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INTRODUCTION TO FRENCH AND EUROPEAN BUSINESS LAW

FRENCH BUSINESS CONTRACT LAW

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Syllabus II

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The 2016 Reform. Since 1804, contract law has only been the subject of rare and occasional modifications. Articles 1101 ff has remained essentially unchanged since 1804. This apparent stability did not prevent developments in this area of civil law. The task of tailoring provisions enshrined in the 1804 Code to new situations has fallen to the courts. Thus, case law has significantly contributed to the development of contract law : contract law became a sort of case law system.

Whatever the process to prepare the Reform, it was then decided that it would use the procedure of Ordinance under article 38 of the Constitution, a law, in 2014 authorized the government to process by Ordinance. The Ministry of Justice issued a draft Ordinance on 25 February 2015.

A period of public consultation then followed until the end of April 2015. The final text of the Ordinance was decided the 10 février 2016, and published in the *Journal official de la République française.* According to article 9 of the Ordinance n° 2016-131 reforming contract law, the general regime of obligations and proof of obligations, its entry into force was set for 1 October 2016.

ln accordance with article 38 of the Constitution, the Ordinance was subject to parliamentary approval. lt was finally ratified, and reformed on some provisions, by the Act n° 2018-287 of 20 April 2018.

After having specified the concept of contract (Section 1), the Civil Code sets out the conditions for the formation of a contract (Section 2). lt also contains provisions on the effects of a contract (Section 3) and on measures available where there is breach of contract (Section 4), and, finally, regarding termination of a contract (Section 5).

Section 1 - Concept of contract

The Civil Code defines the concept of contract (1) and contains general rules relating to contract law {Il). lt also classifies the various contracts (Ill).

I. Definition of contract

Article 1101 has introduced a new definition of contract : lt states that

> *"a contract is a voluntary agreement between two or more persons intended to create, modify, transfer or extinguish obligations".*

This definition is wider than the one previously used in the former article 1101. lt was then written that :

> *"a contract is an agreement by which one or several persons obligate themselves towards one or several others to give, to do, or not to do something".*

The agreement of wills remains the core feature of contract. The contract also continues to deal with obligations. Nevertheless, in the new definition, the contract does not merely create an

obligation. lt may also have the effect of assigning or terminating an obligation. The effects of the contract are thus extended to all operations relating to obligations.

II - General rules (*principes directeurs*)

The "*lntroductory Provisions*" to contract law have identified three general rules, namely freedom of contract (A), binding effect of a contract (B) and good faith (C).

All these principles have been gradually revealed through developments of case law. The report accompanying the Ordinance specified that these general rules *"do not constitute superior rules (...) on which judges could rely to justify increased interventionism".*

ln fact, *"they are principes intended to facilitate the interpretation of all the rules applicable to the contract and, if necessary, to fill any gaps".*

So these provisions can be considered as *guiding principles of contract law* (*principes directeurs*)

A - Freedom of contract (*liberté contractuelle*)

Article 1102(1) provides that :

> *"everyone is free to contract or not to contract, to choose his contracting partner and to determine the content and form of the contract within the limitations set by legislation".*

Paragraph 2 (*Alinea* 2) further states that :

> *"contractual freedom does not allow derogation from rules which are an expression of public policy".*

In fact, situation is more complicated. Legislation can oblige to conclude a contract. For example among many, it is mandatory to take out an insurance contract to drive a vehicle. lt can also affect the identity of the contracting party. Legislation can also forbid somebody to refuse to conclude a contract, because of discrimination relating to age, sex, health, handicap, color of skin, ethnic origin, etc., or in relationship between professional and consumers.

In addition, the legislator is fighting against unfair terms. Requirements as to form are also increasingly numerous, especially compulsory mentions intended to provide better information to a contracting party. So, freedom of contract is unrealistic when there are imbalanced situations such as in employment, insurance or consumer contracts. These contracts have been more and more affected by legislative interventions in order to protect one of the contracting parties.

B - Binding effect of contract (*force obligatoire du contrat*)

Article 1103 has incorporated the binding effect of contract into the introductory provisions. lt is written that :

> *"contracts which are lawfully formed have the binding force of law for those who have made them".*

Difficult to translate : *« les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits ».* The word « loi » is used twice, but differenlty : so a more accurate translation, among many interpretation since 1804, could be : *"contracts which are lawfully formed have binding force for those who have made them".*

This is a very important rule, both in the legal and philosophical way : a contract must be performed. So, French is very reluctant to the concept of efficient breach of contract : a contractor have the choice, entering a contract, between perform the contract or terminate it, if he has a specific interest to do that but by paying compensatory damages to the other party (we will see that regarding in promises of contract rules).

C - Good faith (*bonne foi*)

Under article 1104(1), *"contracts must be negotiated, formed and performed in good faith".* Paragraph 2 points out that *"this provision is a matter of public policy".*

This article has broadened the area of good faith. The former article 1134(3) stated that contracts *"must be performed in good faith".* From now on, the duty of good faith will also include the negotiation and the formation of the contract. ln fact, such extended obligation of good faith was already applied by the courts.

It means that judge can modify, even add duties or obligations in a contract, independently of the will of parties. So, we can consider that, if Article 1103 guarantee security of transactions, by binding effect of contracts, Article 1104 also, and without fear of contradiction, contractual justice, in some specific cases.

Ill - Classifications of contracts

The 2016 Ordinance has also introduced a renewed classification of contracts. Classifying is an essential operation as it determines which legal rules will apply to a contract.

A - Nominate and innominate contracts (*contrats nommés et innommés*)

Article 1105 is based on the traditional distinction between nominate and innominate contracts. A nominate contract is governed by specific statutory provisions. For example, articles 1582 ff of the Civil Code apply to a contract of sale.

By contrast, there is no specific statutory regulations for an innominate (or sui generis) contract.

It follows from article 1105(1) that all contracts, whether nominate or innominate, are subject ta the ordinary law of contract.

ln addition, article 1105(2) points out that nominate contracts are subject to rules which are dedicated to certain contracts.

Where there is a conflict between ordinary (or general) contract law and special contract law, it follows from article 1105(3) that *"the general rules are applied subject to these particular ru/es"*. This is the legal embodiment of the maxim *specialia generalibus derogant* (which means that *"special laws derogate from general laws*").

So, facing a contract, we must qualify it, look for special laws (law of sales for example, and with one, international sale of goods, sale to consumers, or ordinary sale law), and if, but only if, there is no provision or insufficient provisions, general law can apply.

In brief, general law can also be seen as a *subsidiary law.*

B - Classifications based on the obligation contracted

The 2016 Ordinance retained all the classifications already contained in the 1804 Code.

1 - Distinction between a bilateral contract (synallagmatic contract) and a unilateral contract

According ta article 1106 :

> *"a contract is synallagmatic where the parties undertake reciprocal obligations in favour of each other. lt is unilateral where one or more persons undertake obligations in favour of one or more others without any reciprocal obligation on the part of the latter".*

A bilateral contract creates reciprocal and interdependent obligations for bath parties. ln a sale contract, the seller agrees ta deliver the thing, and the buyer ta pay the price.

Unilateral contracts impose obligations exclusively for one of the parties. A gift is a unilateral contract.

This distinction is relevant, for example, in the event of non-performance. Since the obligations of the parties ta a bilateral contract are reciprocal, if one of the contracting parties does not perform his obligation, the other may invoke this non-performance in order not ta perform his own obligation. Similarly, a contracting party who has performed his obligation but did not receive the one provided by the other party may claim restitution.

2 - Distinction between an onerous contract and a gratuitous contract

Article 1107 provides that "a contract is onerous where each of the parties receives a benefit from the other in return for what he provides. lt is gratuitous where one of the parties provides a benefit to the other without expecting or receiving anything in return".

A sale and an employment contracts are examples of onerous contracts of form and capacity. There must be specific protection of the persan who enters into an agreement with no consideration.

3 - Distinction between a commutative contract and an aleatory contract

Pursuant to article 1108, "a contract is commutative where each of the parties undertakes to provide a benefit to the other which is regarded as the equiva/ent of what he receives. lt is a/eatory where the parties agree that the effects of the contract- bath as regards its resu/ting benefits and /osses-sha/1 depend on an uncertain event". ln a commutative contract, reciprocal obligations of the parties are already known. This is sa in the case of a sale or a lease contract. lnsurance contracts, bets and gambling are aleatory contracts.

C - Classifications based on the way a contract has been concluded

1. Distinction between consensual, solemn and real contracts

Article 1109 draws a distinction between consensual, solemn and real contracts. lt states that "a contract is consensual where it is formed by the mere exchange of consents, in whatever way they may be expressed. A contract is solemn where its validity is subject to form prescribed by legislation. A contract is rea/ where its formation is subject to the delivery of a thing".

Compared with a consensual contract, validity of a solemn contract requires not only the parties' agreement, but also the fulfilment of requirements as ta form. This can consist of a notarial act or a written instrument. This type of contract provides greater protection for the most vulnerable party.

The validity of a real contract requires a thing ta be delivered, such as in a bailment.

The contract is cancelled if the required formality has not been carried out or if the thing which is the subject- matter of the contract has not been delivered.

2 - Distinction between contract by direct agreement and standard-form contract

According to article 1110 :

"a *contract by direct agreement [de gré à gré] is one whose stipulations are free/y negotiated by the parties. A standard-form contract contrat d'adhésion"] is one whose general conditions are determined in advance by one of the parties without negotiation".*

The party who has prepared the standard-form contract is the strongest party. The only alternative for the other party is to agree to what has been drafted or not to conclude the contract. He is not in a position to negotiate the contract terms. The transport contract concluded between an airline company and a passenger is a standard- form contract.

This also includes, for example, water supply contracts, internet access contracts, mobile phone contracts, insurance contracts, consumer credit contracts.

The Ordinance provides that the terms of a standard-form contract are to be construed against the party who proposed them.

Mains consequences of this distinction lay on Article 1171, which extend provisions fighting against unfair terms from consumer law to general contract law.

D - Distinction based on the way a contract is performed

1 - Distinction between contract of instantaneous performance and contract of successive performance

Under article 1111-1, "a *contract of instantaneous performance is one whose obligations can be performed as* a *single act of performance".* This is the case for a sale contract.

On the contrary, "a *contract of successive performance is one whose obligations of at least one of the parties are performed in* a *number of acts of performance over* a *period of lime".*

2 - Distinction between framework contract and implementation contract

Article 1111 states that "the framework contract is an agreement whereby the parties agree on the general characteristics of their future contractual relations". implementation contracts specify how they are to be implemented.

The contract whereby a supplier undertakes to provision a trader is a framework contract. The contract whereby he delivers a given quantity for a particular price at a specific date is an implementation contract.

These contracts have been included into the Civil Code by the 2016 Ordinance. They are typically found in distribution law.

Section 2 - Formation of a contract

To conclude a contract, the agreement of all the parties involved is required (I). But this agreement is not enough. Substantive and form conditions must also be observed for the contract to be validly concluded (II). The Civil Code provides rules to sanction a violation of these conditions (III).

I – Conditions of the formation

The contract requires both an offer and an acceptance : this the common process of formation, maybe an abstraction (B), we will see before specific rules of the precontractual period (A).

A - Specific rules

The formation of a contract can be a progressive process, especially where it involves a high degree of complexity or where a huge amount of money is at stake. ln these circumstances, preparatory steps will be undertaken to pave the way for the conclusion of the final contract.

This progressive elaboration of the contract was mainly ignored in 1804. lt has been taken into consideration by the Code since the 2016 Reform.

There are new provisions dealing with pre-contractual negotiations (1) and with pre-contracts (2).

1. Precontractual negotiations

The negotiating parties are free to conclude or not to conclude the contract. Until the Ordinance, this period was not contemplated by the Civil Code. However, case law had already determined the legal rules governing this stage. They are now included into the Civil Code.

a - Under the new article 1112, the negotiation phase creates an **obligation to conduct regarding to negotiations in good faith.**

This is a general requirement. It is not, actually, an “obligation”. To be precise, it should be the word “duty”, because, this is situated before the conclusion of the contract, so without creation of contract

This text considers any *"fault committed during the negotiations".* lt applies therefore to the conduct of the negotiations and not only to their breakdown, even if, mainly, faults appears to the breakdown of the negotiations.

Paragraph 2 points out that *"compensation for the resulting damage may not be intended to compensate for the Joss of the benefits expected from the contract not concluded".*

b - ln addition, the 2016 reform has been innovative in including a **specific duty of pre-contractual information.**

According to the new article 1112-1(1), the party who has any information *"whose importance is decisive for the consent of the other party must inform him of it if the latter legitimate/y ignores this piece of information or relies on his contractual partner".* Paragraph 3 clarifies the concept of information of decisive importance. This means "a *piece of information that has* a *direct and necessary link with the content of the contract or the quality of the parties".* Paragraph 2 specifies that this duty to provide pre-contractual information *"does not apply to an assessment of the value of the act of performance".*

This is a principle of public policy as *"the parties may neither limit nor exclude this duty"* (article 1112-1(5)). The behaviour of each of the partners is likely to make him responsible. This responsibility falls within the scope of article 1240 reserved for extra-contractual liability.

There is also, specific provision in commercial law. We saw the issue of applying Article L; 330-3 of commercial law. We will observe this issue in the Section concerning defects of consent (*vices du consentement*).

c - The Ordinance also introduced another situation where the liability of one of the parties may be incurred. This can happen in the event of **unauthorized disclosure of confidential information** obtained through negotiations.

Article 1112-2 states that "a *person who without permission makes use of or discloses confidential information obtained in the course of negotiations incurs liability under the conditions set out by the general law".*

2. –Negotiation agreements and preparatory agreements (*contrats préparatoires*)

Pre-contracts differ from mere negotiations by the fact that they are based on a proper agreement with a view to the conclusion of the final contract. These are genuine contracts, despite their provisional nature. The obligations imposed by these contracts may be more or less stringent depending on whether there is a negotiation contract (a), a preference pact (b), and unilateral promise of contract (c).

a. Negotiation agreements

The most common negotiation contract, not specified in the Civil Code, consists of a contractualization of the elements envisaged in the framework of the general law of negotiation.

It may be a contract organizing the negotiations, giving rise to a contractual obligation to negotiate with a view to reaching a final contract, sanctioned this time by the mechanisms of contractual civil liability. Such an agreement is very frequent in the negotiation of business contracts and allows for the setting of milestones, and more concrete obligations than those of article 1112-1. The parties are perfectly free, subject to compliance with the rules of public order, to insert any type of clause: a confidentiality clause, an exclusivity mechanism, a price for exclusivity, a clause revealing parallel negotiations, a term for negotiations, an arbitration clause, negotiation schedules, etc.

This type of contract creates a real contractual obligation to negotiate a future contract in good faith.

Sometimes, however, the parties find themselves in a situation of negotiation and address documents, letters of intent, various letters or e-mails to each other: as soon as these reveal an agreement on their common intention to negotiate, we find ourselves in a situation of a negotiation contract, which is then often submissive, in the sense that the parties have only partially organized their negotiation.

One of these figures, the "agreement in principle" (*accord de principe*), results mainly from an old decision of 1958 and can be defined as follows: agreement obliging two parties, one towards the other, not to conclude but to negotiate a second contract, the accessory clauses of which the said agreement does not specify.

b - Preference pact (*pacte de préférence*)

A preference pact is widely used, especially when selling immovables or business assets. However, such a practice was not contemplated in the 1804 Civil Code. The 2016 Ordinance was the opportunity to devote specific provisions to this kind of agreement.

According to article 1123(1), a preference pact is a contract whereby a party undertakes that, if he decides to enter a contract, he will make the first proposal for that contract to the beneficiary of the pact. The grantor does not at all undertake to sell but only, if he wishes to do so, to confer a priority to the beneficiary of the pact.

Difficulties arise where the promisor, notwithstanding his prior commitment, sells the property to a third party.

According to article 1123(2), if a contract is concluded with a third party in violation of a preference pact, then the beneficiary of that pact may obtain compensation for the damage suffered.

Furthermore, where it is established that the third party was aware of the existence of the pact and of the beneficiary's intention to take advantage of it, the latter may also bring an action for nullity of the transaction made in violation of the pact or ask the court to be substituted in the contract concluded.

ln addition, the new article 1123 introduced a new kind of interrogatory action designed to avoid uncertainty as to whether the beneficiary of the preference pact intends to enforce it.

The third party may give written notice to the beneficiary to confirm, within a time limit which the former determines and which must be reasonable, the existence of a preference pact and whether the latter intends to take advantage of it. Such a notice must state that if no reply is received within this time limit, the beneficiary of the agreement will no longer have the right to claim either to be substituted in any contract concluded with the third party or to have the contract declared null and void.

c - Unilateral promise of contract

A unilateral promise is a contract whereby one party (the promisor) grants the other (the beneficiary) the right to choose to conclude or not a contract ; he has an “option”, to consent or not to consent to the contract promised. So essential elements of the contract promised are already determined at the moment of the conclusion of the promise. Only the beneficiary's consent is required for the contract to be definitively concluded.

It follows from article 1124(2) that the withdrawal of the promise by the promisor during the time period allowed to the beneficiary to opt does not prevent the formation of the promised contract. ln addition, article 1124(3) states that a contract concluded in breach of a unilateral promise with a third party who had knowledge of its existence is null and void.

In the event of non-acceptance by the beneficiary, the final contract is not concluded. ln this situation, the unilateral promise may have provided that the beneficiary could be required to pay the promisor indemnities for immobilization. This sum paid is designed to compensate the loss suffered by the promisor as a result of the immobilization of the property during the option period granted to the beneficiary.

This is not as simple as reading Article 1124, and its issue is, or was, a main issue, both in case law and in academic scope.

This breach of the unilateral promise is called "revocation" of the promise. During the waiting period, the promisor is in an ambiguous situation, this ambiguity resting on the definition of the promise contract and the sanction of the possible withdrawal or "revocation" of the promise by the promisor.

Article 1124 of the Civil Code now provides a clear definition of the unilateral promise to contract, as well as the elements of its regime. It should be noted that these new rules are part of the rules of the ordinary law of contracts, and not within the rules relating to sales: these rules therefore apply to all promise contracts, not just promises to sell.

Thus, it provides that "*a unilateral promise is a contract by which one party, the promisor, grants to the other, the beneficiary, the right to opt for the conclusion of a contract the essential elements of which are determined, and for the formation of which only the consent of the beneficiary is lacking*" and goes on to state that "*the revocation of the promise during the time left to the beneficiary to opt does not prevent the formation of the promised contract*" and finally that "*a contract concluded in violation of the unilateral promise with a third party who was aware of its existence is void*".

To understand the scope of this rule, it is necessary to look back at the case law that preceded it and the issues at stake. Some authors considered that the promisor owes an obligation not to do anything that might prevent the beneficiary from exercising the option that he has reserved for the latter, the interest being that, in this case, the beneficiary could obtain the destruction of the contract concluded with a third party on the basis of article 1222, paragraph 2, of the Civil Code. For others, it would be an obligation *to give*, a translating effect of ownership, allowing this time a forced performance in kind without difficulty, a solution criticised because it would make the promise a sort of "half-sale". For still others, it could be an obligation to do : to maintain his offer for the benefit of the beneficiary, a solution which the courts have retained. This question was deduced from the solution given by the courts to the problem of the possible

forced execution in kind of the promise to contract, when the promisor refuses to do so, during the time of its effectiveness, that is to say, before the beneficiary exercises the option, a question which has become classic and is known as the problem of the "withdrawal" of the promise by the promisor.

However, the Court of Cassation ruled (at a time when no legal rule existed) in an important *Cruz case* of December 15, 1993 against any forced execution by the promisor: "*The beneficiaries had not declared that they were acquiring, the promisor's obligation was only an obligation to do and (...) the exercise of the option, subsequent to the retraction of the promisor, excluded any meeting of the reciprocal wills to sell and to acquire*" (*Civ. 3e, 15 déc. 1993, D. 1994. 507, note F. Bénac-Schmidt, Somm. 230, obs. O. Tournafond ; 1995. Somm. 88, obs. L. Aynès ; JCP N 1995. J. 31, note D. Mazeaud ; Defrénois 1994. 35845, obs. Ph. Delebecque, RTD civ. 1994. 588, obs. J. Mestre. Adde : A. Terrasson de Fougères, « Sanction de la rétractation de promettant avant la levée de l'option », JCP N 1995. 1. 194 ; F. Collart Dutilleul, « Les contrats préparatoires à la vente d'immeuble, les risques de désordre », Dr. et patr. déc. 1995. 58 ; D. Stapylton-Smith, « La promesse unilatérale de vente a-t-elle encore un avenir ? », AJPI 1996. 568, R.-N. Schütz, « L'exécution des promesses de vente », Defrénois 1999. 37021, Adde : D. Mainguy, « L'efficacité de la rétractation de sa promesse par le promettant », RTD civ. 2004. 1 ; F. Bellivier et Ruth Sefton-Green, « Force obligatoire et exécution en nature du contrat en droits français et anglais : bonnes et mauvaises surprises du comparatisme », Mélanges J. Ghestin, LGDJ, 2000, p. 91, D. Stapylon-Smith, « La promesse unilatérale de vente a-t-elle encore un avenir ? », art. cit., M. Fabre-Magnan, « Le mythe de l'obligation de donner », RTD civ. 1996. 85 et spéc. no 17*).

For the Cour de cassation, the retraction by the promisor before the expiry of the option exercise can usefully be carried out and the beneficiary is only creditor of an obligation to do, which prevents him from obtaining forced execution in kind of the promise.

On the other hand, the majority of the doctrine considered that the promisor has committed his consent to the sale by concluding this promise so that, unlike a simple offer to sell, the promisor could not retract his promise. Supporting this reasoning, the majority of the doctrine considers that this commitment is irrevocable and that it is equivalent to consent to the promised contract of sale (not only to the contract of promise), a sort of irrevocable "half" consent to the sale which would only await the consent, via the option of the beneficiary. In this hypothesis, the sanction of such a withdrawal should logically consist of the forced execution of the unilateral promise of sale, by the requirement of the maintenance of consent, and not the "classic" - some would say lax - praetorian solution consisting of the simple allocation of damages to the disappointed beneficiary.

Most of the doctrine has, since then, very widely contested the 1993 solution, and has done so on an ongoing basis. Indeed, an obligation to do, as defined by the Cour de cassation, is not in principle susceptible of compulsory execution, so that most authors consider that the promisor's obligation is not expressed in an obligation to do. Secondly, the very principle of "retraction" has been criticized. The promise to sell is a contract and, according to article 1193 (ex-art. 1134, para. 2) of the Civil Code, any contract is in principle irrevocable and unilateral termination of the contract is not possible, unless there is a clause to that effect or the unilateral termination is considered wrongful. Consequently, the doctrine considers that the promisor has already, by the promise, given his consent to the sale since the exercise of the option by the beneficiary will

form the sale. The promisor cannot retract his consent and the beneficiary can, within the time limit, exercise the option, thus forming the contract despite the inoperative retraction of the promisor, thus ensuring not so much the forced execution of the promise as the forced maintenance of the consent of the promisor. It is therefore by consideration of the obligatory effect of the promise itself, independently of its obligations: "The promisor is not in the situation of a debtor but (...) he is, more fundamentally, bound by the contract".

Conversely, it seems difficult to force the consent of a contracting party. The case law thus accepts that no one can be forced to remain within the terms of a contract. The unilateral termination of a contract, which is therefore irregular, is effective, but it engages the liability of the contracting party at fault.

Thus, whether the Cour de cassation detects an obligation to do, that of maintaining his offer by the promisor, one could still conceive that the promisor could unilaterally, but wrongfully, terminate the contract of promise (at least until the option is exercised), unless one moves towards a more objective conception of the contract and admits, as German law does, a forced maintenance of the promisor's commitment. In addition, some authors who wish to maintain the case law solution maintain that the withdrawal from the promise to contract must be able to be analyzed as a simple termination of a contract, of a promise, the object of which is not a sale or a half-sale, but the sole commitment of the promise.

Finally, economic arguments are sometimes brought to support this analysis, insofar as one imagines that the promisor retracts his promise to sell to a third party who offers a sum higher than that expected from the beneficiary, which validates the principles of maximum valuation of a thing.

The Cour de Cassation ruled again in the same direction in a decision of May 11, 2011, in a similar vein to the 1993 *Cruz case* but changing the basis of the reasoning : *"Pursuant to articles 1101 and 1134 of the Civil Code, the exercise of the option by the beneficiary of a unilateral promise to sell after the withdrawal of the promisor excludes any meeting of the mutual wills to sell and to acquire and the possibility of obtaining the forced execution of the sale"* (*Civ. 3e, 11 mai 2011, no 10-12.875 : D. 2011. 1457, note D. Mazeaud, et 1460, note D. Mainguy ; JCP N 2011. 1163, rapp. G. Rouzet ; LEDC juill. 2011. 1, obs. G. Pillet ; adde : Y. Paclot et E. Moreau, « L'inefficacité de la rétractation de la promesse unilatérale de vente » : JCP 2011. 736 ; N. Molfessis, « De la prétendue rétractation du promettant dans la promesse unilatérale de vente ou pourquoi le mauvais usage d'un concept inadapté doit être banni », D. 2012. 231 ; D. Mainguy, « À propos de "l'affaire de la rétractation de la promesse unilatérale de vente" », JCP G 2012. 808*).

The judgment thus validated the analysis according to which the promise contract does not have as its object the consent already given to the sale and excluded the specific performance of the contract. The change in the 2011 decision is that it is no longer an obligation of the promisor that is at stake, but the entire promised contract, and thus a question of forced performance of the contract (C. civ., ex-art. 1184, art. 1226) and not of an obligation (C. civ., ex-art. 1142, art. 1217).

Article 1124 of the Civil Code, paragraph 2, then seemed to reverse this solution. Indeed, it states that "*the revocation of the promise during the time left to the beneficiary to make the*

choice does not prevent the formation of the promised contract", which seems, at first sight, to imply that the revocation is set aside, ineffective, leaving room for the formation of the promised contract and then making possible the forced execution in kind of the promise.

Most authors assert that this solution is a given, which would suppose that specific performance of a promise is really possible, even though the definition of a promise does not consider that the promise binds the promisor, particularly in a promise of sale, as if he had already given his consent to the promised contract, that the forced performance of contracts would be possible according to article 1226 of the Civil Code, and above all that this would result in a considerable infringement of the freedom not to enter into a contract, even though this is formulated as a principle by article 1102, an infringement which deserves at least to be measured against a criterion of proportionality. Now, although article 1124 specifies that withdrawal does not prevent the formation of the promised contract, it does not expressly mention that specific performance is required. This absence therefore refers to the general appreciation of the judge on the basis of article 1226 of the Civil Code, which does not change much compared to the former article 1184 of the Civil Code, so that the old case law was able to continue until an important judgment of 23 June 2021 which partially, but at least in principle, revives the Cruz case law of 1993 (*Cass. 3e civ., 23 juin 2021, n° 20-17.554, D. 2021, p. 1574, note L. Molina ; JCP G 2021, 787, n° 1, obs. G. Loiseau ; JCP E 2022, 1468, note D. Mainguy ; JCP N 2021, n° 27, 1252, note Ph. Pierre et avis Ph. Brun ; Contrats, conc.consom. 2021, comm. 147, note L. Leveneur ; Dr. sociétés 2021, étude 12, note S. Castagné ; Dr. sociétés 2021, comm. 116, note R. Mortier)*.

The judgment considers that the *exécution force,* specific performance, of the unilateral promise of sale, despite the retraction by the promisor before the exercise of the option, allows the option to be exercised (this is the solution of article 1124), is possible at least "when it is possible", which is not the least of the limits, in particular when the retraction has been carried out by the sale of the property to a third party, in which case it would be necessary to obtain the nullity of this third party sale, which is not a small matter.

What is at stake is much more important than the fate of the unilateral promise to contract alone, but rather the general question of whether or not a commitment can be lawfully withdrawn, or whether such withdrawal is "null and void" because it is unlawful, thus facilitating the forced performance, in kind, of a contract, any contract.

The issue concerns contracts for the sale of real estate, where case law admits clauses facilitating the action of the promisor.

Prior to 2021, case law validated clauses requiring the promisor to take action for specific performance, which could now be done in the opposite direction. Many other arrangements favourable to the promisor could be envisaged, such as the insertion of penalty clauses or clauses imposing a penalty on the building.

It also concerns financial contracts, generally based on "options" which are never more than promises, where such clauses are permanent, allowing the "liquidation" of a "position" when the non-performance of a "promise" ("position") is noted once a short period of time (a few days) has elapsed, or contracts for the transfer of company shares, particularly when it is a question of a transfer of "control". No indemnity can, in fact, compensate for the loss of an

acquisition opportunity, and certain losses of opportunity are experienced more harshly, both for the ousted beneficiary (the beneficiary of a promise to transfer securities, or a beautiful house) and for the legal order itself in which such a promise is inserted (financial contracts).

What was shocking in the case law before 2021, and which justified the opposition, sometimes radical, which is expressed in doctrine, is the possibility which seems to be left to the promisor to withdraw, either by caprice or, more surely, because he can conclude a contract with a third party which is more profitable for him, whereas the beneficiary can only obtain symbolic damages, insofar as the beneficiary can defer his choice to another substitutable object.

The "lucrative fault" of the promisor would thus be promised, except, assuming that the 2011 case law holds, that is to say, when the thing which is the object of the promise is not or is no longer available in the hands of the promisor, that the case law severely punishes, by appropriate damages, the non-performance of the promise contract for the benefit of the beneficiary, on the basis of a prejudice which might not be the loss of the chance to enter into the contract, but prejudice of frustration for example.

B - The traditional offer and acceptance model

An offer (1) and a corresponding acceptance (2) are required before the conclusion of a contract. This rule is expressed in article 1113(1), which states that *"the contract is formed by the meeting of an offer and an acceptance by which the parties demonstrate their willingness to be bound".*

1 - Offer

The offer is an expression by one persan (the offeror) of a willingness to enter into a contract and to be bound on specific stated terms.

The Civil Code specifies the conditions under which such an offer is valid (a). lt also contains provisions relating to its termination (b).

a - Conditions of validity

The offer must comply with some conditions in order to create legal effects.

The offer has to be **precise.**

According to article 1114, the offer needs to contain all the essential elements of the future contract.

ln determining whether the offer is sufficiently precise, reference should be made to the essential features of the relevant contract.

For instance, when a sale contract is involved, these essential features are one thing and the price. Article 1582 states that a *"sale is* a *contract whereby* a *person obliges himse/f to deliver* a *thing and the other to pay its price".* If there is a lease contract, the offer has to identify one thing and the rent. Under article 1709, *"the lease of things is* a *contract whereby one party binds*

himself to provide the enjoyment of a *thing to the other for* a *certain time, in return for* a *certain price that this other party obliges himself to pay to the former".*

The offer must be **firm and definite.**

A proposal is an offer only if its acceptance is sufficient for the conclusion of a binding contract. A proposal is not an offer, even if it contains ail the essential terms of the proposed contract, if its author has expressed his intention not to be bound in the case of acceptance. Where there is such a qualification, the maker of the statement intends to have the last word in the conclusion of the contract.

This does not exclude that the offer may be subject to restrictions. This occurs, for instance, where a trader makes it clear that his offer is only capable of acceptance *"while stocks fast".* This qualification relating to the availability of stocks is in accordance with the firmness of the offer because the trader cannot offer for sale more than what he has in stocks.

The offer must be **exteriorized** and brought to the attention of at least of person. According to article 1114, the offer is *"made to* a *particular person or to persons generally".* The offer may be explicit or tacit. lt can arise from an unambiguous behaviour.

b - Termination of an offer

lt is important to distinguish between the withdrawal and the lapse of an offer.

Withdrawal of an offer. This question of withdrawal is settled by articles 1115 and 1116.

According to article 1115, an offer *"may be withdrawn freely as long as it has not reached the person to whom it was addressed".*

Article 1116 points out that *"an offer may not be withdrawn before the expiry of any period fixed by the offeror or, if no such period has been fixed, the end of* a *reasonable period'.* This concept of reasonable period is not specified. ln addition, statutory provisions can determine the time period during which the offer must be maintained. Such provisions have been mainly inserted into the Consumer Code.

Where contracts are made by electronic means, it results from article 1127-1(2) that "a *person issuing an offer remains bound by it as long as it is made accessible by him by electronic means".*

Article 1116(2) lays down the nature of sanctions in the event of wrongful withdrawal : *"The withdrawal of an offer in contravention of this prohibition prevents the contract from being concluded".* On the basis of article 1116(3), only tort liability may be incurred. This paragraph points out that there is *"no obligation to compensate the Joss of profits which were expected from the contract".*

Lapse of an offer. Pursuant to article 1117, *"an offer lapses on the expiry of the time period set by the offeror or, if no time period is fixed, at the end of* a *reasonable time period'.* lt also specifies that the offer *"lapses in the case of the incapacity or death of the offeror".*

2 - Acceptance

Acceptance is the second stage in determining whether an agreement has been reached under classical contract theory. This is an unqualified expression of assent by the offeree to the terms proposed by the offeror. lt must correspond with the offer. No form is required.

Besides general rules (a), the Civil Code also specifies the meaning of silence (b).

a - General rules

Under article 1121, the contract is concluded as soon as the acceptance is received by the offeror. According to article 1118(2), *"as long as the acceptance has not reached the offeror, it may be freely withdrawn provided that the withdrawal reaches the offeror before the acceptance".*

This is not an absolute rule. lt follows from article 1122 that *"the law or the contract may provide for* a *period of ref/ection, which is the period before the expiry of which the offeree cannot express his acceptance, or* a *cooling-off period, which is the period of time before the expiry of which its beneficiary may retract his consent".* ln addition, a specific rule has been made for electronic contracts. Article 1127-2 introduced the so-called *"double-click ru/e".* The offeree is to accept the offer and then confirm this acceptance after having checked the details of his order.

Acceptance must be **unqualified.** The offeree is intended to accept the offer without altering its content. Where this condition is not satisfied, the answer does not amount to an acceptance but is a counter-offer which kills off the initial offer.

This rule is recognized by article 1118(3) which states that *"an acceptance which does not conform to the offer has no effect, apart from constituting* a *new offer".*

b - Silence

Silence by itself is too ambiguous. Under the new article 1120, *"silence does not count as acceptance, except where otherwise provided by legislation, usage, business dealings or special circumstances".*

The legislator gives sometimes effect to silence. This is the case, for example, with article 1738 in relation to a lease contract. lt follows that *"if, at the expiration of* a *written lease, the lessee remains on the premises and is allowed to continue in possession,* a *new lease is thereby created".*

Certain usages, especially in **commercial matters,** recognize that silence can amount to acceptance. This can be admitted where there are ongoing business relationships between the parties. However, judges are strict and require the very existence of a genuine practice giving effect to the silence of one of the parties.

Finally, where the offer is made in the exclusive interest of the person to whom it is submitted, the court may decide that his silence entails acceptance.

This can occur, for example, where there is a debt relief.
ln tact, the judge will have to decide on a case-by-case basis.

II - Conditions of a valid agreement

Under article 1128, three conditions are required for a contract to be validly concluded : the absence of defects of the parties' consent (A), their capacity to contract (B), a legal and certain content (C). ln addition, it can also happen that form conditions are required (D).

A - Absence of defects of consent (*vices du consentement*), integrity of consent

Consent is an essential element of the contract. For that reason article 1129 points out that it must come from a person of sound mind.

Defects are facts which impair the willingness to enter into a contract. They must occur at the date when the contract was concluded. They must also have been a decisive factor of the consent.

According to article 1130, there are three defects of consent, namely mistake (1), fraud (2) and duress (3). Such defective consent is punished by the nullity of contract.

1. Mistake (*erreur*)

Mistake consists of a false representation of the reality which results in a difference between this reality and how it was perceived by one of the contracting parties.

It must not be inexcusable, as would be the case if there was a gross mistake. lt is thus the duty of each party to inform himself about the elements he considers as decisive.

The mistake must have been a determining factor in the conclusion of the contract. ln the absence of this false perception, the contracting party would not have given his consent. The decisive nature of the mistake is assessed *in concreto* by the judge, who will take into account the context in which the contract was concluded.

According to article 1132, mistake must relate to the **essential qualities of the act of performance (*qualités essentielles de la prestation*)or of the other contracting party.**

A mistake about mere motive is not, in the absence of an express stipulation, a ground for nullity of the agreement, even if this motive was decisive (article 1135). Similarly, article 1136 states that mistake as to value cannot justify nullity where a contracting party makes only an inaccurate valuation.

According to article 1133(1), the essential qualities of the act of performance, are *"those which have been express/y or impliedly agreed, and in consideration of which the parties have contracted".* lt can concern the matter from which the thing is made.

The essential qualities of the act of performance can be seen as the essential qualities of *the material of the object of a contract* (before 2016, Anciant Article 1109 states about *"erreur sur la substance",* mistake on the substance*:* I buy a silver candlestick which appears to be a plate candlestick. So if I bought an *ancient* silver candlestick which to be a *new* silver candlestick, there is no mistake on the *substance.*

So case law decided more broadly that this word, "substance", may include any quality which was essential for the parties. One can think of the purchase of a copy when it was believed that the painting was from a famous artist. One can also mention the engine power of a car.

Mistake may relate ta the act of performance of one party or the other.

Mistake is excluded where a hazard has been accepted on a quality of the act of performance.

Article 1134 only accepts a mistake as to the essential qualities of the other contracting party to the extent that this element was the main reason for the contract.

Only contracts concluded *intuitu personae* can therefore be annulled for mistake as ta the person.

Every other mistake is irrelevant, mistake on value of the act of performance, mainly.

2 – Fraud (*dol*)

Fraud in English is not the equivalent of the French word "*fraude"* in French law. In French Law a fraud is committed by using a law to circumvent a law of public policy. So it is an act against the law. It also an act committed to harm another people, it can be declared *inopposable* (unenforceable).

So Fraud in the signification of French *dol*, is an induced mistake, a mistake provoked by a fraud, which is a precontractual fault.

It results from a behaviour designed to mislead a person into concluding the contract.

According to article 1137 : *"fraud is the act of a contracting party obtaining the consent of the other by scheming or lies".*

Paragraph 2 has now introduced intentional concealment. This refers to a party's silence about a piece of information which, had it been known, would have deterred the other party from contracting.

ln addition to these material elements, fraud requires also an intention ta mislead the other contracting party. Failure ta provide any information as a result of mere negligence will not be punished on the ground of fraud.

Article 1139 further makes it clear that "a *mistake induced by fraud is always excusable".*

Compared with mistake, fraud is a basis for nullity even if it bears on the value of the act of performance or on a party's mere motive.

ln principle, fraud must be committed by the other contracting party. But fraud committed by third parties in close relationship with one of the parties is treated in the same way as fraud committed by that party. lt follows from article 1138(1), that fraud is equally established where it originates from the other party's representative, or a persan who manages his affairs. Moreover, paragraph 2 states that fraud is also established where it originates from a third party in collusion with one of the contracting parties.

In Business agreements, and especially in distribution contracts, some provision, Article L. 330-3 of the Commercial Code provide some major issues, adding to general civil contract law.

The consent given by the partners to the framework agreement is the subject of particular attention because of the importance of the economic and financial stakes and the duration of the agreement. The risk for the distributor lies in the possible difference between the results promised by the supplier, a franchisor for example, on the basis of an optimistic or even overestimated presentation of the contractual future, and the commercial reality once the contract is concluded.

To try to overcome this difficulty, the invocation of defects of consent, error, fraud, violence rarely succeeds. Indeed, the distributor is an independent trader, responsible for his own affairs, who must be informed to be informed, although a 2011 ruling requires a revision of this presentation.

Thus, the legislator intervened in 1991 to impose an obligation of information on the producer, who "makes available to another person a trade name, a trademark or a sign, requiring from it a commitment of exclusivity or quasi-exclusivity for the exercise of its activity, is required, prior to the signature of any contract concluded in the common interest of the two parties to provide the other party with a document giving sincere information, which allows him to commit himself in full knowledge of the facts" ( ). This is now the formula of article L. 330-3 of the French Commercial Code, resulting from the law of December 31, 1989, known as the Doubin law (>Document n°1).

The rule, supplemented by a decree of April 4, 1991 and codified in article R. 330-3 of the French Commercial Code (>Document no. 1), applies to all contracts containing an exclusivity obligation in which a distinctive sign, trademark, trade name or brand name is made available, including, for example, franchising, concession or exclusive supply contracts.

Area of the pre-contractual obligation to provide information. - Article L. 330-3 of the Commercial Code does not refer to any particular type of contract, but to a contractual objective: a contract by which one party makes available to the other "a trade name, trademark or sign, requiring from it an undertaking of exclusivity or quasi-exclusivity for the exercise of its activity". Therefore, all contracts having as their object 1) the provision of a distinctive sign; 2) an exclusivity or quasi-exclusivity as reciprocal; 3) a contract for activities of common interest are covered.

It seems quite clear that the legislator's objective was to envisage contracts in which a form of "economic dependence" is organized: the contract presupposes the exercise of a commercial activity that will be carried out under the name, trademark or trade name of the supplier, requiring a commitment of exclusivity on the part of the distributor. This exclusivity means that most of the distributor's activity will be devoted to the performance of a contract based on conditions set by the supplier, regardless of the form of exclusivity chosen: exclusivity of the activity, exclusivity of supply, etc.

The field covered is thus quite considerable, even though the three elements may be combined. Indeed, the contracts in question may concern the franchise contract, of course, since this was the objective of the law, but also the exclusive supply contract, or the concession contract, the classic contractual formulas of distribution. In addition, however, there are all the contracts that meet the characteristics of the law, such as contracts for the provision of a sign or a trademark, regardless of the contractual manner in which it is made available, provided that it produces such a provision: lease ( ), deposit, loan ( ) or even sale ( ), or even sale ( ) or contracts leading to this logic, such as a management lease of a business, including its sign ( ), and why not a contract having little to do with these canonical forms, such as a commercial agency contract in which such a provision is found.

The second condition is based on the identification of an exclusivity or quasi-exclusivity obligation on the part of the distributor. This condition makes it possible to exclude all contracts in which this requirement is not expressly provided for, such as selective distribution formulas. The concept of exclusivity does not pose any particular difficulty with respect to its traditional descriptions (see below, No.), unlike the concept of "quasi-exclusivity". This notion poses numerous difficulties of interpretation. Indeed, a first reflex could lead to the use of the criteria provided for in competition law: Regulation n°330/2010 provides for the same type of notion and the guidelines on the subject invite the consideration that a quasi-exclusivity is identified when 80% of the distributor's supplies are made with the supplier, regardless of whether a clause is provided for to this effect. It would therefore suffice to note that this limit is crossed for the requirement to be imposed, with the difficulty that, in the absence of an exclusivity clause, the parties can hardly have any idea of what their relationship will be. In addition, the question arises as to the basis for this quasi-exclusivity: should the distributor's overall business, its sales, or only the products covered by the contract be considered? An analogy with the interpretation of Article L. 7321-2 of the French Labor Code would allow the distributor's overall activity to be considered, given that the distributor may have several combined activities, thus broadening the basis for determining this rate ( ). The Court of Cassation, however, retained only the products covered by the contract, and thus a stricter concept for the supplier ( ).

The third condition is even more difficult to understand. Indeed, the notion of a contract of common interest is mainly used in an attempt to propose a tightening of the techniques for breaking the contract, following the example of the mandate of common interest. It would then be necessary for the party responsible for the breach, in this case the supplier, to demonstrate the distributor's fault. However, Article L. 330-3 of the Commercial Code does not refer to the time of the breach but to the time of the formation of the contract, and better still to the time of the preparation of the contract, its pre-contractual period, so that the scope of this term seems, as interpreted, purely decorative.

This provision states a specific precontractual information. It is very important because it concerns information of capital interest, the content of which is set out in article L. 330-1 and in the implementing decree (C. com., art. R. 330-1).

They add to Article 1112-1 of the Civil Code, and both provisions regarding mistake and fraud, in the scope of distribution contracts. These provisions impose information which can be grouped into four series of elements.

The first concerns the supplier: its identification elements, as a contractor and as the holder of the right to make the distinctive sign available to the distributor, which implies: the address of the company's registered office, its legal form, the identity of its directors, the amount of its capital, its registration number in the Trade and Companies Register, the date and number of the registration of the mark, its bank account, the five most important ones to be exact.

The second one concerns the network, its seniority, its experience of the company: the date of the creation of the company, a reminder of the main stages of its evolution, and especially the network of operators, i.e. information on the other distributors (the address of the fifty neighbors), as well as all the indications allowing to appreciate the professional experience of the leaders, over the last five years.

The third concerns the contract: the description of the contract and in particular the area of activity concerned, as the basis for the exclusivity, the nature and scope of these exclusivities (purchase, brand, distribution) and the main obligations of the distributor, including the expenses specific to the brand.

Finally, the fourth point concerns the market: a presentation of the general and local state of the market and the prospects for its development (C. com., art. R. 330-1, 4°, para. 2).

This last point is the one that poses the most difficulty. Indeed, if the purpose of the law is to prevent the distributor from being asked to contract on the basis of overly optimistic development prospects, it may be thought that this is where this issue may apply.

The controversy concerns the meaning and scope of this requirement: does it require the supplier to provide the distributor with a study of the local market, or even a projected budget for its business, a business plan (predictable turnover, ratio of benefits, etc) ?

The answer is generally negative: it does not necessarily follow from the formula in Article R. 330-1, 4°, para. 2 that the supplier *"must provide a precise study of the local market ( ) or business forecasts or projected accounts*".

The controversy is fuelled by a view that seeks to protect the distributor on the basis of the particularity of the franchise agreement.

In fact, this contract presupposes the exploitation and repetition of know-how developed by the franchisor, and it is the franchisor's responsibility to ensure that this exploitation is possible and to provide a study of the local market and this requirement would itself stem from the "presentation" of the local market ( )".

These arguments are not wrong, but on the one hand they are based essentially on the assessment of the franchise agreement, which certainly provides the bulk of the litigation, but case law adheres to a strict interpretation of the text and therefore to a consideration of the restrictive nature of the requirements it lays down.

On the other hand, case law requires that the presentation of the local market be carried out in an effective ( ) serious, objective, sincere, etc., which presupposes that the local clientele is presented.

All of this information must be provided in a "*document*" which in practice is known as the "pre-contractual information document" (*Document d'information précontractuelle or "DIP"*). The document must obviously be provided in full: the fact that the distributor acknowledges having received the information in the contract does not remove the obligation to provide information.

A time limit is also required, in terms of a cooling-off period, which imposes the delivery of the document at least twenty days before the date of conclusion of the contract.

This consideration poses a problem in the event of renewal of the contract. The renewal of a contract, for example by the effect of a tacit renewal clause, entails the conclusion of a new contract. Moreover, this new contract presupposes performance during the planned period and therefore an evolution of the network and of the information that would be provided on the distributor benefiting from the renewed contract was a new contractor. The question then arose as to whether the renewal of such a contract presupposed the renewal, under the same conditions, of the performance of the pre-contractual information obligation. The Cour de Cassation has held, quite logically, that such performance of the pre-contractual obligation to inform is required in the case of renewal.

Sanction of the pre-contractual duty to inform are, in first, a week criminal penalty : a fifth class fine of €1,500.

The sanction is above all, and essentially, civil. In the case of a pre-contractual obligation to provide information, the breach of this obligation may constitute a pre-contractual fault that may engage the liability of the supplier (*Cass. com. 25 sept. 2007, JCP, éd. E, 2008, 1638, obs. D. Mainguy et J.-L. Respaud ; Cass. com. 27 janv. 2009, RDC 2009. 1150, obs. M. Béhar-Touchais*).

More delicate is the question of knowing whether the absence of information or a wrongful disclaimer can vitiate the contracting party's consent by fraud or, more simply, by lack of consent.

The Cour de Cassation considers that avoiding has been possible since a decision of February 10, 1998 (*Cass. com. 10 févr. 1998, n°95-21906, CCC 1998, no 55, obs. L. Leveneur, RTD civ. 1998, p. 130, obs. P.-Y. Gautier, p. 365, obs. J. Mestre*), provided, however, that the distributor succeeds in demonstrating the existence of fraud, or more generally the existence of a defect in consent (*Cass. com. 2 déc. 1997, D. 1998, somm., p. 334 obs. D. Ferrier*).

This sanction suppose that the distributor shall support the burden of proof of the violation of the obligation to inform but also of the defect in consent that it has suffered. Consequently, it is not the breach itself that justifies the defect in consent, but the nature of the mistaken information or absent information, which the distributor must prove it was a determining factor in his consent. Conversely, however, the rules of contract law, as regards proof of the performance of an obligation to provide information, allow one to consider that it is the debtor of the obligation to provide information who must prove that he has performed it correctly (C. civ., art. 1112-1). This reversal of the burden of proof would lead to the opposite consideration: the requirement to provide information would presuppose that it was provided in a correct manner, so that it would be for the franchisor to prove that the information was correctly provided. Even more, the mechanism could create a special fraud : the mere fact of not providing the correct information would identify, unless it could be shown to the contrary, this fraud.

However, this is not the solution adopted, at least on the basis of fraud: the Cour de cassation maintains since 2004 the principle that article L. 330-3 of the Commercial Code does not create a special defect in consent, with an original regime, but remains sanctioned by the rules of the ordinary law on defects in consent (*Cass. com., 4 févr. 2004, D. 2005, p. 151, obs. D. Ferrier, Cah.dr.ent. 2004/3, p.29, obs. J.-L. Respaud ; Cass. com. 7 juill. 2004, D. 2005, p. 151, ibidem, JCP, 2005, Cah.dr.ent. 2004/3, p.29, obs. J.-L. Respaud*).

The situation is even more complex when the requirements of Article 330-3 are met (or not met) and the supplier, who is required to provide this information, adds to the legal requirements, in particular by providing a business plan, which is systematically requested by the distributor, if only to validate its project with third parties, his bank or associates mainly.

In this situation, the logic specific to the sanction of common law via the defects of consent finds its natural place, via the sanction of fraud, traditionally. However, a judgment of October 4, 2011 had (*Cass. com. 4 oct. 2011, n°10-20956, D. 2011, p. 3052, note N. Dissaux, D. 2012,Pan. p. 577, obs. N. Ferrier, JCP, éd. G, 2012, 135, note J. Ghestin, RDC 2012, p. 9, note Th. Génicon ; Cass. com. 12 juin 2012, n°11-19047. Adde D. Mainguy, L'erreur sur la rentabilité et le contrat de franchise, RLDC 2012/11, n°4876*) singularly changed the perspective in considering, based on Article 1130 (ancient 1110) of the Civil Code and by an innovative solution invoking an *error on profitability* that: *"after noting that the results of the franchisee's business had turned out to be much lower than expected and had quickly led to its judicial liquidation, without investigating whether these circumstances did not reveal, even in the absence of the franchisor's breach of its pre-contractual obligation to inform, that the franchisee's consent had been determined by a substantial error about the profitability of the business undertaken*". This decision, rendered in the context of franchising, could be considered as changing the situation, even though the franchisor had correctly fulfilled his obligation to inform, but had accompanied it with a grossly optimistic budget forecast.

Indeed, the franchisee may fail in the operation of its franchise for several reasons: the hypothesis of non-existent or insufficient know-how; the hypothesis in which the franchisee does not respect the franchisor's recommendations; and finally the hypothesis of an inefficient distribution point, of a clientele that does not meet the promised expectations, i.e., of an experience that fails to be repeated, a form of "contractual hazard".

The 2011 ruling leads to the franchisor being held liable for this objective and thus common "contractual hazard" in the form of an error in the profitability of the franchisee, in the event of the provision of a very laudatory business plan : the error in the profitability of the business allows the contract to be cancelled. Since then, and in the same case, the Court of Cassation has modified its approach, by a decision of March 17, 2015 (*Cass. com., 17 mars 2015, n°13-24.853; CCC. 2015, comm. 148, AJCA 2015, p. 286, note S. Regnault, JCP E 2017, I, 1079, obs. D. Mainguy*), sanctioning the delivery of a non-serious forecast, entailing fraud.

Finally, in the international order, the question arises as to the authority of the Doubin Law and in particular its character as a police law solution not adopted by French case law.

3 - Duress

Duress is a coercion exerted against a contracting party in order ta force him ta give his consent.

Under article 1140,*"there is duress where one party contracts under the influence of* a *constraint which makes him fear that his persan or his wealth, orthose of his near relatives, might be exposed to considerable harm".* lt follows from this article that, although duress has been exercised against a non-contracting party, it may be a ground for nullity if it has impaired the contracting party's freedom ta decide.

Duress may have been perpetrated by the other contracting party or a third persan.

Even if this is not specifically stated in the Code, two types of conduct were generally described as duress : persona! abuse and mental abuse (blackmails, threats).

In the scope of **Business contracts**, abuse of a state of dependence has been introduced by the 2016 Ordinance. According to the new article 1143, 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".*

It is a kind of repetition of many economic provisions, mainly in french competition law, trying to create a sanction of abuse of a state of economic dependence, in Article L. 420-2 of the Commercial Code, a kinf os sanction of *abuse of purchase power,* as the sanction of abuse of a dominant position can be regarding as an abuse of sale power. Article L. 420-2 was established in 1986 but, since, this is a failure.

Duress is a cause of nullity of the contract insofar as it is illegitimate.

Some constraints may be part of the normal exercise of legal prerogatives. They cannot be a reason for a contract to be avoided. lt results from article 1141 that a threat of legal action does not constitute duress. This article points out that *"the situation is different when the* /ega/ *process is diverted from its purpose or where it is invoked or exercised in order to obtain* a *manifestly excessive advantage".*

B - Capacity and representation

Both parties must be legally competent to enter into the agreement. ln addition to the traditional requirement as to capacity (1), the 2016 reform specified rules for representation (2).

1 - Capacity

According to article 1145, contractual capacity remains the rule. lt provides that *"every natural person is able to conclude* a *contract".*

Article 1146 points out that two categories of people are affected by lack of capacity to conclude a contract, namely *"minors who have not been emancipated"* and *"protected adults".*

ln addition, the capacity of legal persons is limited to acts relevant to the achievement of their social abject as defined by the articles of association.

Lack of capacity is a cause of relative nullity (article 1147).

However, there are some limitations to this general rule :

The incapacitated person may perform alone ordinary acts authorized by law or usage, provided that they are concluded under *"normal conditions"* (article 1148).

Pursuant to article 1149(3), a minor may not escape from undertakings given in the exercise of his profession.

ln addition, the capable contracting party may oppose the action of nullity by asserting, for example, that the disputed act was useful for the incapacitated persan, or that the latter benefited from it. He may also raise the fact that the other contracting party affirmed the act after gaining or regaining his capacity (article 1151).

2 - **Representation**

Representation is a very helpful technique which enables contracts to be concluded on behalf of a person who is not present or is incapacitated. Only the representative is a party to the contract.

Article 1153 provides that the representative can only act within the limits of the authorisation he has received. According to article 1155(1), where the authorisation of the representative is generally defined, it covers only conservatory and administrative acts. Paragraph 2 specifies that *"where the authorisation is special/y determined, the representative may on/y perform the acts for which he is authorized".*

Article 1158 introduced an interrogatory action. Where the third party has any doubt as to the extent of the representative's authorisation, he may request in writing the represented persan to confirm within a reasonable time limit that he has awarded authorisation to the representative. The writing must mention that if there is no answer, the representative is deemed to be authorised to conclude the planned act.

Article 1154 introduced into the Code the distinction between two forms of representation, namely perfect representation and imperfect representation.

ln the case of perfect representation, the representative acts in the name and on behalf of the represented person. lt follows that *"on/y the latter is bound by the undertaking so concluded".*

On the contrary, *"where* a *representative states that he is acting on beha/f of another person but contracts in his own name, he a/one is bound towards the other contracting party".*

The rules for perfect representation have been further specified.

According to article 1156(1), where the representative is acting without authorisation or in excess of his authorisation, the act thus concluded cannot be set up against the represented person unless the third party has legitimately believed in the reality of the representative's authorisation. A third party who was unaware of the absence or excess of authorisation may apply for the act to be declared null and void. Only ratification by the represented persan precludes the possibility of claiming unenforceability or nullity.

Under article 1157, where the representative misuses his authotisation to the detriment of the represented person, the latter may invoke the nullity of the act if the third party was aware of such misuse of powers or could not have ignored it.

Article 1161 strives to limit conflicts of interest. lt states that "a *representative may not act on behalf of bath parties to the contract or enter into* a *contract on his own behalf with the represented person".*

C - Content of the contract (*contenu du contrat*)

This issue is undoubtedly one of the most discussed in the 2016 reform. Article 1128 imposes a lawful content on a contract for its validity, which is determined in article 1162:

> *"A contract may not derogate from public policy either by its terms or by its purpose, whether or not the latter was known to all the parties'".*

Article 1163 then considers the hypothesis of the object of the contract. This requires a lawful object and purpose.

Before 2016, the issues of the subject-matter (*objet*) of the obligation or the contract (C. civ., former art. 1126 to 1130) were the subject of specific provisions, like that of the *cause* of the obligation or contract (C. civ., former art. 1131 et seq.), but they were relatively succinct and rather mysterious, especially as regards the French concept of 'cause'.

For example, article 1108 identified the subject-matter of the contract and article 1129 the subject-matter of the obligation, which appears to be redondant.

From now on the question of the subject-matter of the contract is irrelevant : article 1163 considers only the subject-matter of an obligation.

Moreover, the subject-matter of the obligation is defined as the performance (*prestation*), and not as the thing or the service or money (which would be the subject-matter of the object, i.e. of the performance).

The question of the "cause", on the other hand, is supposed to be eliminated; it is no longer mentioned, except by the notion of "purpose" or “aim” of the contract (*but*).

So, this is a major piece of classical contract law, a romantic piece of French contract law, which made it possible to consider contracts or clauses as avoidable because of their contradiction with a certain conception of the cause. Considered obscure, this notion was thus abandoned, not without much doctrinal debate.

However, the question was in the end quite simple.

A classical conception of cause saw it as the reason for the contract, the immediate purpose of contracting (*causa proxima*) considered in an abstract and uniform way for any contract. Thus, in a synallagmatic contract, the obligation of each party finds its cause in the obligation of the other (I perform such and such a service because I will receive payment, and vice versa).

A more contemporary conception of cause was then proposed. It would be a matter of identifying the cause as the concrete reason (*raison déterminante*) for the contract, the motives which justified the contract (*causa remota*). The cause would then be different for each contract, subjective, its cause impulsive and determining.

Thus, it was a question of knowing for what reason(s) such a contract was concluded, and, thus, to identify possibly an illicit cause (why such an apartment is rented, to live there, the cause is licit; to install a brothel, the cause is illicit).

A synthesis was made by contemporary case law and doctrine.

The cause of the obligation, or objective cause, is the immediate purpose : the cause of the obligation is sought in the reciprocal obligation.

The cause of the contract, or subjective cause, is the motive, the impulsive and determining cause, which allows one to control the legality or lawfulness of a particular contract.

At the same time, the abstraction, the academicism, of the notion, which is very French and unknown to many foreign systems, beginning with the English conception of contracts, has led to its formal abandonment: in many respects, we shall see that, as regards the measure of the consideration, 'cause' remains, if not in its letter, at least in its spirit.

It is shamefull because it was a demonstration of the realism of French contract law, compared to formalism of English contract law : French contract law does not regard a contract as the contract says it is, but rather a contract as facts say it is, whatever this contract says it is. So, when a difference appears between the contracts as its content (suppletive or redacted) and actual contract, its content or behavior of parties, courts, and so lawyers, try to consider this difference to, sometimes, correct the situation : the concept of cause was a very good tool to do that (as good faith or otherwise).

The 2016 reform thus leaves two elements, object and purpose, but the whole can be distinguished according to the functions of the rules, with many of the issues addressed having been strongly inspired by some important developments that the jurisprudence had identified through the regime of the cause, through the identification of specific cases, making it possible to move away from the rather fuzzy conception prevailing before 2016.

The concept was of cause was considered as vague, but it had the merit of allowing judges, and the Cour de cassation, to grasp situations whose solution was as much a matter of legal technique as a moral or judicial concept.

The specific cases now retained make the review of the contract more objective, more formal, more “English”. Many think it is a mistake and that you could not change the sipirt of lawers simply by changing the words of the law.

We will see, and we began to see no real changes. However, there is still room for judges to maintain their ability to adopt original solutions.

Tree issues remains, the objet or *prestation*, the legality (*licéité*) of the contract, and que issue of balance of prestation (as the English *consideration*)

1. The object of an obligation : the *prestation*

a. The *prestation*

According to article 1163, the *prestation,* object of an obligation, what has been promised, must be existing and possible. A thing that cannot exist or no longer exists cannot be the subject-matter of a contract. Nevertheless, it is not required that the thing should exist when the contract was concluded. The contract may relate to a future thing, such as a sale of a building to be constructed or a harvest still under cultivation.

Where the subject-matter of the contract is not determined, article 1163(2) states that it must at least be capable of being determined.

This a question which concerns mainly the couple framework contract and implementation contracts in business contract law, regarding to the determination of the price of the contract.

i. Determination of the subject-matter on general.

Articles 1164, 1165 and 1167 deal with issues that were dealt with in a rather complex manner before 2016, through the question of price determination in certain framework contracts, in contracts for work and services and a rather marginal question concerning the question of indexation clauses.

The question of the determination or determinability of the price is in principle quite simple and associated with the question of the existence of subject matter. Thus, a sale of a thing, a suit for example, is concluded for a price of 500 €, a contract of enterprise, a lawyer's service for example, for a fixed price of 3.000 €: the price is determined here.

On the other hand, another sale may concern all the clothes contained in a shop or a contract concluded with a lawyer is established according to the number of hours that the lawyer will devote to the file: the price is undetermined, it is unknown.

It becomes determinable only if objective elements make it possible, in the future, to ensure this determination: a price per item of clothing, which it will be sufficient to count, a number of hours which the lawyer will have to justify.

The wording of article 1163, paragraph 2 takes a broader view:

"Performance [prestation] is determinable where it can be deduced from the contract or by reference to usage or to the parties' previous relationship, without the need for a new agreement between the parties".

It is therefore necessary that the elements of determination be present at the time the contract is concluded.

ii. Determination of price in framework distribution contracts.

Article 1164 provides that :

> *"in framework contracts, it may be agreed that the price shall be fixed unilaterally by one of the parties, who shall give reasons for the amount in the event of a dispute*".

In the event of abuse in the fixing of the price, the court may be seized of a claim for damages and, where appropriate, the termination of the contract", a formula which is not immediately understandable.

In the case of framework distribution contracts, the case law had used the requirement of determinability of the object, via a rather convoluted reasoning whose objective was to ensure the protection of distributors considered as weak and dependent, to decide that all these contracts had to foresee from their conclusion the elements of determination or determinability of the price of the goods sold in the performance contracts.

These were generally framework contracts for exclusive supply, the execution of which supposed the conclusion of sales contracts, implementation contracts (*contrats d'application*), whereas article 1591 of the Civil Code requires that the sale include a determined or determinable price.

Case law then considered that since the purpose of these framework contracts was to conclude implementation contracts whose price had to be determined or determinable that, by contamination, the framework contract had to determine the price of these future sales as of its formation. Otherwise, the framework contracts were voidable.

Why ? Because implementation contracts were more often sale contracts, and there is a provision in the sale contract law, article 1591 which states that the price of a sale must be determined or determinable.

And, second issue to consider, many framework contracts were regarding as concluded between huge enterprises, suppliers, and little one, distributors, which were supposed to contain clauses imposed, non negotiated, as non-competition clause, exclusivity clauses, post-contractual pre-emption clauses, termination clauses, and so far.

So if we found a way to avoid these contracts, then all these clauses will be avoided.

This requirement made a considerable number of these contracts voidable because of the presence of "list price" clauses, whereby the price of implemtation clauses was not determined at the time of the conclusion of the framework contract but was unilaterally fixed by the supplier at the time of the conclusion of the implementation contracts (or at the time of the publication of the new prices, depending on the supplier's own criteria), which is a common clause in all these contracts.

The price was therefore not determined, or at least not determinable except unilaterally (unilaterality then considered arbitrary), the cancellation of the contracts entailed the abandonment of all post-contractual binding clauses and, often, the obligation to pay a sum to the distributor as a compensation.

In 1971 and especially 1978, the *Cour de cassation* retained this analysis and begun to avoid framework contracts on the basis of (ancient) article 1129 of the Civil Code: *"it is necessary for the validity of the contract that the portion of the object which is the obligation can be determined"*, i.e. the price.

This solution was widely criticized as inappropriate, whereas competition law contains all the tools to avoid the arbitrariness of the supplier, if this was the goal of the case law, whereas the action for cancellation of the framework contract by the distributor was never during the life of the contract but after its expiration, to escape a post-contractual non-competition clause, for example, by using absolute nullity, which sanctioned the lack of determination of the price within the meaning of this case law.

In 1991, in a clumsy manner, but especially in 1994, the Cour de cassation sought a solution which resulted in 1995 in a solution which is partly taken up by article 1164: *"article 1129 of the Civil Code is not applicable to the determination of the price" and "where an agreement provides for the conclusion of subsequent contracts, the fact that the price of these contracts has not been determined in the initial agreement does not affect the validity of the latter, except where there are legal provisions to the contrary"*, and, finally, that *"abuse in the fixing of the price may give rise to termination or compensation*".

The result was that unilateral price fixing by the supplier was no longer considered to be arbitrary price fixing, nor was it an overall price fixing technique. Consequently, the framework contract could perfectly well include a list price clause. But, at the same time, the dispute, which had been fixed at the time of the formation of the contract, moved to its execution since the distributor could accuse the supplier of having committed an abuse in the fixing of the price. However, the Court does not give any criteria to identify such an abuse: it is not only the increase of a price that is the basis of the abuse, but the circumstances surrounding it, the duration of the contract, the intensity of the obligational links, the presence of an exclusivity clause for example.

Moreover, the sanction retained by the courts before 2016 was the termination of the contract and not its resolution. This precision is essential insofar as both are legal techniques for breaking a contract, resolution being, in principle, retroactive, unlike termination.

Article 1164 almost repeats the formula of the 1995 judgment: the unilateral fixing of the price of performance contracts by the supplier is possible and makes that price determinable. On the other hand, in the event of a change in this price, the supplier is liable for the abuse in its fixing, either by damages or by rescission of the contract, this sanction thus resulting in the retroactive destruction of the contract or, if this is impossible, possibly in the payment of damages to compensate for the difference with the "abusive" price.

iii. Determination of the price of contracts for services.

Article 1165 provides that 'In contracts for the provision of services, in the absence of agreement between the parties before their performance, the price may be fixed by the creditor, who must give reasons for the amount in the event of a dispute. In the event of abuse in the fixing of the price, the court may be seized of a claim for damages and, where appropriate, the termination of the contract.

The price in business contracts is determined in a variety of ways: it may be a fixed price (such and such a price fixed for such and such a service), a price based on an indeterminate number of hours of work, a proportional price (based on a turnover), a mixture of these techniques, etc.

Consequently, it is conceivable that the price may be either determined, or determinable, or indeterminate at the time of the formation of the contract, depending on the case. This is the solution of the special law of contracts for services which article 1165 takes up here in a general way: where the price is not fixed, it may be fixed unilaterally by the creditor, subject to the creditor giving reasons in the event of a dispute. In the event of abuse, this may lead to either damages or the termination of the contract.

The formula seems to take up, in an indirect way, the case law existing since the end of the 19th century validating, in the case of a contract of mandate or of a contract of enterprise, the request for revision of unjustified fees, provided that the unjustified character is demonstrated.

2. Legality (*licéité*) of the content

Pursuant to article 1162 :

> "a *contract cannot derogate from public policy either by its stipulations or by its purpose, whether or not this was known by al/ the parties".*

The "***bonnes moeurs****"* are no longer included in this article. However, one may think that the concept of public policy is broad enough to encompass them. It is surprising because, in case law, many judgment used the "*bonnes moeurs"* way to condemn some behaviours or act, as, for example, corruption, before the international measures to fight against, in 1997, in Europe, and 2003 with the Merida Convention, better than the public policy ways because it doesn't actually exist, for example in the *Westman* case, regarding international arbitration, in 1993.

It follows from article 1162 that some rules are deemed so essential to the public interest that no agreement may override them. Respect for public policy represents the limit to freedom of contract.

The lawful "*but*" ("aim" or "purpose"). The assumption of public policy is the other referent of article 6 of the Civil Code and article 1162 of the Civil Code. The latter text, resulting from the 2016 reform, does not exactly repeat that of the former article 1133 of the Civil Code ("The cause is unlawful, when it is prohibited by law, when it is contrary to morality or to public order"). Article 1162 provides that a contract must not derogate from public policy "by its '*but*'". It is sufficient to replace "*but*" by "*cause*" to obtain the same type of requirement.

The lawful "*but*" of a contract may thus be considered, as was the *cause* of the contract, as the motive, the reason, which led a party to enter into a contract, what was formerly called the remote *cause* (causa remota), as opposed to the immediate *cause* (causa proxima), which is the mutual performance. Article 1162 thus indicates that it is immaterial whether the purpose was known or not by all the parties. The "*but*" may therefore be perfectly lawful for one party, but not for the other: one person rents an apartment to another, but the other rents it to house terrorists. Valid for the one, it is not for the other. This "division" of the case is not self-evident. Thus, in a judgment of 1956, in a case involving the lease of a building in which the tenant had set up a brothel, the Cour de cassation required that the motive, which was considered unlawful, had not only been common but agreed between the parties, so that it had to be included in the contractual field.

The extent of public policy is constantly in evolution as it depends on the society values atone time.

The French law distinguishes between many forms of public policy. There is a family, labour, or economic public policy. For example, public policy justifies the cancellation of contracts infringing basic human rights or the integrity of the human body.

Economic public policy rules can be divided into two kinds of rules.

– Public policy of direction consists of rules that are imposed by the State in an attempt to protect the core values of society, as competition law for example.

– Public policy of protection covers imperative norms intended to protect specific groups of citizens or interests which are under particular care by the State.

This division is mainly pedagogic but not very efficient, many rules in the former (protection) concerns direction issues, and the reverse for the latter.

Moreover, there is public policy rules by the law, but also, what we call virtual public policy rules, designed by case law, when a court ruled a law as including public policy rules, or when case law creates rules, as with non-competition clauses, where there no explicit laws to rule this issue.

International agreements, there is also two specific concepts, **international public policy**

(*ordre public international*) and **overriding mandatory provisions** "*lois de police*".

In international contracts, facing a court or an arbitrator, public policy rules are relative, only overriding mandatory provisions can be imposed. Regarding article 9 of the Rome I Regulation, on the law applicable to contractual obligations, "*overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation"*.

For example, if contractors enter into an international contract that includes an anti-competitive effect or a hypothesis of corruption, and choose a law that validates this type of behavior to apply to the contract, the judge, for example a French judge, will set aside the chosen law and impose French police law, French and European competition law or French criminal rules or the Merida Convention of 2003 prohibiting the corruption of foreign public officials. On the other hand, in the case of a foreign mandatory law, claimed by a foreign contractor before a French judge, the latter has a simple option to apply it, if it is not contrary to French international public policy.

International public policy is a more complex concept, used by the judge who receives a foreign decision or an international arbitration award in order to impose its enforcement in France : this is done by way of an *exequatur* decision (enforcement or recognition) which is only possible if the foreign decision or the arbitration award complies with the French (o English, or American, etc.) concept of international public policy. So international public policy is a domestic issue.
This can include both internal and international rules: for example, the suspension of proceedings in the case of a company subject to collective proceedings, but also the prohibition of corruption or influence peddling, money laundering, anti-competitive practices, etc., as well as international state sanctions such as embargoes, economic sanctions against a country, its leaders, "persons of interest", companies, etc. All these rules of international public economic law, but also of foreign investment law, have a direct or indirect impact on the validity of a contract.

Validity of the contract and economic legislation. - It should be noted above all that the development of verification of the lawfulness of the contract can be seen in the application of economic rules, both from legislation or case law.

For the last fifty years or so, this legislation has endeavoured to combat two types of practices, those known as " restrictive practices of competition", in which one can identify questions relating to tariff transparency (C. com., art. L. 441-3 et seq.), but also specific clauses such as mandatory minimum resale price clauses. There is also "anti-competitive practices" rules, which are covered by antitrust law, i.e. practices that have an effect on a market and, in particular, various forms of agreements, qualified as "cartels", or "abuse of dominance" between companies through a concept close to that of the cause of civil law of contracts (cf. C. com., art. L. 420-1 and L. 420-2 ex-Ord. 1 Dec. 1986, art. 7 and 8; TFEU, art. 101 and 102). However, article L. 420-3 or article 101§2 TFEU proposes an automatic nullity of clauses or contracts that are contrary to this public order of competition.

Example 1 : non-competition clause. These clauses require a person who is bound to another

person under an activity contract (employment contract, agency contract, self-employment contract, distribution contract, management lease, etc.) or a contract involving the transfer of an activity (contract for the transfer of a business, contract for the transfer of a title, etc.) not to engage in an activity (often at the end of the contract: post-contractual non-competition clauses).

The principle of contractual freedom requires that they be considered valid, as a matter of principle, even though they conflict with the principle of freedom of trade and industry or the principle of freedom of employment.

For a long time, the validity of such clauses was subject to compliance with objectively assessed conditions: limitation as to the prohibited activity (not prohibiting everything), limitation in time and space, so that it was sufficient for these limitations to be present for these clauses to be valid.

Since 1992, the Cour de cassation has adopted a more subjective approach, by applying the principle of proportionality, regarding the imposing in the first place the existence of a legitimate interest on the part of the creditor and assessing the proportionality of these clauses and of the infringement of the principle of freedom of employment or of trade and industry with this legitimate interest in such a way that these clauses may be set aside, reduced, depending on the case, or even, in the case of an employment contract, subjected to an additional requirement, that of remuneration (on the basis of the cause, moreover).
But there is also competition rules.

VBER (Vertical Block Exemption Regulation) n° 720/2002, replacing VBER n° 330/2010, contains article 5 regarding the non-competition clauses issue.

So, reasoning in European competition law must be regarding article 101 of TFEU as a whole. Article 101§1 prohibits cartel, or anti-competitive agreement, and a non-competition clause is one of this agreement, also when it is in a contract. But in this case, we need to apply article 101§3 regarding to exemption rules, including Block Exemption Regulations.

But **European competition law** applies only in important cases, regarding to the "De minimis" communication, in 1997, which considers European competition in not applying when market shares of parties are situated under (in vertical restraints) 15% of the relevant market (to be defined in each case).

Beyond the "de minimis", exemption shall apply on condition that market share held by the supplier and the purchaser does not exceed 30% of the relevant market. So beyond this threshold of 30%, exemption shall not apply, which an individual exemption is needed.

Even under the 30% threshold, some practices, designed as hardcore restrictions, (as price fixing clauses to resale prices, or in an exclusive distribution system, restriction of the territory of exclusivity clause, into which the exclusive distributor may not actively or passively sell the contract goods or services, so he can not propose offers outside this territory or accept offers from customers coming from outside the contractual territory), affect the ability to the benefit of the exemption.

Article 5 considers some practices, as clauses, which are called excluded restrictions, as long terms exclusivity clauses (exceeding 5 years), and non-competition clauses (obligations). Regarding theses clauses, article 5.3 states that :

> *" By way of derogation from paragraph 1, point (b), the exemption provided for in Article 2 shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where all of the following conditions are fulfilled:*
> *(a) the obligation relates to goods or services which compete with the contract goods or services;*
> *(b) the obligation is limited to the premises and land from which the buyer has operated during the contract period;*
> *(c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer;*
> *(d) the duration of the obligation is limited to a period of one year after termination of the agreement".*

So in European competition law, if it applies, non-competition clauses are valid only in vertical restrictions containing a transfer of know-how, especially franchising agreements, but not only.

Example 2 : exclusivity clauses. In this case, in French contract law, article L. 330-1 and 2 of the commercial clause provides limitation of the duration of such a clause in a sale or lease contract of good at ten years, extended by case law to any framework contracts xhich implementation contracts are sale contracts of goods. In other contracts, for example in a distribution contract of services, it is not clear whether or not it shall apply. If not, we can try to consider an exceeding duration of such an obligation as a perpetual obligation, which, since the 2016 reform of contract shall be considered as indefinite terms of contract, and, so, able to be terminated by each party of the contract.

But competition law can also, as non-competition clauses, apply. In this case, two concerns appears.

First, article 4 (hardcore restrictions) regards as enable to be exempted, absolute territorial exclusivity clauses. As seen, such a clause is invalid, and invalids the whole contract when the clause forbids the purchase to offer beyond the territory or to accept offers form customes coming beyond this contractual territory.
Second, article 5§1 (excluded restriction) states that :

> *"1. The exemption provided for in Article 2 shall not apply to the following obligations contained in vertical agreements:*
> *(a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds 5 years;*
> *(b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;*
> *(c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers;*
> *(d) any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable*

conditions via competing online intermediation services;"

So, in the general case, we must consider if European competition law is applying, and in this case, the duration shall not exceed five years, or EU competition law in not applicable, so French rules, if applicable -in an international contract) limits this duration to ten years.

3 - Contractual balance or unbalance

It is a great challenge, to legislator or to lawyers to consider the balance of interest in a contract : we can expect that any party try to conclude with an unbalance in his favor, sale or purchase at a good price. Contractual balance is reached where the whole obligations assumed by a party are of the same value as those of the other, this balance being considered in an overall manner.

But il it also an oxymoron to consider sanctioning contractual unbalance. Tolerate huge unbalance is, certainly insufferable to the whole legal system, because it should validate scams, in criminal cases, or, in a civil perspective, an economic harm (*lesion*). In other regard, if every contract can be challenge by filing an application to control balance or unbalance of a contract, no contractual security can be guaranteed. Si contract law, in most countries consider that unbalance cannot be controlled except in some strict exceptions.

This explains that they are no provision in French which guarantees balance in a contract and why article 1168 of the Civil code states that :

> *"in synallagmatic contracts, the absence of equivalence in the acts of performance is not* a *grounds for nullity of the contract, unless otherwise provided by legislation".*

Exceptions are multiple, and we can consider five of them.

a) Consistency of consideration

Article 1169 specifies that *"an onerous contract is null and void when, at the time of its conclusion, what was agreed in return for the benefit of the persan undertaking an obligation was illusory or derisory"*

.

Article 1169 is intended to sanction the absence or quasi-absence of any consideration. A derisory or illusory price will involve nullity of the contract. Conversely, an insufficient price is not enough to question its validity due to the principle that substantive inequality of bargain should not be taken into account. II appears from this text that imbalance in itself is not sufficient to question the validity of the contract. But the Civil Code may not tolerate the existence of excessively imbalance contracts. Even if the equivalence of benefits is not a legal requirement, the Civil Code contains provisions against particularly high imbalances.

b) Deprive of the essential obligation

According to article 1170, *"any contract term which deprives* a *debtor's essential obligation of ifs substance is deemed not written".*

This new article 1170 will be used to suppress clauses which undermine the essential obligation of the contract. The essential obligation is the one in the absence of which the parties would no longer have any interest in the contract. The rationale behind the article is that the contract cannot bath bind the debtor and contain a clause that relieves him of his obligations.

This provision come from the *Chronopost* case which in 1996 rules that a limitative liability clause, when it concerns an "essential obligation", delivery in a sale contract for example, is deemed not written, regarding for lack of cause.

c) Significant imbalance

According to article 1171(1), *"in* a *standard-form contract, any clause which creates* a *significant imbalance in the rights and obligations of the parties to the contract is deemed to be not written".*

Paragraph 2 outlines that the evaluation of the significant imbalance does not concern either the *main subject-matter of the contract or the adequacy of the price* in relation to the act of performance.

Until now, the system of protection against such unfair terms was organised under the Consumer Code : article L. 212-1 of the Consumer protection Code, which provides the same kind of sanction, but in the field of a consumer contract. Such a provision exists in consumer law since 1978 in France and spread in EU law by a Directive of 1993.

But here is also a specific provision in the Commercial Code, regarding unfair commercial practices in article L. 442-1, I, 1° and 2°.

This article must be combined with article L. 442-1 at his whole and to article L. 442-4 of the Commercial Code :

> ***Article L. 442-1*** *: I. - Any person engaged in production, distribution or service activities, in the context of commercial negotiations, the conclusion or performance of a contract, shall be liable for and shall be obliged to compensate the damage caused by:*
> *1° Obtaining or attempting to obtain from the other party an advantage that does not correspond to any consideration or that is manifestly disproportionate to the value of the consideration given;*
> *2° To subject or attempt to subject the other party to obligations that create a significant imbalance in the rights and obligations of the parties;*
> *3° To impose logistical penalties that do not comply with article L. 441-17 ;*
> *4° With regard to food products and products intended for the feeding of pets subject to I of article L. 441-1-1, to practice, with regard to the other party, or to obtain from it discriminatory prices, payment deadlines, conditions of sale or terms of sale or purchase that are not justified by real considerations provided for in the*

agreement referred to in article L. 443-8, thereby creating a disadvantage or an advantage in competition for this partner
II. - Any person engaged in production, distribution or service activities who abruptly breaks off, even partially, an established commercial relationship, in the absence of prior written notice that takes into account, in particular, the duration of the commercial relationship, with reference to trade practices or interprofessional agreements, shall be liable for the damage caused and shall be required to pay compensation.
In the event of a dispute between the parties as to the duration of the notice period, the party who terminated the relationship may not be held liable for an insufficient period of notice if he gave eighteen months' notice.
The provisions of the present II do not prevent the option of termination without notice in the event of non-performance by the other party of its obligations or in the event of force majeure.
III. - Any person offering an online intermediation service within the meaning of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 promoting fairness and transparency for business users of online intermediation services shall be liable for any damage caused by failing to comply with the obligations expressly provided for in the same Regulation.
Any clause or practice not expressly referred to in the said Regulation shall be governed by the other provisions of this Title".

Article L. 442-2 : *Engages the responsibility of its author and obliges him to repair the damage caused the fact, by any person exercising activities of production, distribution or services to participate directly or indirectly in the violation of the prohibition of resale out of network made to the distributor bound by an agreement of selective or exclusive distribution exempted under the applicable rules of competition law.*

Article L. 442-3 *: Clauses or contracts providing for any person engaged in production, distribution or service activities, the possibility :*
a) To benefit retroactively from discounts, rebates or commercial cooperation agreements ;
b) To automatically benefit from more favorable conditions granted to competing companies by the co-contractor;
c) To prohibit the other party from transferring to third parties the claims it has on the other party.

Article L 442-4 *: I.-For the application of Articles L. 442-1, L. 442-2, L. 442-3, L. 442-7 and L. 442-8, an action is brought before the competent civil or commercial court by any person who can prove an interest, by the Public Prosecutor's Office, by the Minister in charge of the economy or by the Chairman of the Competition Authority when the latter observes, in the course of matters within its jurisdiction, a practice mentioned in the aforementioned Articles.*
Any person with a legitimate interest may ask the court to order the cessation of the practices referred to in Articles L. 442-1, L. 442-2, L. 442-3, L. 442-7 and L. 442-8, as well as compensation for the harm suffered. Only the party who is the victim of the practices provided for in Articles L. 442-1, L. 442-2, L. 442-3, L. 442-7 and L. 442-8 may have the unlawful clauses or contracts declared null and void and request

restitution of the undue advantages.
The Minister for the Economy or the Public Prosecutor's Office may ask the court to order the cessation of the practices mentioned in Articles L. 442-1, L. 442-2, L. 442-3, L. 442-7 and L. 442-8. They may also, for all these practices, have the unlawful clauses or contracts declared null and void and request the restitution of the advantages unduly obtained, provided that the victims of these practices are informed, by all means, of the institution of this legal action. They may also request the imposition of a civil fine, the amount of which may not exceed the highest of the following three amounts:
-five million euros
-three times the amount of the benefits improperly received or obtained;
-5 % of the turnover (excluding tax) in France of the perpetrator of the practices during the last financial year since the financial year preceding that in which the practices were carried out.
II - The court shall systematically order the publication, dissemination or posting of its decision or of an excerpt therefrom in accordance with the procedures it shall specify. It may order the insertion of the decision or an extract from it in the report drawn up on the operations of the financial year by the managers, the board of directors or the management board of the company. The costs are borne by the convicted person.
The court may order the execution of its decision under penalty.
The summary proceedings judge may order, if necessary under a fine, the cessation of abusive practices or any other provisional measure.
III - Disputes relating to the application of Articles L. 442-1, L. 442-2, L. 442-3, L. 442-7 and L. 442-8 are assigned to courts whose seat and jurisdiction are determined by decree".

The purpose of this whole can explain the importance of article L. 442-1 of the Commercial Code. It concerns every business contracts but the core of the provision concerns mainly relationship between suppliers and buyers, and especially mass retail undertakings. When this kind of unbalance is observed, the supplier, or the Ministry of the Economy can suit the buyer. The Ministry of the Economy may suit independently, and can obtain large damages and the restitution of the advantages unduly obtained, which are generally widely superior to damages and to the civil fees.

The whole system must be articulated even if article L. 442-1 appears to be a specific law comparing to article 1171 and even if they not proceed in the same way. For example paragraph 2 of article 1171 states that unbalance can not concern main subject-matter of the contract or the adequacy of the price, contrary to article L. 442-1 of the commercial Code.

However, a judgment, in 26 January 2022, ruled that article 1171 shall be considered as a general rule and any others, including article L. 442-1 as specific rules, so they must be applied in priority and if not applied, so article 1171 of the Civil Code can be applied.

d) Lesion (economic harm)

Lesion (or economic harm) refers to the prejudice suffered by a contracting party in the event of a serious disproportion, at the time the contract was concluded, between his performance and that of the other contracting party.
lt can only be invoked in some specific contracts.

This occurs, for example, where a vendor sells his property at a price that is too low compared to its actual value. Article 1674 contains this rule in the context of a sale of an immovable where the seller suffers a loss of more than seven-twelfths of the price. lt is considered that such imbalance should result from an exploitation of mental weakness or need for money suffered by the seller.

Similarly, special rules will apply to minors and protected adults.

e) Other provisions in business law

Many specific rules contain such exceptions of article 1168 of the Civil Code. For example, article 1844-1 prohibids the *"clause leonine"* in statutes of any corporation : it is a clause which reserve benefits of a company to a sole associates or make the supports of any debt to another.

Other example in contracts of carriage, article L. 133-1 of the commercial code states that any limitation of liability of obligations of the conveyor is void.

D. Forms

As a rule, no form conditions are required by article 1128 for the validity of a contract.

This is the principle of mutual consent (*consensualisme*), which results from the freedom of will.

Contracts only require the consent of the parties This principle makes it easier to conclude contracts.

lt is still contained in the new article 1172(1).

Exceptions to the principle of mutual consent. Form requirements may sometimes be specified.

– Some of this exceptions are situated in the field of proof.

Article 1359, for example states the principle of written proof for legal acts. Electronic writing has been given the same probative value as paper writing (article 1366).

Other form rules are required to render the contract effective against third parties.

For example, the sale of an immovable only becomes enforceable against third parties after it has been registered in the land register.

Article 1173 makes it clear that *"form requirements imposed for the purposes of proof of* a *contract or setting up* a *contract against another persan have no effect on the validity of the contract"*.

– Some main exceptions interest the *very validity* of the contract.

According to article 1172, the validity of some contracts does not simply result from an exchange of consents.

The validity of *formal* contracts depends on the respect of the mandatory form requested. It can be a written contract, mainly, of a contract passed in front of a public officer, a *notaire*, for a donation for example, very useful to transmit an enterprise for a father to its heirs.

The validity of *real* contracts is subject to the delivery of a thing. The validity of solemn contracts depends on the drawing up of an authentic written document or a private agreement. Main exempla is loan of a thing or deposit of a thing, that both are considered as real contracts.

This is a huge difficulty in business contracts. There is a lot of distribution contracts for example, where they are some clause imposing to one person to loan a thing or money, or deposit things.
What we call *"beer contracts"* for example are concluded between a brand, which posseses actually many brands, of its owns or as a licensee, and a restaurant, an hôtel or a "*bar*", a café, with an exclusive clause of supply. To facilitate the conclusion and the weight of the exclusivity, many contracts content loan of money, for example to help to buy the business ot to redesign and refurbish the shop.

Second example an alternative to franchising agreements with sale contracts as implementation agreements is also developed from years. Ordinary, the franchisor sale goods to the franchisee. So the franchisee must finance its stocks and run the risk of unsold goods, and cannot resale goods at a minimum imposed price by the franchisor. But, it is the franchising business model to have goods sold by franchisee at the same price everywhere in a country, and maybe in the world. But this is a criminal issue in France, even largely ignored, and it is also, and mainly anticompetitive, and constitutes a Hardcore restriction, regarding article 4 of the VBER. So to circumvent these issues, franchisor develop what they call themselves "commission affiliation", in which there are the basic of a franchising agreement, transmission of a know-how, of trademarks and other distinctive signs, and assistance of the franchisee : this is the "affiliation" component of the agreement. Thus, franchisor doesn't rallu "sale" goods but deposit them via a sela-deposit contracts. The franchisee doesn't buy, he doesn't finance the stock, can sale at a fixed price, because it is not a resale (actually, advised prices of sale, because of the VBER concern), he can return unsold goods, and so on. But in this case, deposit agreement is not actually a deposit agreement but a promise of deposit agreement : the deposit agreement is actually concluded only with the taking of goods, which is no a *delivery,* because delivery is an obligation, performance of a contract yet concluded, and it is not concluded until goods are not longer in the possession of the depository.

Ill - Rules to sanction a violation of the conditions of a valid agreement

ln the event that one of the conditions of the contract formation has not been fulfiled, the contract cannot validly create legal effects. This deficiency is punished by nullity of

contract. This leads to the retroactive suppression of the contract due to a defect which occurred at the time of its conclusion.

Nullity must be differentiated from lapse of contract. Under article 1186(1), "a *contract which has been va/id/y formed /apses if one of ifs necessary e/ements disappears".*

Nullity is declared by the court after a legal action has been brought (A). Effects of nullity are determined by the Civil Code (B).

A - Legal action for nullity

A claimant who seeks nullity of a contract has to bring an action before the court. Article 1178(1) makes it clear that *"nullity must be dec/ared by* a *court".*

This action is subject to different rules (2) depending on whether there is a relative nullity or an absolute nullity (1).

1. Distinction between relative nullity and absolute nullity

Rules governing this action for nullity are different depending on whether it concerns an absolute nullity or a relative one.

Article 1179 draws a distinction between the violation of a requirement of public interest, which is sanctioned by **absolute nullity,** and the breach of a private interest, which is punished by **relative nullity.**

For example, nullity for impossible or illegal content is considered as being in the public interest. Therefore, it will be punished by absolute nullity of the contract.
On the contrary, relative nullity will apply, for instance, to unsoundness of mind, defects in consent, incapacity to exercise rights, or lesion. This is justified as the requisite condition is intended to protect one of the parties.

2. Effects of the distinction between relative nullity and absolute nullity

This distinction determines the legal rules governing the action for nullity.

a - Persons entitled to bring an action for nullity

Given that relative nullity is a nullity of protection, it can only be invoked by a limited group of persans. Article 1181(1) adopts a narrow view since relative nullity may be claimed only by the party that the legislation intends to protect. ln fact, other persans are also entitled to bring an action in the place of the beneficiary party.

For example, his heirs may invoke a relative nullity.

As regards an action for absolute nullity, article 1180(1) states that *"abso/ute nullity may be c/aimed by any persan who can demonstrate an interesf',* as well as by the State Prosecution service.

b - Limitation period

- The action for nullity is subject to the ordinary limitation period of five years (article 2224). This limitation period runs from the day on which the contract was concluded or, where appropriate, from the day on which the defect of consent disappeared. Special texts, in particular in the Consumer Code or in the Commercial Code, provide for shorter periods.

- This limitation period may be interrupted or suspended under the ordinary conditions defined by articles 2233 ff (see, Lesson 8, General Regime of Obligations, Section 3, **111,** B).

- Nullity may also be raised as a defence. According to article 1185, such defence of nullity can be claimed at any time.

c - Affirmation

Article 1182(1) states that *"affirmation is an act whereby* a *persan who cou/d rely on the nullity of the contract renounces the right to do so".*

- Affirmation is only available where there is a relative nullity. lt is ruled out in the event of absolute nullity. This exclusion is easily justified. Affirmation by a persan extinguishes only his own right of action. However, the action for absolute nullity is for any interested persan.

- The 2016 Ordinance has introduced a new interrogatory action. Linder article 1183, "a *party may c/aim in writing tram a persan who could rely on the nullity of the contract either to affirm it, or to proceed with an action for nullity within a period of six months, on pain of losing the right to do so. The grounds of nullity must have ceased".* The writing expressly states that in the absence of an action for nullity brought before the expiry of the six-month period, the contract will be considered to have been affirmed.

B - Effects of nullity

The extent of nullity can vary (1). As a rule, nullity leads to the retroactive disappearance of the contract which is treated as if it had never been made (2). Consequently parties return to their initial position and they have to restitute what they received.

1. Extent of nullity

Article 1184 of the Civil Code recognises that the contract may be partially null and void. The aim is to condemn only what was illegal, while preserving the rest of the contract. Where the ground for nullity exclusively affects one or more contract terms, nullity of the entire act only occurs if that orthose terms were a decisive factor in the commitment of the parties or of one of them.
ln addition, the contract is maintained where the law treats the term as not written.

2. Retroactive effect of nullity

The retroactive effect of nullity involves restitutions.

For example, where a sale has been annulled, the seller must pay back the price and the buyer must render the thing.

The rules on restitution are different depending on whether the contract was for a sum of money (a), a thing (b) or a provision of services (c). Moreover, the Civil Code has introduced rules to protect third parties from the effects of restitution (d).

a - Restitution of money

Where the contract only involved a sum of money, this must be paid back. Article 1352-6 points out that *"restitution of a sum of money includes interest at the rate set by legislation and any taxes paid to the persan who received if'.*

b - Restitution of a thing

As a general rule, article 1352 provides that *"the restitution of a thing other than a sum of money takes place in kind or, where this is impossible, in value, estimated at the date of the restitution".*

ln addition, the Civil Code contains other specific rules.

- Difficulties may arise when a period of time has elapsed between the conclusion of the contract and the recognition of its nullity. The one who returns the thing is liable for damages and deteriorations that have reduced its value, unless he is in good faith and these are not caused by his fault.

- Where the thing has been sold, the persan who is required to return it is only under the obligation to pay the price received if he is in good faith. ln the event of bad faith, he must restitute the value of the thing if it exceeds the price.

- According to article 1352-3, the restitution includes the fruits and the value of the enjoyment provided by the thing. If the fruits are not returned in kind, their value is estimated at the date of restitution.

- Article 1352-5 provides that the persan entitled to the restitution must reimburse expenses necessary for the conservation of the thing and those which have increased its value, to the extent of the estimated capital gain at the date of the restitution.

- Where the nullity has been granted in favour of an incapacitated persan, he is not required to restitute all that he received. Otherwise, nullity would not be of much interest to him. According to article 1352-4, restitution *"is reduced in proportion to the profit which he has drawn from the act that has been annulled".*

c - Restitution in respect of provision of services

Linder article 1352-8, such a restitution takes place in value, assessed at the date at which the service was provided.

d - Position of third parties

With regard to third parties, the retroactive effect of nullity can produce serious consequences as no one can transmit more rights than he has himself.

For example, if a sale is annulled while the purchaser had already resold the property, the sub-purchaser's right disappears as a result of the destruction of the purchaser's right.
Various methods are used to allow a third party to conserve his property.

- The sub-purchaser of a movable may invoke article 2276(1) which states that *"possession equals title"*. He must be in good faith.

- The sub-purchaser of an immovable may invoke acquisitive prescription. He has to justify a certain period of possession which varies according to whether he is in good faith or bad faith (cf Lesson 5, Property Law, Section 2, II, C).

- More generally, the courts apply the theory of appearance which makes it possible to preserve the right of a third party who made a legitimate error.

Section 3. Performance of a contract
(…)
Section 4. Transmission of a contract
(…)

Section 5 Termination of Business contracts

§ 1 Causes of termination

§ 2 Effects of termination