or seems negligible, but because it does not represent an interest. On the other hand, more ambiguities arise with regard to the standard applicable the illusory consideration: the reference to illusion could refer to the case law built on the basis of the highly problematic false cause or error as to the cause, i.e. scenarios in which a false belief has formed the basis for determining the consideration agreed between the parties (22).

Thirdly, Article 1170 also testifies to the reiteration of earlier applications, deeming not written "*any clause which deprives a debtor's essential obligation of its substance*". It consolidates the *acquis* of the *Chronopost* case law of the Court of Cassation of 22 October 1996 (23) and its consequences, in particular the decision in *Faurecia II* of 29 June 2010 (24), while clearly specifying the threshold of the breach in question: it is necessary that the clause "deprives" the obligation of its substance and not simply that it "contradicts" or is "irreconcilable" with it (25). Article 1170 thus covers any clause the purpose or effect of which is to deprive the contract of its interest, to make the consideration derisory or to withdraw the penalty and to make it thus potestative. This direction was criticised for the difficulty in identifying "the essential obligation" and the threshold of its "breach" (e.g. in the case of a limitation of liability clause). Nevertheless, it may continue to apply to non-binding, derisory or exclusive liability clauses; unbalanced risk distribution clauses, etc.

B. Grey areas

The "cause" matrix has, however, been abolished. Consequently, outside the confines specifically drawn by the Articles examined above, one wonders which review ought to be conducted, without the adaptation tool that was the "source concept" (26). In particular, Article 1169 refers to the "*onerous contract*", defined by Article 1107 as that in which "*where each of the parties receives a* benefit *from the other* in return *for what he provides*". It thus leaves aside legal "acts" as a whole, as well as "gratuitous contracts" (which the same Article defines as that in which one party provides a benefit "*without expecting or receiving anything in return*"). Moreover, the provision

may not encompass those scenarios in which the existence of a cause does not manifest itself in the expectation of a consideration *stricto sensu* (27), but more broadly of interest: the new article summarises the most common manifestation of the notion; the consideration requirement is a reflection of the vestige of the old cause, its epiphenomenon. Fortunately, it is the most frequently encountered situation. What about those cases in which the cause does not manifest itself in this form, for example when the interest sought lies in long-term co-operation as in "co-operation contracts" (28)? Should not the rationale underlying each individual's undertaking be reviewed? One of the keys to future solutions lies in the links to be made by the courts between Articles 1169 (which reduces the cause to the "*what is agreed in return*") and 1107 (which refers to a "*benefit*" in the definition of the "*onerous contract*" and somewhat broadens the scope of the former article). A benefit does not, in fact, manifest itself in the form of a consideration. The articulation of these two texts thus depends on the scope of the review of "*what is agreed in return*" and the fate to be reserved for those scenarios that lay on the periphery of that review.

In this respect, and firstly, it is certainly possible to include aleatory contracts (insurance contracts, sale with a life annuity, gambling contracts, etc.) alongside commutative contracts within the scope of Article 1107 and that of the onerous contract: a "*benefit*" is indeed expected, even if the latter depends on an "*uncertain event* " (Article 1108). The pre-2016 case law did not say anything else by expressing this benefit as a chance of gain or the possibility of covering a risk; more generally, by the notion of "uncertain events" (the *Avant-projet Catala* reserved this hypothesis by covering, in a specific Article 1125-3, "*the absence of hazard*"). Bringing the hypothesis within the scope of Article 1169 and of "*what is agreed in return*' nevertheless requires, if one wishes to be perfectly accurate, that a further step be takento take a further step and cover (as has been done in certain decisions) the "guarantee of the risk defined in the contract" as the "consideration" (29), at least for aleatory contracts intended to "provide security against chance" (insurance contracts); to accept "the chance of gain" and uncertain events for those whose goal is "to speculate on chance" (gambling) (30) .

Secondly, it is certainly possible once again to include unilateral contracts in the category of "onerous contracts"; unilateral contracts are now defined at Article 1106 as those in which, as opposed to synallagmatic contracts, "*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*" (unlike previously, onerous and synallagmatic can no longer overlap). However, can we consider that there is consideration "agreed in return" for the undertaking by the person "undertaking obligations"? Is it possible, after 2016, to believe that a promise to pay for "derisory" or "illusory" consideration is void? A loan for no agreed consideration from the borrower? In light of what "consideration agreed in return"? As can be seen, while the "consideration" requirement corresponds to commutative contracts, it "justifies" unilateral contracts even less. For them, a sub-distinction must still be made. On the one hand, when these contracts are real - a category retained in Article 1109 of the Civil Code - such as a deposit, pledge or loan (not granted by a credit professional because that loan is considered "non-real" (31)), the cause of one party's obligation to restitute lay, not in a consideration, but in an "efficient" cause: namely, the prior surrender of one thing by the other party (on the basis of Articles 1875, 1892, 1919, 2071 of the Civil Code). Thus, in the scenario of a loan (again, not granted by a credit professional always), only the restitution of the thing was sufficient to constitute the cause, without regard to the assignment of the latter (32). Since the cause has disappeared and remains the only reference to the "consideration agreed", there is now a contradiction: either one leans towards Article 1109,

which maintains the category of the real contract and one still refers to the surrender of the thing as an efficient cause, leaving aside the control of "consideration agreed in return"; or to minimise the real nature of the contract and to lean towards Article 1169, to effectively control the benefit derived by the person receiving the thing as "consideration agreed in return": namely the benefit of the provision of a sum of money or property for a specified time (loan) or service rendered against possible remuneration (deposit), etc. On the other hand, for non-real acts or unilateral contracts, such as recognition of debt or a promise to sell, the cause had to be understood outside the context of a contract if it was to be given consistency and so as to control the true reason for the undertaking : the cause resided in the extinction of a pre-existing, contractual, legal or even natural debt (benefit effected or previously remitted for promises to pay (33)); in a future advantage, such as the possibility of concluding a future contract for certain pre-contracts (the unilateral promise for example (34)), the promise of a loan (35) or, more broadly, in any undertaking made on the basis of the certainty of another future commitment (36). Consequently, if in the first case the debt did not exist or if in the second case the contingencies were non-existent, there was no cause. In order to grasp these situations today, the "consideratioin agreed in return" should be understood to be outside the strict contractual field (in past or future services). The same applies to certain surety interests: case law had hitherto considered that the undertaking of the guarantor on first demand was "caused whenever the payer has an *economic interest* in the conclusion of the basic contract, regardless of the fact that he was not a party to it" (37); for sureties and after much hesitation (38), it considered the undertaking of a surety as justified in "consideration of the [creditor's] obligation to provide credit [to the principal debtor]" (39), or even a defined "real benefit" (40). Again, in order to bring these solutions into the category of “consideration agreed in return”, it must be accepted that the contractual scope ought to be extended to other contracts or relationships other than those of the parties.

Lastly, what about those contracts (or even unilateral acts) that conceal their justification, as well as those more abstract agreements for which the link is intended to be broken with the "consideration agreed in return"? For acts that conceal the consideration (such as a promise to pay or an acknowledgment of debt that says nothing as to the origin of the debt), there is no provision replacing the former Article 1132 on proof of the cause, which served to presume the existence of a cause in such a scenario (41) and admitted, in the event of dispute, that its absence be established (42). Can we nevertheless consider in this case that it was "agreed in return”? It would be in the interests of case-law to pursue this course and presume that, as nobody would give an undertaking for no reason, consideration has been agreed. For abstract acts detached from their “consideration”, again nothing is said. The effectiveness of some of these acts should nonetheless be imposed, in particular in cases of international hybridisation and reception of foreign institutions: the Court of Cassation admitted debts benefiting the collaterals agent (an institution under the law of New York State allowing a multitude of creditors to entrust their debts detached from their cause to a single agent for recovery), or more accurately did not consider the mechanism contrary to the French conception of public policy (43). It would therefore be surprising if a reform - proclaimed as one intended to modernise and support the international attractiveness of French law - should reverse this trend.

Notwithstanding these ambiguities, and even though the "cause" has been abolished, many of its applications have been retained and are able to collect and continue to carry many of the constructs discussed above - with the proviso, nonetheless, of a redistribution of roles with other notions.

II. The potential changes: the ground is still shifting

Henceforth, many of the innovations brought to bear on the basis of the cause could find other forms, in this case the checks put in place with regard to standard-form contracts and, to a lesser extent, for states of dependence (A). Moreover, the broad review of error, which already offered an alternative to the existence of a cause, could mitigate the assumptions remaining outside the scope of the review of a "consideration agreed in return" (B).

A. Reviewing the content of the contract *versus* "policing" standard-form contracts and the state of dependence

Firstly, we must realise that the subscription by one party to a contractual framework predetermined by the other has served to support, even tacitly, many innovations in case-law based on the notion of cause. This was the case for the eradication of clauses depriving the contract of its essential obligation under former Article 1131: the decision in *Chronopost* , for example, concerned a clause limiting liability in a standard-form contract, setting the amount of compensation payable at 120 francs – being the price paid by the customer for transport – thus making the penalty for failure to fulfil the essential obligation (i.e. delivery within a specified timeframe) derisory; the outcome of the decision in *Point-club vidéo* of 3 July 1996 was based – again tacitly – on the assessment of the "consideration agreed in return" as drawn up by one of the parties – professionals in the given sector – with a great deal of publicity surrounding the profitability to be expected from the trade they supplied (44). Now, this concern seems to be directly endorsed by the regime attached to the new category of standard-form contracts, which might consequently be deemed sufficient. European projects support this view which, in the absence of a general review of the existence of a cause or content in the contract, provides for the ineffectiveness of the special clauses which have not been subject to individual negotiation, in the event that they instil in the contract "*a significant imbalance in the rights and obligations of the parties*" (Art. 4.110, PECL; Art. 30-4, draft European Contract Code; Art. II-9: 409, DCFR) (45). It is necessary, however, to specify what may be sanctioned on this basis.

The definition of the standard-form contract at Article 1110 refers, not without great ambiguity, to contracts "*whose **general conditions** are determined in advance by one of the parties **without negotiation***" (46). Consequently, it does indeed enable us to grasp the assumptions that have been found in the case-law referred to. In its extension, Article 1171 deems unwritten, following the example of Article L. 212-1 of the Consumer Code (and, to a lesser extent, L. 442-6, I, 2 ° of the Commercial Code (47)), clauses that create a "*significant imbalance in the rights and obligations of the parties*". This may be read as a fair assessment of the elements that may have penetrated the contractual field in the course of subscribing to a standard-form contract: the subscribing party enters into a contractual framework predetermined by the other, thinking to find the "ordinary" clauses of this type of contract (48); conversely, provisions creating a significant imbalance cannot be considered to have factored in the consent of that party. The Swiss or German authorities put it more delicately by describing such clauses as "surprising" and, for that reason, as being unable to factor into consent given "lock, stock and barrel". Again, this point of view is not unrelated to the lines of reasoning based on former Article 1131, which may extend to that of Article 1170: the contractual scope depends on the type of contract chosen and its cause; in a standard-form contract, the participant's consent is reduced to a minimum, namely the typical purpose pursued – for example, the rapid transport of goods – so that any clauses which counteract this aim must be disregarded.

Nevertheless, there are limits to this overlap, linked in particular to the scope of the two texts (as well the assessment criteria (49)): on the one hand, the review of the consideration agreed in return and of the breach of the essential obligation is supposed to concern the core of the contract, its essential obligations (at least for Article 1170); on the other, the control of unfair terms is disregarded in respect of clauses relating to "*the main purpose of the contract*" or "*the adequacy of the price in relation to the act of performance*" (paragraph 2, using the wording of Article L. 212-1 of the Consumer Code) and thus closes in on "ancillary" clauses. The two controls should therefore be complementary. However, it is not so easy to distinguish between these delimitations: what about a clause limiting the amount due in the event of non-performance - an ancillary clause, included in the general conditions - to a derisory amount and eliminating any sanction - therefore calling in question the essential obligation (by making it potestative)? What about a termination clause that could lead to the disappearance of the contract? (50) Ultimately, depending on the scope that case law will outline for standard-form contracts of accession and the clauses that may be involved in the control of unfairness, the controls on the content of the contract and unfair terms may be more or less porous.

Moreover, to a lesser extent, situations of dependence now covered by Article 1143 for the defect of duress may also fall within the scope of assumptions formerly understood on the basis of the cause. Article 1143 provides that "*there is (...) 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***" (51). Again, this is a (partial) adoption of the case law of the Court of Cassation from 2002, which attempted to sanction economic duress, without achieving that aim as there was no finding of economic duress on the facts of the case (moreover, there have been very few judgments on that basis) (52). However, this type of mix of subjective elements (those of the defect of consent) and objectives (the finding of an excessive advantage) is not unknown to European codifications and has generally been considered as taking over from the absence of the review of the existence of consideration: Articles 4.109 of the European Principles and II-7: 207 of the Draft Common Frame of Reference provide for the sanction of the subjective lesion (a combination of the defect of consent and contractual imbalance) authorising a party to "bring about" the nullity, rescission or revision of the contract where the excessive profit or unfair advantage which unbalances the latter is the product of an abuse committed on the basis of a situation of economic or intellectual dependence by the contracting party (also Article 30-3 of the preliminary draft of the European Contract Code).

There are therefore links with the content of the contract, especially since the condition of a manifestly excessive advantage drawn by the party abusing the state of dependence has been added to the most recent version of the legislation. In one of the preliminary draft reforms (the Terré draft) it was proposed that the state of dependence be placed amongst the provisions on the content of the contract: "*where a contractor, in exploiting the state of necessity or dependence of the other party or his or her characteristic situation of vulnerability, gains a manifestly excessive advantage from the contract, the victim may ask the court to restore the contractual balance. Should this prove impossible, the court shall declare the contract null and void*" (53). However, such abuse was ultimately placed among defects of consent and its assessment redirected towards the breach of consent (the integrity of the consent will be checked and, in the event of a breach, the excessive advantage will then be considered) (54). It is still too soon, however, to know which side (defect or imbalance) will serve as a focus for the application of the text. There are also

questions as to whether it will really be used, the cumulative criteria being such as to discourage litigants and courts alike (55).

B. Control of the content of the contract *versus* sanction of the error

Secondly, the reform confirms the links between the controls of the content of the contract - formerly the existence of the cause - and error. The opposite would have been surprising since these links are broadly used in practice, counsel for the parties veering between the two depending on opportunity. In addition, other newly-introduced correlations could make it possible to remedy the shortcomings previously identified in the control of the "consideration agreed in return".

Firstly, the old overlaps have been confirmed, albeit nuanced (56) (more generally, the rules governing error remain stable overall, as with other defects, with the exception of duress) (57). This is generally the case with Article 1133 defining the purpose of the error taken into account as "*the essential qualities of the act of performance*", "*expressly or impliedly agreed and which the parties took into consideration on contracting*" (58). The legislation thus formalises the approximation of the "consideration agreed" and the "qualities agreed", far removed from the objective definition of the "substance" of the thing contained in the 1804 Code. In so doing, it sufficiently shows that the definition of interest in the contract and its inclusion within the scope of the contract can be understood from the point of view of the content of the contract as well as that of the error (59). For example, the fact that the transfer of ownership of a property entails a tax-exempt effect may continue to be treated on one or the other of these bases.

Secondly, the overlaps are also confirmed with respect to an error particularly related to the old cause, namely that on grounds "*unrelated to the essential qualities of the benefit due or the contracting party*": while error as to the grounds usually remains indifferent, it can be taken into account on condition that the parties have "*made it a decisive element of their consent*" (Article 1135, paragraph 1). This, again, is the formalisation of case law of the Court of Cassation from 2001 (60) dealing with situations that can both be understood as an absence of agreed consideration (in line with the developments in the "subjectivisation" of the case) or as an error as to grounds. Moreover, in French case law, similar assumptions (such as those relating to the *ab initio* absence of the expected profitability of the contract) could be dealt with prior to 2016 on one or other of these bases, depending on the judicial strategies of the litigants (and differences in regime; for example, the error must be excusable) (61). However, the new legislation presents a major difference with Articles 1133 (general error) and 1169 (agreed consideration) of imposing a drastic condition of inserting cause within the scope of the contract: between express stipulation and admission of a tacit insertion (albeit certain in the light of the context), it opted for the former. In this respect, it struggles to counter the criticism of the possible instrumentalisation of such an insertion- in the sense that a party in a position of strength can refuse it - and the rather artificial nature of this division (62). As a result, it is likely that Article 1169 and its (unspecified) "agreed consideration" still have a bright future ahead of them.

On the other hand, the basis of error could be called upon to effectively take over in scenarios involving the previously identified shortcomings of Article 1169. Because this text is only applicable to onerous contracts, the basis of error may be used for acts of generosity, an error described in the second paragraph of Article 1135, as "*the motive for an act of generosity (...) where, but for the mistake, the donor would not have made it*", even if the beneficiary did not

know these reasons (no conditions being laid down in that regard (63); the application may certainly be extended to gratuitous acts in general). It is also necessary to watch for the reaction of the courts, faced with assumptions that are ill-suited to the identification of an agreed "consideration" (unilateral acts and contracts) and whether they allow themselves to be tempted, on the basis of error, to reason by analogy (64).

Conclusion

From this course, one can therefore retain undeniable factors of continuity in the control of a justification of the commitment of each party. However, redistributions between different foundations cannot be ruled out, due to the upward shift in the risk control of a lack of justification - the membership and dependency policy - and the shortcomings in the scope of application of the Control of the content of the contract. To be continued…

Notes

(1) For example, M. Fabre-Magnan, « Critique de la notion de contenu du contrat », *RDC* 2015. 639 ; E. Savaux, « Le contenu du contrat », *JCP G* 2015, suppl. au n° 21, p. 20 et seq.

(2) See also the preliminary draft of the European Contract Code, known as the "Gandolfi Code". For nuances, however, cf. T. Genicon, « Dialogues entre la cause et la considération : à propos de la promesse rémunérée d'exécuter une prestation déjà due », *Mél. Camille Jauffret-Spinosi,* Dalloz, 2013, spec. p. 447, n° 38, approximating the notion of cause with the common-law concept of consideration; G. Wicker, « La réforme du droit français du contrat : de la cause à la causalité juridique », *European Review of Contrat Law*, 2009, p. 83, approximating cause with the notion of contracrual basis in German law; « La suppression de la cause et les solutions alternatives », *in La réforme du droit des obligations en France,* SLC, 2015, p. 109, enumerating references to the cause in other countries.

(3) In the same sense, D. Mazeaud, « Pour que survive la cause en dépit de la réforme ! », *Droit & Patrimoine*, Oct. 2014. 38; G. Wicker, « La suppression de la cause par le projet d'ordonnance : la chose sans le mot ? », Dalloz 2015. 1557.

(4) In the following discussion, for reasons of volume constraints, there will be no discussion of changes made in the sanctions of the concept and the performance of the contract.

(5) For a more complete and historical picture, drawn from a European perspective, cf. G. Wicker, « La suppression de la cause et les solutions alternatives », cited above, n°s 4-7.

(6) Cass. ass. plen., 29 October 2004, n° 03-11.238: *Bull. Civ.,* n° 12; Dalloz 2004. 3175, note D. Vigneau; *ibid.* 2005. 809, obs. J.-J. Lemouland & D. Vigneau; *RTD civ.* 2005. 104, obs. J. Hauser.

(7) For a mixture of recent genres, on the basis of the old articles, cf. Cass. Com., 7 June 2016, n° 14-17978: *Bull. Civ* .IV, to be published; *JCP S* 2016, n° 39, 1329, obs. Y. Pagnerre; *JCP E* 2016, n° 39, 1504, obs. S. Schiller, J.-M. Leprêtre & P. Bignebat; *JCP G* 2016, n°37, 957, j. Chaconac; Dalloz 2016. 2042, obs. D. Baugard & N. Dissaux; *RDC* 2917/1. 21, Obs. E. Savaux, arguing, against an employee complaining of a disguised financial penalty, that "*there is no unlawful cause for the clause of the promise of retrocession of shares granted free of charge to an employee who foresees a discount on the redemption value in the event of dismissal (depending on the cause of the termination of the contract)*", because "*the disputed undertaking found its cause in the general balance sought by the parties in their contractual relations*".

(8) M. Planiol, *Traité élémentaire de droit civil*, t. II, 2e éd., 1905, LGDJ, nos 1037 et s.

(9) X. Lagarde, « Sur l'utilité de la théorie de la cause », Dalloz 2007. 740 ; L. Aynés, « La cause, inutile et dangereuse », *Droit & Patrimoine*, Oct. 2014, p. 40.

(10) Cass. Civ. 1ère, 3rd July 1996, n° 94-14.800: *Bull. Civ.* I, No. 286; Dalloz 1997. 500, note Ph. Reigné; *JCP* 1997.I. 4015, obs. F. Labarthe; *Defrénois* 1996, art.36381.1015, note P. Delebecque; *RTD civ.*1996. 901, obs. J. Mestre.

(11) H. Capitant, *De la cause des obligations,* Dalloz, 1923, spéc. nos 4 et s. ; J. Rochfeld, *Cause et type de contrat*, LGDJ, 1999, « Cause atypique » ; J. Ghestin, *Cause de l'engagement et validité du contrat*, LGDJ, 2006, nos 153 et seq.

(12) Cass. Civ. 1ère , 3rd July 1996, cited above.

(13) Cass. Com., 22 November 2011, n° 10-20.215.

(14) Cass. Com., 13 June 2006, n° 04-18.946; Com. 2 December 2008, n° 07-17.970.

(15) Cass. soc. 10 April 2013, No. 11-25.841: *Bull. Civ.* V, n° 97.

(16) See eg. Cass. Com., 18 March 2014, No. 12-29.453.

(17) See Cass. Com, 27 March 2007, n° 06-10.452: Dalloz 2007.Pan. 2970, obs. S. Amrani-Mekki; *JCP* 2007.II. 10119, note Y.-M. Serinet, noting that the 'video club contract', contrary to the situation in 1996, did not support the merchant's main activity so that the merchant could find the 'required profitability' elsewhere and, more importantly, that proof of "the absence of any real consideration" was not reported; com., 9 June 2009, 08-11420, where this motive is considered to be too remote.

(18) For the conditions for considering that a consideration has been "agreed", see below.

(19) There has been established case law in this sense since Cass. 1 Civ, 9 November 1999, No. 97-16800 and No. 97-16306: *Bull. Civ.* I, No. 293, Dalloz 2000, p. 507, note A. Cristau; *Defrénois* 2000, Art.37107.250, obs. J.-L. Aubert; Cass. civ. 1ère, 20 February 2001, No. 99-12.574: *Bull. Civ* .I, No. 39. It can now be based on Article 1179, Civil Code.

(20) However, as a nuance, one must realise that it is always possible to conceal a review of proportionality behind that of the derisory nature of the consideration: cf. e.g. Cass. Com, 8 February 2005, No. 03-10.749: *Bull. Civ* .IV, No. 21.

(21) Cass. Civ. 3e, 3rd March 1993, No. 91-15.613: *Bull. Civ* . 28; *contra* if these elements do not exist, Cass. Civ. 3e , 24th October 2012, No. 11-21.980.

(22) To be linked with error, see below and e.g. Cass. Civ. 1e, 10th July 2013, n° 12-17.407, in which the Court noted the "*false cause*" of an undertaking given by a manager, assignee of a partner's claim against a company placed in receivership, the risk of default being proven upon conclusion. It remains to be seen whether the courts will maintain a strange solution, the sanction of the partial false cause being linked to the partial reduction of the consideration, to the extent of what it ought to have been in the absence of misunderstanding, and only with regard to unilateral acts; cf. Cass. Civ. 1ère, 11 March 2003, No. 99-12.628: *Bull. Civ* .I, No. 67.

(23) Cass. Com., 22 October 1996, No. 93-18632: *JCP G* 1997, I, 4002, obs. M. Fabre-Magnan; *JCP G* 4025, obs. G. Viney; *Ibid* II, 22881, D. Cohen; Dalloz 1997. 121, note A. Serials; *Ibid* sum. 175, obs. P h. Delebecque; *Defrénois* 1997, 333, note D. Mazeaud; *RTD civ.* 1997, 418, obs. J. Mestre; *ibid* 1998, 213, obs. N. Molfessis; *Conc. consum.* 1997, 24, obs. L. Leveneur.

(24) Cass. com., 29 June 2010, no. 09-11841: Dalloz 2010, 1832, note D. Mazeaud; *JCP G* 2010, 787, obs. D. Houtcieff; *JCP E* 2010. 1790, obs. P h. Stoffel-Munck; *Conc. Consom* . 2010, 220, obs. L. Leveneur.

(25) F. Terré (dir.), *Pour une réforme du droit des contrats*, Dalloz, 2008, art. 64.

(26) And with no power to innovate: cf. M. Fabre-Magnan, « Critique de la notion de contenu du contrat », cited above.

(27) In the same vein, G. Wicker, « Suppression de la cause et solutions alternatives », *in La réforme du droit des obligations en France*, SLC, 2015, p. 107, spéc. p. 128 et seq.

(28) S. Lequette, *Le contrat-coopération. Contribution à la théorie générale du contrat,* Economica, 2012, who defines them as contractual models making it possible to organize "*a linking of complementary assets so as to coordinate the parties' convergent yet different interests*".
(29) Paris, 5 Feb. 2013, No. 12/100205: *RCA* 2013, focus 11, L. Bloch; *JCP G* 2013. 195, obs. C. Byk; *Ibid* I. 411, obs. G. Loiseau; *RDC* 2013. 1441, obs. F. Leduc.
(30) For this classification, see F. Leduc, cited above.
(31) Cass. 1 civ. 28 March 2000, No. 97-21.422 : *Defrénois* 2000, Art.37188.720, obs. J.-L. Aubert; *JCP* 2000.II. 10296, concl .J. Sainte-Rose; *D.* 2000. 482, note S. Piedelièvre.
(32) Since Cass. Civ. 1ère, 20 November 1974: *Bull. Civ.*I, n° 311.
(33) See H. Capitant, *op. cit.,* n°. 29.
(34) See J. Carbonnier, *Droit civil. Les obligations,* Quadrige, PUF, 2004, § 974.
(35) See H., L. et J. Mazeaud et F. Chabas, *Leçons de droit civil*, t. II, *Obligations : théorie générale*, vol. I, 9e éd., par F. Chabas, 1998, Montchrestien, no 2645..
(36) For example, Cass. Civ., 1ère, 13 December 1988, no. 86-19.068: *Bull. Civ.*I, No. 352.
(37) Cass. Com., 19 April 2005, no. 02-17.600; 3 June 2014, No. 13-17643; *Adde*, for a similar scenario, Cass. com. 27 October 2009, noting the "personal interest" of a broker in extending credit, namely to "support the current business" in question.
(38) Between seeing the cause in relations between the principal debtor and the guarantor or in those of the principal debtor and the creditor, that is to say in "*the agreed consideration for the benefit of a third party*", cf. J. Ghestin, *op. cit.*, n°648/1, or in "*any advantage granted by the creditor to the principal debtor and subject to the supply of such security*", cf. A.-S. Barthez and D. Houtcieff, *Personal* Security *Interests,* 2010, LGDJ, No. 454.
(39) Cass. Com., Nov. 8, 1972, *Lempereur* : *Bull. Civ.*IV, No. 278; D. 1973. 753, note Ph. Malaurie; 29 Apr 2002, no. 98-17.233.
(40) Cass. Com., 3 May 2006, no. 05-11.229, unpublished.
(41) See eg. Cass. Civ., 1ère , 3rd July. 2013, No. 12-16.853: *Bull. Civ.* I, No. 145: "*the agreement is nevertheless valid, although the cause is not expressed*".
(42) For example, Cass. Civ. 3E , 8th June 2010, No. 09-14.595.
(43) Cass. com., 13 sept. 2011, no 10-25.533 : *Bull. civ.* I, n° 131 ; *D.* 2011. 2518, obs. L. d'Avout et N. Borga ; *RTD. com.* 2011. 801, obs. Vallens ; *RTD civ.* 2012. 113, obs. B. Fages.
(44) Cf. explanations to this effect by President J.-P. Ancel, under Cass. Civ. 1ere , 3rd July 1996, cited above.
(45) Already in this sense, see J. Beauchard, « L'absence de cause dans les principes européens », *in Etudes offertes à C. Lombois*, PULim, 2004, p. 831.
(46) On the detail of these criteria, cf. T. Revet, « Les critères du contrats d'adhésion », Dalloz 2016. 1771; F. Chénedé, « Le contrat d'adhésion de l'article 1110 du Code civil », *JCP éd. G* n° 27, 4 Juillet 2016, 776.
(47) "*I. Any producer, trader, manufacturer or person recorded in the trade register who commits the following offences shall be held liable and obliged to make good the damage caused… 2° Subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties; (…)*". The penalties and scope of the review are not identical (liability, fine, etc., and there is no limiting the scope of the review to ancillary clauses).
(48) On the details of this process, we allow ourselves to refer to J. Rochfeld, V° Cause, *Encyclopédie de droit civil Dalloz,* 2012, n° 63 et seq.
(49) For further details in this regard, cf. G. Chantepie & M Latina, *La réforme du droit des obligations,* Dalloz, 2016, n° 446.

(50) This type of question has already been raised in relation to the case law resulting from the decision in Cass. com. 10 July 2007, n° 06-14.768 : *Bull. civ*. n° 188, Dalloz 2007. 2966, obs. B. Fauvarque-Cosson, known as *Les Maréchaux*: it reqires that a distinction be made between "*the unfair use of a contractual prerogative*" and "*the infringement of the very substance of the rights and obligations lawfully agreed between the parties*". For more detail, see *Les prérogatives contractuelles*, RDC 2011, p. 639 et seq.

(51) On this text, see e.g. O. Deshayes, T. Genicon et Y.-M. Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations,* LexisNexis, 2016, p. 218 et seq.

(52) Civ. 1re, 3 Paril 2002, n° 00-12.932 : *D.* 2002. 1860, note J.-P. Gridel, note J.-P. Chazal ; *Ibid*. 2844, obs. D. Mazeau ; *RTD civ.* 2002. 502, obs. J. Mestre et B. Fages: "*The abusive exploitation of a situation of economic dependence, made to take advantage of the fear of an evil directly threatening the legitimate interests of the person, may vitiate his consent* ". There is every reason to believe that this defect of consent will be upheld too little in the future, the text referring to assumptions in which "*the will is not simply subjected in an unequal balance of forces but is extirpated to the part that was not able to refuse the act to which his contracting party made him subscribe* ": G. Loiseau, « Les vices du consentement », *CCC* 2016/5, dossier n° 3, spéc. n° 13. E.g Cass. com., 12 nov. 2008, n° 07-15.604 : *Bull. Joly* 2009. 276, note P. Mousseron.

(53) D. Houtcieff, « Le contenu du contrat », *in* F. Terré, (dir.), *Pour une réforme du droit des contrats,* Dalloz 2009, p. 218.

(54) G. Loiseau, cited above, n°10.

(55) On the latter, see G. Loiseau, cited above

(56) G. Wicker, « La suppression de la cause… », cited above, n°11.

(57) For further details, cf. G. Loiseau, cited above.

(58) For more details on this text, cf. in particular O. Deshayes, T. Genicon & Y.-M. Laithier, *op. cit.* , P. 188-189.

(59) In the same vein, G. Wicker, *ibid*.

(60) Cass. Civ. 1ere, 13 February 2001, No. 98-15.092 : *Bull. Civ.*I, No. 31; *RTD civ* .2001. 352, obs. J. Mestre & B. Fages; *Defrénois* 2002, art. 37521.476, note D. Robine; *JCP* 2001.I. 330, obs. J. Rochfeld.

(61) For example, Cass. com., 4 October 2011, n°10-20.956, which admits the sanction of the lack of profitability expected on the basis of the error.

(62) G. Chantepie & M. Latina, *op. cit.*, n° 317; O. Deshayes, T. Genicon and Y.-M. Laithier, *op. cit.*, p. 184 and p. 193-194.

(63) G. Chantepie & M. Latina, *op. cit.*, n° 318.

(64) See above, "*Grey Areas*". In this sense, see O. Deshayes, T. Genicon and Y.-M. Laithier, *op. cit.*, p. 197.