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THE FRENCH REFORM OF CONTRACT LAW: THE ART OF REDOING WITHOUT UNDOING

Mustapha Mekki*

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Keywords: France, French reform, Code revision, French contract law, formation of contract, effects of contract

* Professor of Law, Université Paris-Nord (Paris XIII). This text was first published in French; see M. Mekki *Le volet droit des contrats : l’art de refaire sans défaire*, D. 2016, 494. It was translated into English by Camille Audebaud, Laura Potvain, and Yasmina Saadane under the supervision of Professor Olivier Moréteau. This is a user-friendly translation, with some additions and sometimes departures from the original, to make the text accessible to a larger, non-French public. The author also thanks William H. Patrick, Christabelle Lefebvre, and Camille Renard for the final revision and editing.

1 – From the Reform Project to the Ordinance. Many thought that the reform of the law of obligations would remain the *Arlésienne*¹ of the law. The recent resignation of Christiane Taubira, the former Minister of Justice, casted doubts, till the last minute, as to the outcome of the reform project. However, this did not prevent Ordinance no. 2016-131 of February 10, 2016, reforming the law of contract and the general regime and proof of obligations, to be published in the official gazette (*Journal officiel de la République française*) on February 11, 2016.² The reform was not adopted by way of ordinary legislation. In order to gain time on a busy parliamentary agenda, the French Parliament delegated the power to enact the reform to the executive, causing the reform to be adopted by way of an ordinance, without parliamentary debates. The Ordinance is packaged with a report to the President of the Republic meant to disclose the spirit of the law and its body of rules, in the absence of a record of parliamentary proceedings.³ A major rule of construction provided by the report immediately sets the tone: any rule not expressly made mandatory (public policy) is deemed a suppletive rule. Whether the courts will abide by this guideline with a weak normative power is left to be seen.

2 – A Dialogue Between the Sources of Law. The final Ordinance is the outcome of an evolution that will not be traced in this paper.⁴ However, we must point out that it appears as the fruit of a

1. *L'Arlésienne* is a play by Alphonse Daudet in which the character known as “the *Arlésienne*” never appears on stage at any point. The expression is used about someone or something that one believes may not exist at all. See *L'Arlésienne*, 2 HARRAP'S UNABRIDGED: DICTIONNAIRE FRANÇAIS-ANGLAIS (2007).

2. With some exceptions, quotations are to the draft Louisiana translation of the Ordinance, by David W. Gruning, Alain A. Levasseur, and John R. Trahan, revised by Juriscope, with the terminology expertise of Michel Séjean.

3. Rapport au président de la République relatif à l'ordonnance no. 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, NOR : JUSC1522466P, JO Feb. 11, 2016 [hereinafter Report Presented to the President].

4. For a general presentation, see D. Mazeaud, *Droit des contrats : réforme à l'horizon !*, D. 2014, 291; J.-B. Seube, *La réforme du droit des contrats vaut bien une ordonnance !*, JOURN. SOCIÉTÉS Apr. 2014, 8; N. Molfessis, *Droit des*

dialogue between various sources of the law. Indeed, an open public consultation on the draft Ordinance took place until the end of April 2015,⁵ triggering comments by academics and law professionals. All criticisms, observations, comments, and proposals were not only processed by the Civil Affairs team of the Ministry of Justice, under the supervision of Guillaume Meunier, but most importantly, many of them were included in the final draft.⁶ Even if all of the modifications or lack thereof will arouse criticisms or regrets, the result is coherent as a whole and, for the most part, it is relevant. However, in order to give time to users such as legal practitioners (judges, advocates, notaries, corporate lawyers), professors and ordinary citizens, to get accustomed to the new provisions, the entry into force of the Ordinance was delayed until October 1st, 2016 (article 9 of the Ordinance). For the sake of legal certainty, the new provisions only apply to contracts entered into after this date. A few exceptions may be found in paragraphs 3 and 4 of article 1123 as well as in articles 1158 and 1183, which will apply to existing contracts upon entry into force. These relate to the so-called “interrogatory actions” (*actions interpellatoires ou interrogatoires*), established to apply in the context of pre-emption agreements, representation, and nullity.⁷ Lastly, article 9 paragraph 4 could raise an issue of interpretation: “When a legal proceeding has been introduced before the entry into

contrats : l'heure de la réforme, JCP 2015, 199; P. Dupichot, *Regards (bienveillants) sur le projet de réforme du droit français des contrats*, DR. ET PATR. May 2015, 32, 40 *et seq.*; M. Mekki, *Réformer le droit des contrats. Du mythe à la réalité*, <https://perma.cc/GBT4-3UQF>.

5. Projet d'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations, <https://perma.cc/TQX5-6YD4> [hereinafter Draft Ordinance].

6. About three hundred contributions have been appraised by the working group led by G. Meunier; *see also* G. Meunier, *Droit des contrats : les enjeux d'une réforme !*, D. 2016, 416.

7. Report Presented to the President, *supra* note 3: “as a matter of fact they are procedural mechanisms implemented to allow a party to end with a situation of uncertainty that do not affect existing contracts and that can be used at the discretion of the interested parties.”

force of this Ordinance, the action is pursued and judged in accordance with the former law. This law will also apply on appeal and *cassation*.” There are two possibilities: if this paragraph applies to all provisions, it would contradict paragraph 2 providing that existing contracts are governed by the former law. Conversely, if restricted to interrogatory actions, it would mean that legal proceedings introduced before October 1st, 2016 and still pending beyond this date would still be governed by the former law. The second interpretation is more fitting. It may have been wiser to place this provision in paragraph three rather than creating a separate paragraph 4, to eliminate any doubt regarding its connection with the provisions on interrogatory “action.”⁸

3 – The Future of the Ordinance. As a rule, the Ordinance should have received parliamentary ratification within six months of its publication. Failing that, the Ordinance would no longer have force of law. However, if the bill is introduced during that time period, but has not been discussed yet, which is what happened,⁹ the Ordinance is automatically downgraded into regulation, losing the force of a legislative act and making it judicially reviewable as being *ultra vires*. If ratified in time, which did not happen, the Ordinance gains legislative force.¹⁰ However, there may be implied ratification in the event a subsequent legislative act refers to the Ordinance.¹¹ Now, whether one agrees with the reform or not, efforts must be

8. The precision may seem redundant, but the purpose is to prevent from analyzing these exceptions with regard to civil procedural rules. Indeed, procedural rules are commonly of direct application in pending proceedings. To avoid any discussion, the legislator preferred to add this precision concerning the interrogatory actions, which are extrajudicial.

9. Bill no. 3928, to ratify Ordinance no. 2016-131 of Feb. 10, 2016, reforming contract law and the general regime and proof of obligations, introduced on July 6, 2016: <https://perma.cc/839L-L5VG>.

10. See C. François, *Application dans le temps et incidence sur la jurisprudence antérieure de l'ordonnance de réforme du droit des contrats*, D. 2016, 506.

11. Cons. Const., 23 Jan. 1987, no. 86-224 DC, D. 1988, 117 (note F. Luchaire); RFDA 1990, 698 (note G. Vedel).

made to understand the meaning, value, and scope of its various provisions and think about the way actors may draft clauses, either complying with the new law or departing from it. However, though it is time to apply the new law, some of its provisions have been challenged in the last months of 2017, during a parliamentary ratification process that has not been concluded yet, and may end up with a reform of the reform. The present text has not been updated with the amendments discussed after the publication of the Ordinance.

4 – A Large Consensus. Those expecting to find revolutionary provisions in the Ordinance will be disappointed. Though the draft was improved in its final version, most of the original text was left unchanged. The report to the President of the Republic points to a consensus between the reform project and the final text.¹² The report highlights that one of the purposes is to make the law more accessible and intelligible without adulterating the fine style of the Civil Code. A stated objective is also to fit in with a globalized world where legal systems compete. French law must be modernized to remain a model or offer itself as a model again. While resisting the idea of restating French law as an attractive model, reforming the law of obligations projects the image of a rejuvenated and modern law, connected with the surrounding world. Beyond these objectives, the Ordinance still relies on a set of values, most particularly legal certainty. Economic efficiency also permeates the whole Ordinance. Contractual justice feeds into numerous provisions. Certainty, efficiency, and equity are the motto of the new law of obligations.

5 – A Didactic Approach of the Reform. The author of this comment considered two possible ways of conducting the discussion. A first option consists in adopting a problem-based approach, or comparing the draft with the final text of the Ordinance, focusing first on consolidations and then on innovations. To be clear and

12. See, on the objectives and values, the Report Presented to the President, *supra* note 3.

learner friendly, the choice has been made to address the differences between the draft and the final version in a more technical way. This was preferred to a second option, which would have been to contrast provisions increasing judicial powers (e.g. article 1122) with those increasing the parties' prerogatives. (e.g. article 1225 on the resolutive clause). However, such an approach may prevent a rigorous and structured perception of changes carried out—at times limited to the change of a single word. For the sake of clarity, the choice was made to follow the logical order of the Ordinance and to address in a linear manner clarifications, precisions, suppressions, corrections, and additions brought by the final Ordinance, sometimes at the cost of some innovation. If the government conveniently accepted to review its original draft (under the French system, legislative bills can be introduced by the executive), it did not change the general economy of the text. The work is limited to redoing without undoing. This presentation will be limited to contract law: the preliminary provisions of chapter I, chapter II on formation and chapter IV on the effects of contracts.¹³

I. PRELIMINARY PROVISIONS

6 – Introductory Articles. Compared to the draft Ordinance, title III on the sources of obligations breaks new ground with the enactment of article 1100, introducing the various “sources of obligations”: juridical acts, juridical facts and “the mere authority of legislation” (article 1100 Civil Code). Juridical acts and juridical facts are respectively defined in articles 1100-1 and 1100-2. These provisions may have been integrated hastily, without properly articulating

13. In subsection 1, we will focus on contract only. Subsection 2 on extracontractual liability (C. CIV. arts. 1240 *et seq.*) uses the wording of the former Civil Code articles 1382 *et seq.* Few modifications were made in subsection 3 on the other sources related to quasi-contract (C. CIV. arts. 1300 *et seq.*), except a correction to article 1303 modified from the former article 1303.

a general theory of juridical acts.¹⁴ Yet, was it necessary? Close attention should be paid to article 1100, paragraph 2, which provides that obligations: “may arise from the voluntary performance or the promise of performing of a duty of conscience toward another.” Though limited in scope,¹⁵ this acknowledgment of some forms of unilateral commitments is to be welcome.¹⁶ The Ordinance keeps the language of article 1, paragraph 2 of the draft reform of the Ministry of Justice (2009). The transformation of a natural obligation into a civil obligation may now be based on the new article 1100, paragraph 2.¹⁷ Without pondering over these hastily written preliminary provisions, their new contents must be analyzed. Echoing the draft Ordinance,¹⁸ article 1101 and the following articles aim to define or redefine the fundamental notions of contract law and reaffirm the underlying general principles, though this phrase is not used in the text.

A. Definitions

7 – Reorganization of Some Definitions. In the draft Ordinance, the definition of contract was innovative in the sense that it addressed its “legal effects.” It was reworded in the new article 1101 of the Civil Code, contract being now defined as “an agreement of wills between two or more persons whereby obligations are created,

14. For other proposals, see N. Blanc, *Dispositions préliminaires - Analyse des articles 1101 à 1110 du projet d'ordonnance portant réforme du droit des obligations*, GAZ. PAL. 30 Apr. 2015, 3.

15. R. Libchaber, *Regrets liés à l'avant-projet de réforme du droit des contrats - Le sort des engagements non bilatéraux*, REVUE DES CONTRATS 2015, 634.

16. It will be very useful in inheritance law (commitment of an heir to comply with the deceased last unwritten wishes), but also in environmental law (companies that, within the framework of corporate social responsibility, commit themselves to comply with soft law principles—e.g., Global compact).

17. See in this regard, Cass. Civ. 1, 10 Oct. 1995, no. 93-20.300, Bull. I no. 352, D. 1997, 155 (note G. Pignarre); RTDCiv 1996, 120 (obs. R. Libchaber), 1997, 85 (chron. N. Molfessis); See also Cass. Civ. 1, 4 Jan. 2005, no. 02-18.904, Bull. I no. 4, D. 2005, 1393 (note G. Loiseau); RTDCiv 2005, 397 (obs. J. Mestre & B. Fages); JCP N. 2005, 1509 (note M. Mekki).

18. Blanc, *supra* note 14.

modified, transferred, or extinguished.” It is unfortunate that the legislature made the choice to restore the link between contract and obligations.¹⁹ First, it is inconsistent with the rest of Ordinance that no longer refers to obligations to do, not to do, and to give. Then, it is inconsistent with the concept of juridical act, defined by its legal effects (Civil Code article 1100-1). Last but not least, this reflects a narrow perception of the contract, failing to recognize that contracts produce legal effects beyond the sole obligations.²⁰ Such a definition does not encompass all the “new functions” of contract.²¹

The Ordinance corrects and completes the definitions contained in the draft. Under article 1108, paragraph 2 (former article 1106 paragraph 2), the contract is aleatory “whenever the parties accept to have the effects of the contract, as regards both the benefits and the losses that will ensue, depend on an uncertain event.”²² The concept of “real contract” is also introduced in the preliminary provisions. Article 1109 paragraph 3 provides that “[a] contract is real when its formation is subject to the delivery of a thing.” Improvements regarding the definition of “contract of adhesion” call for special attention. The Ordinance adopts a broader definition of the contract of adhesion. Whereas the original draft referred to the absence of negotiation of essential terms (former article 1108 paragraph 2), article 1110 paragraph 2 now relates to contracts “whose general conditions, not subjected to negotiation, are determined in advance by one of the parties.” This modification, modelled after German

19. On the importance of the reasoning based on contractual clauses in the reform, see M. Mekki, *La réforme du droit des contrats et le monde des affaires : une nouvelle version du principe comply or explain !*, GAZ. PAL. 5 Jan. 2016, 18.

20. See P. Ancel, *Force obligatoire et contenu obligationnel du contrat*, RTDCiv 1999, 771.

21. M. Mekki, *Les incidences du mouvement de contractualisation sur les fonctions du contrat*, in LA CONTRACTUALISATION DE LA PRODUCTION NORMATIVE, COLLECTION: THÈMES ET COMMENTAIRES 323 *et seq.* (S. Chasagnard-Pinet & D. Hiez eds., Dalloz 2008). Functions expressed in institutions such as *contrat-organisation*, *contrat-alliance*, *contrat-coopération*, or *contrat-relationnel*.

22. F. Leduc, *Le projet d'ordonnance portant réforme du droit des contrats et le caractère aléatoire du contrat d'assurance*, REVUE DES CONTRATS 2015, 895.

law,²³ is all the more decisive, since article 1171 on abusive clauses is now limited to contracts of adhesion. However, considering that its function is primarily explanatory, the fact that the concept of contract of adhesion is consecrated as a category of its own may cause it to become an important source of dispute. The mere reference to “essential terms,” inspired from Quebec law,²⁴ would have dramatically reduced its scope, as it excluded the so-called “peripheral” or accessory provisions that create the most difficulties in practice (exclusion clauses regarding warranties or liability, unilateral termination clauses . . .).²⁵ Generally speaking, the Ordinance aims at removing concepts that could be a source of litigation,²⁶ a point made clear by the abandonment of the term “essential.” Likewise, article 1111’s definition of framework contracts also removes any reference to “essential features,” as provided in the original draft of article 1109.

B. “General Principles”

8 – Enrichment of the General Principles²⁷ of Contract. The Ordinance of February 10, 2016 both mitigates and enriches the “principles” of contract.²⁸ These principles do not supersede the rules, but shall guide judicial interpretation. Although the principle

23. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], arts. 6, 305, para. 1, and 307, para. 1.

24. B. Moore, *Le contrôle des clauses abusives dans les contrats de consommation et d'adhésion : perspectives de droit québécois*, in L'AMORCE D'UN DROIT EUROPÉEN DU CONTRAT 109 *et seq.* (Société de législation comparée 2010).

25. On this point, see F. Chénéde, *Le contrat d'adhésion dans le projet de réforme*, D. 2015, 1226, no. 1. See also R. Boffa, *Article 1108 : le contrat d'adhésion*, REVUE DES CONTRATS 2015, 736, no. 5.

26. The concept of “evident terms” is often replaced by “express reference.”

27. See Report Presented to the President, *supra* note 3; the report uses the term “fundamental principles.”

28. M. Mekki, *Les principes généraux du droit des contrats au sein du projet d'ordonnance portant sur la réforme du droit des obligations*, D. 2015, 816; See also M. Mekki, *La réforme au milieu du gué. Les notions absentes ? Les principes généraux du droit des contrats - aspects substantiels*, REVUE DES CONTRATS 2015, 651.

of freedom of contract remains unaffected (article 1102), the limits to its exercise are mitigated with the removal of any reference to control of proportionality or fundamental rights and freedoms. Such removal may sound surprising, considering its frequent use²⁹ in positive law and regarding the *Cour de cassation*'s judicial policy, which promotes this type of control.³⁰ The principles are enriched with a new element provided for in article 1104, “[c]ontracts must be negotiated, entered into and performed in good faith. This provision is of public order,” the latter words preventing any derogation by a contractual clause.³¹ Another principle, previously contained in the provisions themselves (former article 1134), must be added. The binding force of contract is now enshrined in article 1103: “Contracts legally entered into have the binding force of legislation for those who have made them.”

9 – General and Special Rules. Lastly, a provision omitted in the draft has been introduced in the preliminary provisions³²: former article 1107 of the Civil Code connected the general law of contract with the law applicable to specific contract. It is reinserted in the new article 1105, with limited change in the wording. One may have wished for a more precise drafting regarding the possible conflict between private law norms, the new text only stating that “the general rules are applied subject to these particular rules.” Why not say that these particular rules only displace the general ones in those situations where they are inconsistent with them?³³

29. For a study on case law, see J. Ghestin, G. Loiseau & Y.-M. Serinet, *LA FORMATION DU CONTRAT*, I LE CONTRAT - LE CONSENTEMENT nos. 409 *et seq.*, 549 *et seq.* (4th ed., L.G.D.J. 2013).

30. B. Louvel, *Réflexions à la Cour de cassation*, D. 2015, 1326.

31. See Y.-M. Laithier, *L'obligation d'exécuter le contrat de bonne foi est-elle susceptible de clause contraire ? Réflexions comparatives*, D. 2014, 33.

32. N. Balat, *Réforme du droit des contrats : et les conflits entre droit commun et droit spécial ?*, D. 2015, 699; See also N. Blanc, *Contrats nommés et innomés, un article disparu ?*, *REVUE DES CONTRATS* 2015, 810.

33. On this proposal, see Blanc, *supra* note 32, at no. 8.

II. FORMATION OF CONTRACT

10 – Chapter II on formation of contract is composed of four sections: conclusion,³⁴ validity, form,³⁵ and sanctions. This section will focus on conclusion, validity, and sanctions.

A. Conclusion

11 – Negotiations. Though the final text largely follows the draft, article 1112 brings something new to the Civil Code.³⁶ Article 1112 states: “The initiative, process, and breach of precontractual negotiations are free. They must imperatively satisfy the requirements of good faith.” The adverb “imperatively” insists on the public order requirement. The rule is simplified since article 1112, paragraph 2 uses a concise formulation to characterize a wrongful breach: “In case of fault committed during the negotiations, reparation of the damage resulting from it cannot have for its object to compensate for the loss of the benefits anticipated from the contract not entered into.” Regarding the damage, the Ordinance consolidates existing jurisprudence.³⁷

12 – Duty to Inform. Regarding the duty to inform, changes are substantial. Previously dealt with under validity of contract, the duty

34. Concerning subsection 4 on contracts electronically concluded, there are few modifications. The reference to invitation to treat is removed in the new articles 1127-2 and article 1127-1, 3°, which states that French language must be part of the proposed languages. For a general overview, see P. Chauviré & A.-M. Gruel, *Les dangers de la période de l'échange des consentements*, JCP N. 2015, 1207.

35. C. CIV. art. 1172 concerns a clearer way of formulating the principle of mutual consent and its exceptions. The notion of solemn contract is clearer and the notion of real contract has to be added.

36. See, B. Haftel, *La conclusion du contrat dans le projet d'ordonnance portant réforme du droit des obligations*, GAZ. PAL. 30 Apr. 2015, 8.

37. Cass. Com., 26 Nov. 2003, no. 00-10.243, D. 2004, 869 (note A.-S. Dupré-Dallemagne), 2922 (obs. E. Lamazerolles); REVUE DES SOCIÉTÉS 2004, 325 (note N. Mathey); RTDCiv 2004, 80, 85 (obs. J. Mestre & B. Fages). Cass. Civ. 3, 28 June 2006, no. 04-20.040, D. 2006, 2963 (note D. Mazeaud), 2638 (obs. S. Amrani-Mekki); RTDCiv 2006, 754 (obs. J. Mestre & B. Fages), 770 (obs. P. Jourdain).

to inform is now placed where it belongs, namely at the negotiation stage under subsection 1. The draft article 1129 is substantially rewritten (article 1112-1). Some awkward turns have been corrected. “Party” is substituted to “party to a contract” (*contractant*), which is more consistent with a precontractual duty to inform, with one omission at the end of the first sentence where the word *cocontractant* remains. Article 1112-1 paragraph 4 clarifies the burden of proof: “It is up to the party who claims that an information was owed to her to prove that the other party owed her that information, contingent upon the rights of that other party to prove she had provided the information.” This paragraph reproduces verbatim article 33, paragraph 3 of the Terré draft reform.³⁸ Paragraph 2 is also suitable as it avoids any discussion reconsidering the *Baldus* decision,³⁹ as it adds that “[n]evertheless, this duty to inform is not owed with respect to the appraisal of the value of the performance.” The new article 1112-1, paragraph 1 limits the scope of the duty to known information, thereby excluding information that the party should have known. Therefore, the duty to make inquiries in order to inform no longer exists, at least in general contract law. Still, the reference to the other contracting party’s reliance could raise difficulties. Is it not the purpose of a contract to generate reliance? Paragraph 1 insists that the information must be of decisive importance, a point that is clarified in paragraph 3: “The information which has a direct and necessary link with the content of the contract or the quality of the parties has a determinative importance.” Lastly, paragraph 5 provides that “the parties may neither limit nor exclude this duty,”

38. See POUR UNE RÉFORME DU DROIT DES CONTRATS (F. Terré ed., Dalloz 2009) [hereinafter Terré Draft Reform].

39. Cass. Civ. 1, 3 May 2000, no. 98-11.381, D. 2002, 928 (obs. O. Tournafond); RTDCiv 2000, 566 (obs. J. Mestre & B. Fages). See also Cass. Civ. 3, 17 Jan. 2007, no. 06-10.442, D. 2007, 1051 (note D. Mazeaud), 1054 (note P. Stoffel-Munck), 2966 (obs. S. Amrani-Mekki); AJDI 2007, 416 (obs. S. Bigot de la Touanne); RTDCiv 2007, 335 (obs. J. Mestre & B. Fages).

which may be too broad. Does this mean that a clause could not protect some information, aside from non-disclosure clauses, dealt with in article 1112-2? Suppose that a seller asks a buyer to personally estimate the condition of the property, and the buyer accepts: is this reprehensible under article 1112-1, paragraph 4?

13 – Offer and Acceptance. The reform introduces in the Civil Code a doctrine of offer and acceptance, which was absent in the original text. Former article 1108 only referred to “the consent of the party who obligates himself.” The new article 1114 tends to complete the definition of offer: “The offer made to an identified or unidentified person, includes the essential elements of the contract which is contemplated and expresses its author’s will to be bound when it is accepted. In the absence thereof there is only an invitation to negotiate.” The expression “the author’s will to be bound” refers to a firm proposal that must not be potestative. Whereas the draft reform addressed the issue of revocability of the offer, the final articles 1115 and 1116 prefer the language of “withdrawal” (*rétractation*) of the offer. Offer (article 1115), acceptance, and any withdrawal thereof (article 1118) only produce effect when received by the other party (*théorie de la réception*). Article 1115 provides that the offer can be withdrawn as long as it has not reached the person to whom it was addressed, an improvement from the draft mysteriously referring to the offer “that was brought to the knowledge of” (former article 1115).

Regarding the general conditions, the rule defined by the jurisprudence, that “in case of inconsistency between general conditions and particular conditions, the latter prevails over the former,” is confirmed (article 1119, paragraph 3).

14 - Preparatory Contracts. Preparatory contract law is source of shillyshallying.⁴⁰ Article 1124 paragraph 1 provides: “A unilateral promise is a contract whereby a party, the promisor, grants to

40. M. Mekki & T. Semere, *Les contrats préparatoires : un peu de consolidation, beaucoup d'innovations*, JCP N. 2015, 1208.

the other, the beneficiary, the right to choose to conclude the contract the essential elements of which are specified, and for the formation of which only the beneficiary's consent is lacking." The draft's reference to a "certain amount of time," which could have been a source of dispute, has been abandoned. Now paragraph 2 provides that: "The withdrawal of the promise during the period of time granted to the beneficiary to make his choice does not prevent the formation of the contract as promised." As implied in the report to the President of the Republic, any provision not expressly made mandatory is to be regarded as suppletive.

Article 1123 defines the pact of preference: "The pact of preference is a contract whereby a party binds himself to propose to his beneficiary to negotiate with the latter first in case the former should decide to enter into a contract." Article 1123 restores a double requirement to obtain the nullity or the substitution of a pact of preference: proof of the knowledge by a third party of the existence of the pact of preference and proof of the beneficiary's intention to take advantage of it. Why have such heavy requirements? However, several clarifications are welcome. The first one concerns the interrogatory action, which requires, when implemented by the third party, the determination of a reasonable time limit. Furthermore, the draft reference to the "presumption" of existence of the pact of preference is abandoned. The third party can implement it in any case. Article 1123 removes the reference to "apparent terms." Last but not least, the reservation regarding a non-disclosure agreement, both controversial and counterproductive, has been wisely removed.

15 – Bilateral Promises to Sell: A Restored Coherence. The coherence between preparatory contracts was threatened by the well-established jurisprudence of the *Cour de Cassation*. Since 2010, it has ruled that in the event of a dispute between successive

buyers of a same right on an immovable, the first party to publish is preferred even though he would have acted in bad faith.⁴¹

This principle prevented the notary from refusing to draw up the second sale although he would have known of a first promise to sell considered as a sale.⁴² In other words, a unilateral promise was given a stronger binding force than a bilateral promise to sell which, as one says, *vaut vente* (is considered as a sale).⁴³ The coherence is finally restored with new article 1198, paragraph 2:

When two successive acquirers of rights bearing on the same immovable hold their right from the same person, the one who was the first to register his title of acquisition, written in authentic form, in the land register is given preference even though his right be posterior in time, on the condition that he be in good faith.

The second purchaser, publishing first and in bad faith, can no longer take advantage of land registration rules.

B. Validity

The validity of contract, as provided for by the Ordinance, refers to consent, legal capacity and representation, and content of the contract.

16 – Consent. To make the rule more accessible, article 1129 recalls the principle contained in article 414-1 of the Civil Code: only a sane individual can validly consent to a contract. This unnec-

41. Cass. Civ. 3, 10 Feb. 2010, no. 08-21.656, Bull. III no. 41. Cass. Civ. 3, 15 Dec. 2010, no. 09-15.891, RTDCiv 2011, 369 (obs. T. Revet). Cass. Civ. 3, 12 Jan. 2011, no. 10-10.667, Bull. III no. 5; D. 2011, 851 (note L. Aynès), 2298 (obs. B. Mallet-Bricout); AJDI 2011, 238; RTDCiv 2011, 158 (obs. P. Crocq), 369 (obs. T. Revet); DEFRÉNOIS 2011, 479 (obs. C. Grimaldi). Cass. Civ. 3, 19 June 2012, no. 11-17.105, D. 2013, 391 (obs. S. Amrani-Mekki & M. Mekki); AJDI 2013, 302 (obs. F. Cohet-Cordey); JCP N. 2012, 1379 (obs. M. Mekki).

42. M. Mekki, *La réforme du droit des contrats et la pratique notariale*, JCP N. 2015, 1111.

43. See C. CIV. art. 1123, para. 3; the sole knowledge by a third party of the unilateral promise to sell is grounds for nullity of the contract.

essary reminder makes the Code unwieldy. Several minor modifications or precisions are worth considering. For those who may still have doubts, nullity for vice of consent is a relative nullity (article 1131). Error of law remains within the scope of error on substantial qualities, which, besides the legal uncertainty that it could create,⁴⁴ does not comply with the jurisprudence of the *Cour de cassation*.⁴⁵

Fraud is now dealt with in articles 1137 and following, with a few noticeable rectifications. The concept of intentional concealment, included in the draft (article 1136) is enlarged in article 1137, paragraph 2. The draft referred to the intentional concealment of information that a party had to provide to the other “according to the law.” This modifier has been removed from the final version. This change must be welcome, since the duty to inform may exist outside of legislative sources. Indeed, the Ordinance refers to information of which the contracting party “knows its decisive character for the other party.” However, the addition was not needed, since this is already included in article 1130, paragraphs 1 and 2. A more significant modification may prevent some delaying tactics. The draft requirement of a “benefit gained” by the contracting party in case of fraud by a third party (draft article 1137), which seemed to imply that nullity could only be pronounced on the proof of an unbalanced contractual relationship, is removed. Article 1138, paragraph 2, excludes such an interpretation: fraud is also established “when it originates from a third party in collusion.”

Of all vices of consent, economic violence is the most controversial, which explains a number of significant modifications in relation with the original draft. It remains a subset of violence rather than becoming an autonomous vice of consent. The draft requirement of a “state of necessity,” deemed too vague, is removed. The

44. R. Boffa, *La validité du contrat*, GAZ. PAL. 30 Apr. 2015, 18, no. 12.

45. See e.g., Cass. Civ. 3, 20 Oct. 2010, no. 09-66.113, Bull. III no. 192, D. 2011, 279 (note A. Binet-Grosclaude), 387 (note O. Tournafond), 472 (obs. S. Amrani-Mekki); AJDI 2010, 881 (obs. Y. Rouquet).

Ordinance also satisfies a unanimous doctrinal request, adding the requirement of a manifestly excessive advantage obtained by abuse of economic dependence. Article 1143 (former draft article 1142) now provides that:

There is also violence when one party, taking advantage of the state of dependence in which the co-contracting party happens to be, obtains from him a commitment the latter would not have agreed to in the absence of such a constraint and derives from it a manifestly excessive advantage.

In addition, the Ordinance rightly removed the twenty-year stopping period mentioned in the draft. Indeed, the draft article 1143, paragraph 2, provided that “an action in nullity cannot be brought beyond twenty years from the day the contract was entered into,” words that no longer appear in new article 1144. The constitutionality of this provision may have been challenged by way of the priority preliminary ruling (*question prioritaire de constitutionnalité*) for denial of access to justice or may have undergone a conventionality control under article 6, paragraph 1 of the European Convention of Human Rights, on fair trial. Indeed, the stopping period may deprive a person from the right to sue even before the conditions of action are met.⁴⁶

17. Capacity and Representation. Provisions on legal capacity are enriched with a reference to juridical persons. The new article 1145, paragraph 2 thus provides: “the capacity of juridical persons is limited to acts useful for the achievement of their purpose as defined by their corporate documents and to acts which are accessory to them, in compliance with the rules applicable to each one of

46. See Cass. Civ. 1, 24 Jan. 2006, no. 03-11.889, D. 2006, 396 (obs. I. Gallmeister), 626 (note R. Wintgen), 2638 (obs. S. Amrani-Mekki); AJ fam. 2006, 116 (obs. F. Bicheron); RTDCiv 2006, 320 (obs. J. Mestre & B. Fages); JCP 2006, II, 10036 (note M. Mekki).

them.” The provisions on incapacity also make a few minor changes.⁴⁷

Rules applicable to representation are clarified. Article 1158, paragraph 1, provides that:

A third person who is in doubt as to the extent of the authority of a conventional representative on the occasion of an act he is about to conclude can demand in writing that the person represented confirm, within a time period he sets and which must be reasonable, that the representative has the authority to conclude the act.

One may regret that both the draft and the final text did not make the “interrogatory action” provided for in this article contingent to situations of ostensible authority (creation of an appearance) as provided in new article 1156. The Ordinance improves the modalities of the interrogatory action. First of all, instead of requiring a response within a reasonable time (former draft article 1157) of the interrogated principal, the new article 1158, paragraph 1, imposes on the third party to fix a period of time that must be reasonable. The drafting is improved, even if reasonableness may give room to debate. The Ordinance also removes controversial wording (“apparent terms”). Under article 1158, paragraph 2, “[t]he writing mentions that for lack of an answer within this time period, the representative is considered to be authorized to conclude this act.” Ostensible authority is addressed in article 1156, which introduces the *théorie de l'apparence* in the Civil Code: “An act made by a representative without authority or beyond his authority is ineffective against the person represented, unless the third person with whom he contracts legitimately believed that the representative had authority, particularly on account of the behavior or statements of the represented.”

47. See C. CIV. art. 1149, para. 2: “The mere fact that a minor has made a declaration of majority does not constitute an obstacle to nullification.” See also C. CIV. art. 1152, 3°, this provision adds persons against whom prescription runs: “a person subject to an order empowering their family to act on their behalf.” A few other draft provisions relating to donations have been abandoned; see Draft Ordinance, *supra* note 5, at arts. 1151-1, 1151-2.

The addition of the adverb “particularly,” absent from draft article 1155, affords broader judicial discretion.

18. Content of the Contract: Object. The content of the contract is probably the most controversial part of the reform⁴⁸ especially due to the removal of the concept of cause, upheld in the final text of the Ordinance.⁴⁹ Subsection 3 is substantially rich and the modifications brought by the final Ordinance are material.⁵⁰ Regarding the object, the terminology is improved. Rather than having a contract that cannot derogate from public order “by its content,” we end up with a contract that “cannot derogate from public order either by its stipulations or by its purpose, whether or not the latter was known by all the parties” (new article 1162). The Ordinance also explains what a determined act of performance is. A useful addition is made at the end of the draft article 1163, with paragraph 3 now providing that: “An act of performance is determinable where it can be deduced from the contract or by reference to usage or the prior dealings between the parties, *without the need for further agreement.*”

19. Price. Provisions Concerning Price are Modified in Depth.⁵¹ The question of the unilateral determination of the price no longer deals with successive performance contracts, but is now limited to framework contracts, governed by the new article 1164.

48. See, e.g., M. Fabre-Magnan, *Critique de la notion de contenu du contrat*, REVUE DES CONTRATS 2015, 639; E. Savaux, *Le contenu du contrat*, JCP 2015, 20 *et seq.* (no. 21).

49. Compare R. Boffa, *Juste cause (et injuste clause)*. *Brèves remarques sur le projet de réforme de droit des contrats*, D. 2015, 33 with C. Grimaldi, *Les maux de la cause ne sont pas qu'une affaire de mots*, D. 2015, 814. See generally T. Revet, *Le projet de réforme et les contrats structurellement déséquilibrés*, D. 2015, 1217; F. Chénéde, *L'équilibre contractuel dans le projet de réforme*, REVUE DES CONTRATS 2015, 655; G. Durand-Pasquier & J.-M. Delpérier, *L'équilibre du contrat (clauses de prix, clause abusive...)*, JCP N. 2015, 1209.

50. Some articles were moved and now have a coherent place within the future Civil Code. This includes former article 1170 on the prohibition of the equivalence of “obligations” (now called “acts of performance” in the new text), which closed subsection 3 on content. It now appears within article 1168.

51. M. Latina, *La détermination du prix*, BLOG DALLOZ RÉFORME DU DROIT DES OBLIGATIONS, Mar. 2015, <https://perma.cc/XDN6-SG9N>.

The language of the article matches its spirit: “In framework contracts it may be agreed that the price will be fixed unilaterally by one of the parties, provided that party be in a position to explain the reason for the amount in case of dispute.” The words “explain the reason” replace the stronger “justification,” which appeared in the draft. Similar wording is used in article 1165 on contracts for the supply of services. Still, article 1164 raises a series of questions. Must the unilateral determination of price necessarily be based on a contractual clause? Should the unilateral determination of price be limited to framework contracts, as implied in the report submitted to the President of the Republic? Lastly, the new text excludes the possibility of judicial revision. Under article 1164, paragraph 2: “In case of abuse in the fixing of the price, the court may be called upon by a party to grant damages and, where applicable, to decide on the dissolution of the contract.” This limitation of judicial power in a field narrowly limited to framework contracts may be regretted. One notes the removal of the controversial reference to “market prices,” a notion said to raise concerns in economic circles, which seems exaggerated in the author’s opinion. The draft article 1165 is totally rewritten and now follows the same regime as framework contracts. The new article 1165 provides that:

In contracts for the supply of services, in the absence of an agreement by the parties before performance, the price may be fixed by the obligee, provided he can explain the reason for the amount in case of a dispute. In the case of abuse in the fixing of the price, the court may hear a claim for damages.

The judicial power of revision is also removed from contracts for the supply of services. This limitation to the power to revise the contract is not in harmony with the creation of judicial revision powers in the case of *imprévision* (article 1195)!

20. Abusive Clauses.⁵² As predicted, in response to the doctrinal outcry triggered by the original draft,⁵³ the Ordinance limits the scope of abusive clauses to adhesion contracts (former article 1169, now article 1171), as redefined more broadly in the preliminary provisions. This restriction will not have a large impact, as the provision primarily addresses “significant imbalance.” Article 1171 provides:

Any term of a contract of adhesion that creates a significant imbalance in the rights and obligations of the parties to the contract is deemed unwritten. The evaluation of the significant imbalance bears neither on the principal object of the contract nor on the adequacy of the price in relation to the performance.

Judges will now have to separate the “truly” negotiated contracts (*contrats de gré à gré*) from the “falsely” negotiated ones. Many will be tempted to fake a negotiation, for instance by the exchange of purely formal emails, in order to avoid having the deal characterized as a contract of adhesion, an issue that will no doubt become crucial. Former Civil Code article 1107 is reenacted in article 1105, offering a legal basis to conciliate article 1171 with special rules such as articles L.132-1 of the Consumer Code and L. 442-6, I, 2° of the Commercial Code. However, a number of issues remain. General and special rules may not be incompatible, since they are based on different requirements and have distinct consequences. It is especially true of aforesaid article L.442-6, I, 2°, which has stricter

52. See Draft Ordinance, *supra* note 5, at art. 1168. Draft article 1168 becomes article 1170 and is not modified: “Any contract term which deprives an obligor’s essential obligation of its substance is deemed not written.” As already suggested, the interpretation should go beyond clauses limiting the liability of one party, so as to include reclamation clauses, divisibility clauses The report submitted to the President of Republic upholds this interpretation, noting that it will apply, “especially” to clauses limiting liability. Note that some authors suggest to limit the scope of the new article 1170, making it subsidiary to article 1171 on abusive clauses: L. Gatton, *Les clauses abusives en droit commun des contrats*, D. 2016, 22.

53. F. Bicheron, *N'abusons pas de la clause abusive*, GAZ. PAL. 30 Apr. 2015, 24 *et seq.*, AJCA 2015, 218 (note G. Chantepie).

conditions; behavior requirements are added to the significant imbalance, and a different remedy is provided, namely civil liability. Is it then possible, in one action, to obtain the eradication of the abusive clause under article 1171 and an award of damages under article L.442-6, I, 2° of the Commercial Code? In any case, regarding the procedure, one may primarily use article L.442-6, I, 2° and article 1171 as an alternative. Furthermore, the Ordinance eliminated this cumbersome notion of “removal” to retain a more traditional notion of “deemed unwritten.” Lastly, as there is no more reference to the “contracting party’s claim,” one may wonder whether others may bring an action (third parties: non-profit organizations, government entities?) and about judicial powers. This opening may warrant greater effectiveness.

C. Sanctions

21. Nullity. Though the provisions on sanctions did not generate many comments,⁵⁴ they remain important. Some minor cleanup has been made to the draft.⁵⁵ The interrogatory action has been kept: “One party can, in writing, ask the other party who could claim the protection of the nullity either to confirm the contract, or to bring an action in nullity within a six-month time under pain of foreclosure. The ground of nullity must have ceased” (article 1183). The combination with the stopping periods should now be settled by reference to new article 1105. Special rules supplant general rules. The interrogatory actions could be excluded when the causes of nullity come from public order provisions. Retroactivity in case of nullity, which had been removed in the draft, is reintroduced in the final version. Now article 1178, paragraph 2 provides that: “An annulled contract

54. G. Wicker & H. Boucard, *Les sanctions relatives à la formation du contrat*, JCP 2015 (no. 21, 32 *et seq.*).

55. See C. Civ. art. 1183; interrogatory action contained in article 1183 removes any reference made to “apparent terms” for a mere written notice that “set out expressly that unless the action for nullity is brought within a period of six months, the contract shall be deemed to have been confirmed.”

is deemed never to have existed.” One may regret the absence of a provision regarding *opposabilité*⁵⁶ (effectiveness against third parties⁵⁷) and on conversion by reduction.⁵⁸ Article 1179, paragraph 2, adds an important word to determine the scope of relative nullity: nullity is relative “when the rule violated has for its sole object the protection of a private interest.” The addition of “sole” responds to those who could have thought that the distinction between general interest and private interest was sometimes problematic especially where the harmed interest relates to a fundamental right. By using this term, article 1179, paragraph 2, seems to include within the category of absolute nullity cases where the rule infringed protects both a private interest and the general interest. Another rectification of terminology, which has significant practical consequences, is contained in article 1181, paragraph 1. Former article 1181 provided for relative nullity “claimed” by the one protected by the law. The new version provides that: “The relative nullity can be claimed only by the party the legislation intends to protect.” Unlike the term “invoked” used in the draft, the term “claimed” does not exclude the judicial power to raise *ex officio* a case of relative nullity. At present, only a party can ask for relative nullity. The judge can raise a case of relative nullity, in compliance with civil procedure rules (especially the subject matter of the dispute and the adversarial principle). Article 1184 (former draft article 1185) now includes a most welcome second paragraph: “The contract is upheld when legislation considers the clause unwritten or when the aims of the disregarded rule require that the contract be upheld.” The purpose is twofold. On the one hand, it points to the difference of regime between a clause deemed unwritten and the partial nullity of a clause. On the other hand, and more importantly, it sets aside the case where the decisive

56. L. Sautonie-Laguionie, *Articles 1178 à 1187 : l'absence de l'opposabilité aux côtés de la nullité et de la caducité*, *REVUE DES CONTRATS* 2015, 767.

57. See *Opposabilité*, GÉRARD CORNU, *DICTIONARY OF THE CIVIL CODE* (A. Levasseur & M.-E. Laporte-Lageais trans., LexisNexis 2014).

58. Compare with Terré Draft Reform, *supra* note 38, at art. 87.

nature of a clause would not trigger the retroactive termination of the entire contract in order to guarantee the efficiency of the sanction and the purpose of the rule infringed.⁵⁹

A very important notion was missing in the draft and now appears in the final version: the defense of nullity. Article 1185 provides that: “The exception of nullity does not prescribe if it concerns a contract that has not received any performance,” in compliance with the jurisprudence of the *Cour de cassation*.

22. Caducity. Article 1186 has been modified by the final Ordinance, even if it remains within a section on sanctions that cannot be linked to the essence of that technique.⁶⁰ First, the case where “an external element to the contract but necessary to its enforcement is missing” is no longer mentioned. This convoluted formula most likely referred to the case of the suspensive condition, but was not precise enough; its removal is fortunate. As to caducity in groups of contracts,⁶¹ article 1186, paragraph 2, provides that:

When the performance of several contracts is necessary to the achievement of the same overall operation and when one of them fails, the contracts the implementation of which is made impossible by this failure as well as those contracts for which the implementation of the failed contract was a determinative condition of the consent of a party lapse.

This formula is less restrictive than the former one, which provided for the impossibility to perform another contract from the group of contracts or the lack of interest in the performance of another contract from the group of contracts. The difficult notion of interest, fortunately, disappears. Then, the article deals with two

59. As an example, see Cass. Civ. 3, 6 June 1972, no. 71-11.279, D. 1973, 151 (note P. Malaurie); Cass. Civ. 3, 31 Jan. 2001, no. 98-12.895, D. 2001, 3520 (obs. L. Rozès); JCP 2001, I, 354 (obs. Y.-M. Serinet).

60. J.-B. Seube, *L'article 1186 du projet : la caducité*, REVUE DES CONTRATS 2015, 769. Caducity is neither a sanction, nor an institution of the formation of contract.

61. S. Bros, *L'interdépendance contractuelle, la Cour de cassation et la réforme du droit des contrats*, D. 2016, 29.

cases of cascading retroactive termination. The first one, objective, when the extinction of a contract from the group of contracts makes impossible the performance of another from that same group. A second one, subjective, when the lapsed contract was “a determinative condition of the consent of a party.” Indeed, caducity in groups of contracts does not only concern structurally interdependent contracts, but also interdependent contracts by the will of the parties. Then, the parties have the possibility to extend the notion of “interdependent” groups of contracts to cases defined by means of a contractual clause that must be clear, precise, and unambiguous. Article 1186, paragraph 2, suffered no modification: “however, caducity only operates where the contracting party against whom it is invoked knew of the existence of the general transaction at the time he gave his consent.” This wording may be problematic, especially regarding divisibility clauses. Indeed, if the contracts are “structurally interdependent” (the disappearance of a contract making it impossible to perform another) and if the third party knows of the general transaction (e.g. financial leases), cascading retroactive termination will occur even if a divisibility clause had been incorporated in the contract. Lastly, the text is silent on the retroactivity of caducity, allowing the court to assess the amount of restitutions on a case-by-case basis, as underlined in the report submitted to the President of Republic.

III. EFFECTS OF CONTRACT

23 – The Reform Deals with the Effects of the Contract Between the Parties and on Third-Parties.⁶² Chapter III dealing with interpretation of contract (articles 1188 to 1192-1) is not discussed here. Article 1190 includes an important provision: “In case of doubt, a mutual agreement is interpreted against the obligee and in

62. P. Chauviré, *Les effets du contrat dans le projet d'ordonnance portant réforme du droit des obligations*, GAZ. PAL. 30 Apr. 2015, 29.

favor of the obligor, and the contract of adhesion is interpreted against the party who proposed it.”⁶³

A. *Effects Between the Parties*⁶⁴

24 – Hardship: From Dissolution to Revision due to Unpredictability. French law was known for its strict adherence to *pacta sunt servanda* even in those cases where, due to an unforeseeable event, performance of the contract becomes excessively onerous for one of the parties. Except in those cases where outside circumstances made performance impossible (*force majeure*), parties remained bound by promised performance.⁶⁵ The initial draft article 1196 made room for a duty to renegotiate the contract in such circumstances, to which the final text adds a possibility of termination in case of failure to renegotiate within a reasonable time. The new article 1195 of the Civil Code now reads:

Should a change in circumstances that was unforeseeable at the time the contract was concluded make its performance excessively onerous for a party who had not agreed to assume the risk, that party may ask the other party that the contract be re-negotiated. While the negotiations are ongoing the party continues to carry out its obligations.

In the event of a refusal or a failure to re-negotiate, the parties may agree that the contract will be dissolved on the date and under the conditions they lay down, or they may ask by common agreement that the court proceed with its adaptation.

If they fail to reach an agreement within a reasonable time, the court may, at the request of one party, revise the contract or put an end to it, at the time and under the conditions the

63. See C. Witz, *L'interprétation du contrat dans le projet de réforme du droit des contrats*, D. 2015, 2020.

64. O. Deshayes, *Les effets du contrat entre parties*, JCP 2015 (no. 21, 43).

65. See Cass. Civ., 6 Mar. 1876, D. 1876 I, 193 (Canal de Craponne). See also *Compagnie Générale d'éclairage de Bordeaux v. Ville de Bordeaux*, C.E. 30 Mar. 1916, D. Jur. III 1916, 25; S. Jur. III 1916, 17. The *Conseil d'État*, the highest administrative court, accepted that the price of natural gas could be revised in case of hardship.

court will determine.

The process is made clear. If there is no renegotiation or in case of failure to renegotiate, the parties may terminate the contract as agreed or ask the court to proceed to its adaptation. In case of failure to reach an agreement to re-negotiate, terminate, or adapt the contract, the matter can be referred to the court.

The draft gave the court the power to “terminate” the contract. The Ordinance adds the power to revise. Finally, French law makes provision for revision of contracts in case of hardship. The door is now wide open.⁶⁶ The scope of the revision remains to be determined, probably in accordance with the legitimate expectations of the parties, as contemplated in the Terré draft reform.⁶⁷

B. Effects of Contracts on Third Parties

25 – Promise for Another and Stipulation for Third Parties.

For one thing, it is fortunate to have modified draft article 1204, which is now article 1203: “One may contract in one’s name only for one-self.”⁶⁸ In this new version, the expression “in general,” no longer appears, and neither does the prohibition of stipulation for third parties; this makes no sense since article 1205 (former draft article 1206) stated the opposite: “One may stipulate for another.”⁶⁹

Regarding third parties, the promise for another,⁷⁰ and stipulation for a third party, no significant change has been made. Minor ambiguities and inconsistencies detected in the draft have been fixed.

66. R. Cabrillac, *L'article 1196 : la porte entrouverte à l'admission de l'imprévision*, REVUE DES CONTRATS 2015, 771.

67. See Terré Draft Reform, *supra* note 38, at art. 92: “the court can set about the contract considering the legitimate expectations of the parties.”

68. “In general” is removed; it was contradicted by the provisions that followed.

69. O. Deshayes, *Article 1204 : la prohibition des contrats pour autrui*, REVUE DES CONTRATS 2015, 775.

70. E. Netter, *Le porte-fort*, BLOG DALLOZ RÉFORME DU DROIT DES OBLIGATIONS, 2015.

Regarding the promise for another (*promesse de porte-fort*), article 1204 provides:

One may promise a performance by a third party.
The promisor is released of any obligation when the third party accomplishes the promised performance. He may otherwise be found liable in damages.
When the promise has for object the ratification of an undertaking, there is retroactive validation from the date of the promise for another.

As for the stipulation for a third party, it has been aligned on the provisions concerning the formation of contract.

According to the draft article 1207, paragraph 2, the stipulation was irrevocable once the author or the promisor had knowledge of the beneficiary's acceptance. To ensure consistency with the theory of reception enshrined in article 1121, it is provided in article 1206, paragraph 3, that: "The stipulation becomes irrevocable at the moment when the acceptance reaches the stipulator or the promisor."

C. Duration

26 – Duration of Contract. Provisions on duration of contract needed to be completed⁷¹ and this has been achieved. Firstly, according to article 1210, "[p]erpetual commitments are prohibited." Article 1210, paragraph 2, clarifies how they can be ended, a point on which the draft article 1211 was silent. The contract can be terminated under the same conditions as a contract of indefinite duration: "Either contracting party may terminate them under the conditions provided for contracts of indeterminate duration."

As for contracts of indefinite duration, the draft article 1212 could be read as ruling out the possibility of a contractual notice. Article 1211 now unambiguously provides that: "[w]here a contract

71. A. Etienney de Sainte Marie, *Article 1212 : la résiliation du contrat à durée indéterminée*, REVUE DES CONTRATS 2015, 777.

is concluded for an indeterminate duration, each party may terminate it at any time upon giving notice provided in the contract or, if the contract does not so provide upon giving reasonable notice.”

The question remains whether the contractual notice also has to be reasonable. In this sense, the wording “in its absence” is ill-formulated but should be inconsequential since the jurisprudence generally verifies that there is a sufficient notice. One should also note the abandonment of paragraph 2 of the draft article 1212 prohibiting abusive termination. One should not, however, conclude that breaking off a contract of indefinite duration became a discretionary right.

The doctrine of abuse can be applied without textual basis. In addition, the draft article 1212, paragraph 2, alluded to liability in case of abuse, a weak sanction compared to the re-instatement or continuation of the abusively terminated contract. Finally, one may question the very existence of article 1212 dealing with contracts of definite duration: “[w]here a contract is for a determinate duration, each party must perform it until its term arrives.” Too general and useless, reminiscent of the binding force of contract, this article may in the future turn into a strong argument against the efficiency of anticipatory breach clauses.

D. Assignment of Contract

27 – Assignment of Contract. Assignment of contract, initially part of the general regime of obligations,⁷² is moved to the section on effects of contract, between the paragraphs on duration and non-performance of contract. This was recommended by Professor Laurent Aynès, a member of the Terré taskforce, who is of opinion that assignment of contract is related neither to assignment of right nor

72. L. Aynès, *La cession de contrat*, DR. ET PATR. 2015, 249; R. Boffa, *Les opérations translatives dans le projet d'ordonnance*, GAZ. PAL. 4 June 2015, 8; see also C. Barrillon, *La cession de contrat en voie de consécration*, GAZ. PAL. 9 June 2015, 15.

assignment of debt. It relates to effects of contract, precisely between “duration of contract” and “nonperformance of contract.”

This formal disconnection between assignment of contract and assignment of right and debt strengthens the idea that the notion is fully autonomous, as asserted in the report to the President of the Republic. Once neglected in the draft Ordinance, assignment of contract is rightly defined as the assignment of the status of party to the contract (new article 1216). The final version clarifies its legal regime. Article 1216 provides that the consent of a contracting party may be:

Given in advance, notably in the contract between the future assignor and the assigned party, in which case assignment is effective against the assigned party when he is notified of the contract concluded between the assignor and the assignee or when he takes cognizance of it.

This anticipatory consent gives legislative force to earlier jurisprudence. Just like the assignment of right, the assignment of contract is null if it is not in writing (article 1216, paragraph 2). Articles 1216-1 to 1216-3 deal with the legal regime of assignment. If the person subject to assignment has not expressly consented to discharge the assignor, a discharge that would only be effective for the future (article 1216, paragraph 1), the assignor remains the “guarantor” of the assignee’s debts.

Such an equivocal term left room for interpretation. The new article 1216-1, paragraph 2 abandoned it: “In its absence, and except for a contrary stipulation, the assignor is solidarily bound for the performance of the contract.” According to article 1216-2, the assignee may use against the person, subject to assignment, the defenses inherent to the debt such as nullity or termination, yet without using defenses personal to the assignor.

Making a difference between defenses inherent to the debt and personal defenses, the implementation of which is controversial when applied to suretyship, could be an issue in the future. Consider the case of nullity, conceived by the text as a defense inherent to the

debt: does it remain a defense in case of nullity for fraud whereas, when applied to suretyship, it is considered an exception strictly personal to the debtor?⁷³

As for the person subject to assignment, he can set up against the assignee, all the defenses, without distinction, which he could have set up against the assignor (article 1216-2, paragraph 2). Finally, if the assignor is not discharged by the person subject to assignment, existing securities remain in place. If the assignor is discharged, the securities only remain in place with the agreement of third-party guarantors. If the assignor is discharged, solidary co-debtors remain liable to the extent which remains after deduction of his share of the debt (article 1216-3). This new regime of contract assignment is welcome, as it may reduce the volume of litigation.

E. Nonperformance

28 – Contractual Nonperformance.⁷⁴ Provisions dealing with “remedies” for nonperformance of contract form the last section of the chapter on contract. Changes were numerous, although for some of them it feels like they stopped midstream.⁷⁵ For one thing, some terminological corrections should be highlighted. Whereas the draft used the word “remedies,” the Ordinance sticks to “sanction” (article 1217, paragraph 2). The word remedy obviously has a common

73. Cass. Mixte, 8 June 2007, no. 03-15.602, Bull. Mixte, no. 5; D. 2008, 514 (note L. Andreu), 2007, 1782 (obs. V. Avena-Robardet), 2201 (note D. Houtcieff), 2008, 871 (obs. D. R. Martin), and 2104 (obs. P. Crocq); AJDI 2008, 699 (obs. F. Cohet-Cordey); RTDCiv 2008, 331 (obs. P. Crocq); RTDCom. 2007, 585 (obs. D. Legeais), 835 (obs. A. Martin-Serf).

74. The exception for nonperformance of articles 1219 and 1220 was not modified, except for the substitution of the word “performance” to “obligation,” which is less precise.

75. M. Mekki, *Les remèdes à l'inexécution dans le projet d'ordonnance portant réforme du droit des obligations*, GAZ. PAL. 30 Apr. 2015, 37.

law origin⁷⁶ and, more importantly, it would not fit in with the content of section 5, which includes both remedies and actual sanctions.

The draft article 1217 featured a first scenario allowing a party to “suspend the performance of one’s own obligation.” The new text specifies that a party can “refuse to perform or suspend performance of his own obligation.” Terminological fine-tuning continues in article 1218 regarding force majeure, with language alluding to “temporary prevention” rather than “the non-performance (which) is not irreversible.”

Finally, in case of temporary prevention, the suspension does not apply to the contract but to the performance of the obligation. In substance, the suspension can be excluded in case of temporary prevention, if such a suspension could lead to a delay so important that it would justify termination by judgment. Otherwise, the draft and final Ordinance remain identical.

29 – Specific Performance in Kind. The principle that contractual obligations are to be performed in kind remains sacrosanct. However, the draft article 1221 included a limit when the cost of specific performance would be “manifestly unreasonable,” which triggered a doctrinal controversy.⁷⁷ This obstacle to specific performance was not removed,⁷⁸ but the wording was corrected and completed. The Ordinance requires a “manifest disproportion,” which is more in line with the concept of abuse of right, as acknowledged in the report submitted to the President of the Republic. In addition, this must be manifest disproportion “between its cost to the obligor and its interest of the obligee.”

76. See O. Moréteau, *Les remèdes à l'inexécution du contrat : approche théorique et pratique de l'exécution forcée en droit du commerce international*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 2017, 639.

77. See J. Lebourg & C. Quézel-Ambrunaz, *Article 1221 : l'exécution forcée en nature des obligations*, REVUE DES CONTRATS 2015, 782.

78. About this criticism, see Y.-M. Laithier, *Le droit à l'exécution en nature : extension ou réduction?*, in RÉFORME DU DROIT DES CONTRATS ET PRATIQUE DES AFFAIRES 97 *et seq.* (P. Stoffel-Munck ed., Dalloz 2015); Mekki, *supra* note 75, at no. 10.

The author of the present report regards this as a dangerous limitation to the binding force of a contract,⁷⁹ and is concerned by the reference made to the obligee's interest when applying what will be a balance of interest approach.⁸⁰ Assessing the cost for the obligor is the easy part of the test, but what do we mean by the "obligee's interest?" Are courts to take into account positive and negative interests? Are they to take into account solely interests internal to the contract or must they add external interests too? Does this solely relate to the actual amount of the damage caused? Must it take into account the satisfaction caused by a monetary award? What about taking into account the project that the creditor wanted to achieve?

If the obligee's interest is the key notion, should not the obligee be under the duty, in the future, to clearly stipulate what his relevant interest is in the contract? To what extent would the judge be bound by such provisions? Could the bad faith of the obligor and possibly of the obligee be taken into account when deciding for or against specific performance? Lastly, could parties exclude such an option and require in the contract that any default could lead to specific performance, regardless of the cost? The spirit of the revision, as expressed in the report submitted to the President of the Republic, is to treat all provision not made expressly imperative as suppletive. All this generates many questions.

Article 1222, as finalized in the Ordinance, marks a setback of unilateralism and the return of court adjudication.⁸¹ Once the obligor has been put in default, the obligee may contract in view of performance by another, though at a reasonable cost, as was provided in

79. See, regarding the scope of nullity, Cass. Civ. 3, 15 Oct. 2015, no. 14-23.612, D. 2015, 2423 (note C. Dubois); RDI 2016, 27 (obs. D. Tomasin).

80. Please note that this assessment of the cost of the enforced performance exists in some specific texts: for environmental law, see Environmental Code arts. L. 514-20, L. 125-7; for consumer law, see Consumer Code art. L. 211-9; and for jurisprudence, see Cass. Civ. 1, 9 Dec. 2015, no. 14-25.910, D. 2016, 360 (note S. Desmoulin-Canselier).

81. M. Faure-Abbad, *Article 1222 : la faculté de remplacement*, REVUE DES CONTRATS 2015, 784.

pre-revision articles 1143 and 1144 of the Civil Code. However, if there is a need to destroy what had been performed in violation of the obligation, such destruction must be previously authorized by the court. The report to the President of the Republic points to the “irreparable consequences of such a destruction” and to the need to “avoid abuse on the part of the obligee.”

30 – Price Reduction. This setback from unilateralism can also be observed regarding price reduction, governed by article 1223. In the event of defective performance, the obligee may accept such performance and request a price reduction, provided that the obligor has been put in default. The original draft allowed the obligee to act unilaterally.

Article 1223 is built on an alternative. If the obligee has not paid yet, he can give notice to the obligor of his intent to reduce the price. One understands that in such a case the court would only be called in case of disagreement on the reduced price. If the obligee has already paid, then he must “request” a price reduction from the other party. One may imply that failing the other party’s consent, the obligee will pray the court to force the contracting party to restore part of the price.

31 – Ways to Terminate the Contract. Article 1225 deals with dissolution clauses (*clauses résolutoires*). Such a clause must “specify” (rather than “designate,” the term used in the draft) the commitments whose nonperformance will result in the termination of the contract. The earlier wording was conducive of itemization and some worried that it may preclude the stipulation of “catch-all clauses,” though one is not sure the new wording will help. Under article 1225, paragraph 2, dissolution presupposes that the obligor has been put in default in vain, unless it was agreed that the contract would be dissolved by the mere effect of nonperformance. Express reference must be made to the dissolution clause when the obligor is put in default. One may regret some lack of coordination between

the dissolution clause and dissolution upon notice.⁸² Is the obligee given an option or must he necessarily abide by the terms and conditions of the termination clause?⁸³

Article 1226 makes provision on dissolution by notification. There is no need to put the obligor in default in case of emergency. One may regret that the exemption is not more general. One should for instance dispense the obligee from putting the obligor in default when it is clear that performance has become impossible.⁸⁴ According to article 1226, paragraph 2, the formal default notice must “expressly mention” that if the obligor fails to perform the obligation, the obligee will have the right to dissolve.

Regarding judicial dissolution, article 1227 states that: “Dissolution may in any event be claimed in court proceedings.” The adverb “always” has been dropped from the draft. The new wording connects the various dissolution methods. Even if a dissolution clause exists and even if dissolution is possible with notice, the judicial dissolution remains a possible option. This provision does not prevent anticipatory waiver of judicial dissolution clause, as expressly stated in the report to the President of the Republic.

According to article 1228, the court can acknowledge or declare the full dissolution of the contract or order its performance, with the possibility of granting additional time to perform, or simply award damages. Article 1229 adds valuable details regarding the effects of dissolution and is more specific than the draft version. Paragraph 3 provides the following:

82. See Report Presented to the President, *supra* note 3; termination out of court is “an autonomous option given to the obligee, victim of the nonperformance, who from now on will have the choice between two termination options, judicial, or unilateral, especially failing an express termination clause.” Does this mean that he will have the ability to choose termination by notification including when such a termination exists? We might think that.

83. See, especially, Cass. Com. 20 Oct. 2015, no. 14-20.416, GAZ. PAL. 2 Feb. 2016, 26 (note D. Mazeaud): the creditor can choose unilateral non-judicial dissolution without having to comply with the conditions of the termination clause.

84. See, e.g., LA. CIV. CODE art. 2016.

Where performances exchanged would only be of use upon the complete performance of the contract terminated, the parties must restore the whole of what has been received. Where the performances exchanged are of use as the reciprocal obligations are performed, restitution is not due for the period preceding the last performance that did not receive a counter-performance.

In this case, dissolution is no longer called *résolution* but *résiliation*. The word *résolution* is used where there is full restoration. Where there is no restoration for the time prior to the last act of performance, which did not receive something in return, it is a *résiliation*.⁸⁵ This disconnects retroactivity and restoration. The latter is now governed by the Code.⁸⁶

32 – Reparation of Damage. Subsection 5 deals with the reparation of damage resulting from nonperformance of a contract. Article 1231 of the Ordinance clarifies the former article 1146 of the Civil Code: “[u]nless nonperformance is final, damages are due only if the obligor has previously been put in default to perform his obligation within a reasonable time.” This has the effect of exempting the obligor of the obligation to pay moratory damages regarding this additional reasonable time.⁸⁷ A same exemption is provided regarding the implementation of the penalty clause under article 1231-5, paragraph 5. Then, the Civil Code now enshrines, within the new article 1231-3, the equivalence of gross negligence and fraud: “[t]he obligor only owes damages that were foreseen or could have been foreseen when the contract was concluded, unless the nonperformance occurred through gross fault or fraud.”

33 – Conclusion: Prepare your Clauses. The new provisions introduced into the Civil Code by the Ordinance of February 10,

85. See C. CIV. art. 1230; it provides that dissolution does not impact clauses relating to dispute resolution or those meant to be effective even in case of dissolution, such as confidentiality clauses and non-competition clauses. The effect of dissolution on clauses excluding or limiting liability remains an issue.

86. See Report Presented to the President, *supra* note 3.

87. Compare with LA. CIV. CODE art. 1989: “[d]amages for delay in the performance of an obligation are owed from the time the obligor is put in default ...”

2016 will no doubt generate questions and sometimes disapproval. The ongoing parliamentary ratification process may bring changes here and there, but overall it is time to look ahead and comply with the new contract law, while figuring out possible adjustments, by way of contract clauses.

