

The new look of the contract's guiding principles

المظهر الجديد للمبادئ التوجيهية للعقد

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Date of submission:02/04/2025 Date of final acceptance:06/06/2025 Date of publication :juine2025

Abstract

The guiding principles participate in preserving the legal aspect of the contract on one hand and its social aspect on the other hand by searching for the economic efficiency that each party is seeking.

The jurisprudence, the judiciary and the legislation all created some sort of turmoil in the contract theory, which was dubbed as "the contract theory crisis", as a result of the obstruction in the debate between the conservative jurisprudence and reformist jurisprudence, each point of view seen itself as the only one with a solution for the problem; however, the moderate centrist take would still be the closest take to impose itself, at least in the near future

Keywords : contract; guiding principles; good faith; party autonomy, binding force

ملخص:

تساهم المبادئ التوجيهية في المحافظة على الكيان القانوني للعقد من جهة والاجتماعي من جهة أخرى البحث عن الفعالية الاقتصادية التي يسعى كل طرف الى تحقيقها.

ساهم كل من الفقه، القضاء والتشريع في خلق نوع من الاضطراب الذي تمر به نظرية العقد بما سُمي "بأزمة نظرية العقد" بالنظر الى الانسداد الذي وصل اليه النقاش بين الفقه المحافظ والفقه الإصلاحي لنظرية العقد، كلٌّ مؤمن بأن الخروج من النفق يستدعي اتباع الحل الذي يقترحه، ويبقى التيار التوافقي والوسطي هو الأقرب الى فرض نفسه، على الأقل في المستقبل العاجل.

الكلمات المفتاحية: العقد، المبادئ التوجيهية، حسن النية، سلطان الإرادة، القوة الملزمة

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Introduction

The contract is a legal mechanism for the exchange of interests between persons. Originally organised in civil law, the contract is one of the oldest concepts to have given rise to a wide-ranging doctrinal debate, which is still the subject of theoretical and practical discussion today.

For a long time, contemporary contract theory was relatively stable but recently, some schools of thought began to call for a reform of the basic principles of contract theory. These currents came up against another trend, which advocated the maintenance of these principles.

Against this backdrop, the courts have continued to seek to justify their repeated departures from the guiding principles of contract theory by invoking some principles that are considered obsolete and no longer have any real impact on contract theory.

It therefore seems that a re-examination of the traditional guiding principles has become necessary, imposed by different evolutions, which calls for a renewal. In addition to including a 'traditional' principle (known in domestic and international law), namely the principle of good faith. This gives us a new picture of contract theory.

SECTION I: Modernisation of traditional contracting principles

Contract theory is based on basic principles without which it is difficult to conceive of its existence. These principles are seen as a wall of security. However, the limits of these principles remain unclear and are subject to many variables, including economic, social, political and so on.

SUBTITLE A: The principle of freedom of contract underpins the motivation to engage in contractual agreements.

This guiding principle gives the contracting party a wide discretionary power (first requirement), but this power can be reduced by legislative or regulatory intervention in order to establish special protection (second requirement).

1- Authority to act at their discretion is granted to the contracting party

This authority gives a set of powers which remain exclusive to him, without the interference of any will outside his personal will. These powers may be summarized as follows.

a- The choice to commit

Any person can oblige another one to enter into negotiations with a view to concluding a specific contract without initially being obliged to do so¹. This right is legally referred to as the freedom to enter into a contract or not², as an exclusive right of the individual³. Some rules have been imposed on contractors during the pre-contractual period⁴, but if the person considers that his own interest is not guaranteed by what he has obtained through negotiation, he can refuse the contract without being legally obliged to justify his position by refusing to contract⁵.

This conclusion is in line with a 2010 Algerian Supreme Court decision concerning a case that can be summarised as follows: one party sought the intervention of the court to order another party to appear before a public official, namely a notary, for the purpose of concluding a contract for the sale of an apartment. The Oran court granted the plaintiff's request. However, the Supreme Court overturned the lower court's decision and raised a point of law based on the incorrect application of the law, ruling that *"the expression of will must result from the free will of its author. It follows from this analysis that the trial judges, by requiring the applicant to appear before the notary to sign the contract of sale, erred in the application of the aforementioned article. This error*

*renders their judgment subject to annulment, without it being necessary to discuss the issues raised”.*⁶

b- choosing the person with whom to contract

This principle was confirmed by the Commercial Chamber of the French Court of Cassation in a 2017 ruling, which ruled out the idea of requiring the contractor to specify in advance objective criteria indicating how to choose the contracting party⁷. This decision has been analysed by researchers from an economic and legal perspective⁸.

The French Court of Cassation recently handed down a decision that illustrates this point. It was called upon to rule on a specific case, the facts of which can be summarised as follows: two pharmacies located in a village share the needs of two associations working in the paramedical field. During regional elections, a disagreement arose between the mayor, who also serves as president of both associations, and the spouse of the owner of one of the local pharmacies. In response to this situation, the two associations decided to continue working exclusively with the other pharmacy, without providing any explicit justification for this decision. This measure led the owner of the original pharmacy to initiate legal proceedings to obtain compensation for the termination of the collaboration.

The Court of Appeal of Aix-en-Provence had initially ordered the two associations to pay damages to the pharmacy. However, the Court of Cassation overturned this decision⁹, which attracted considerable interest from the legal community. The Commercial Chamber ruled that the two associations had the right, in the name of freedom to choose their contractors, to terminate any relationship with either of the two pharmacies without having to justify their position, and that they incurred no liability in this regard.

This decision by the Court of Cassation is of paramount importance, as it reaffirms the fundamental principle of contractual freedom, according to which each party is free to choose its co-contracting party. This freedom is in no way limited by external circumstances or tensions between the parties. Thus, the decision of the Court of Cassation emphasises that the right to choose a co-contractor without having to provide justification is an inalienable right for each party, thereby preserving the autonomy of will within the contractual framework.

2- Government-driven legislative and regulatory intervention.

The imbalance between the parties' positions often results in an unfair distribution of contractual obligations, thereby compromising the essential functions of contracts in our society, in particular their economic and social role. In response to this problem, legislative intervention has proved necessary to frame and regulate the various contractual transactions.

a- The public interest is used to justify restrictions on freedom of contract.

The doctrine¹⁰ considers it naive to seek a concept of public interest, but this term is commonly used to justify legislative and regulatory intervention aimed at setting limits on freedom of contract.

The interests afforded legal protection vary in degree, some being more protected than others. These interests thus form a pyramid whose apex is the general interest of society. This is why the law intervenes in many cases to limit freedom of contract, with a view to satisfying the general interest of society¹¹.

This trend is confirmed by certain researchers, who argue that legislative intervention aimed at limiting the discretionary power of economic actors is intended to steer the country's economy in line with economic policy. Through such intervention, the state seeks to protect the public interest. State intervention in the control of prices for certain raw materials can be considered a relevant

example of public order. This measure, justified by the desire to preserve the general interest in the face of free market pricing, illustrates state intervention in the economy. In this case, the intervention is considered a restriction on the freedom of contractors to set prices.

Case law establishes that public order of direction reached its peak after the end of the Second World War¹². However, its role has been reduced under pressure from the liberal economic system and its policy of price liberalisation. However, this does not imply the outright abandonment of such practices, as it has been observed that the state continues to limit contractual freedom in the context of implementing a given economic policy, with a view to guiding the economy according to its specific priorities at a given time.

The public order of protection is defined as the body of legal texts which, taken as a whole, are intended to restrict contractual freedom in order to protect the defaulting party to the contract¹³. The general protection regime is based on the inequality of the legal positions of the contracting parties, thus justifying the intervention of the legislature or the judiciary to impose protection on one of the parties to the detriment of the other.

b- practical aspects of interventionism

Traditionally, the existence of such a restriction was not envisaged in the contract law, as the individual's freedom to contract or not is dedicated to his personal interest. However, the development of social life has forced the legislator to impose some contracts, such as compulsory motor insurance¹⁴, compulsory insurance against natural disasters¹⁵ or compulsory inclusion in social security¹⁶.

It seems obvious that people who are victims of car accidents, natural disasters, accidents at work, etc. cannot themselves pay for the damage caused. The legislator therefore obliged individuals to take out an insurance contract when he considered that protecting the general interest of society. It seems obvious that people who are victims of car accidents, natural disasters, accidents at work, etc. cannot pay for the damage caused themselves. The legislator has therefore obliged private individuals to take out an insurance policy when it considers that protecting the general interest is a priority.

Subtitle 2: The inescapable binding force

The binding force principle guarantees the stability of transactions and thus contributes to the achievement of contractual legal somety¹⁷.

1- The self-determination of the contracting parties

The debtor must execute the contract as agreed with the creditor or risk civil legal consequences.¹⁸ This reflects the sanctity of what was agreed between the parties at the pre-contractual stage. According to researchers in contract theory¹⁹.

The binding force has led to the creation of a 'privileged' protection of what has been agreed between the parties, which is not affected by changes in the external circumstances surrounding it. According to article 164 of the Algerian Civil Code, which stipulates that: 'The debtor, warned in accordance with articles 180 and 181, is bound to perform his obligation in kind where possible', or to seek annulment with damages.

In a related context, even as comparative civil law evolves, the binding force of contracts remains a preeminent principle in contract theory. It received a strengthening of its basic components, as

evidenced by the introduction of article 1221 on specific performance in kind has also been welcomed in French civil Code²⁰.

1- Judicial intervention in the performance of a contract

Judicial intervention in contracts is considered to be one of the greatest threats to contractual legal somety. However, even if it gives rise to reservations, especially in the business world²¹, in some particular instances, the judge must intervene to ensure proper consideration of the contract's performance in its various capacities. The legislature has moreover authorised this intervention²². However, analysis of judicial developments in comparative case law has confirmed that judicial intervention exceeds the limit set by the legal texts.

The French legal system has distinguished itself by enforcing multiple contractual obligations through case law, notably safety requirements in specific contract executions²³, and by instituting a range of duties based on contractual good faith²⁴. The exercise of judicial authority during the contract's performance stage is also intended to remedy contractual imbalance, which may result from multiple causes²⁵.

Recently, however, the emphasis has been placed on some specific issues, notably the power to intervene to control unfair terms. These are defined by the legislator in Article 03 V of Law 04-02²⁶ as an unfair term is defined as a contractual condition which, either on its own or in tandem with other provisions, creates a notable disparity in the rights and responsibilities of the contracting parties.

Unfair terms take several forms, all of which are intended to create an apparent imbalance between the obligations of the contracting parties. Where one party enjoys benefits not guaranteed to their counterpart²⁷, Another possibility is that a single party has the sole authority to delay or terminate the contractual responsibilities²⁸.

In stap of ending contractual relationships, it's worth exploring situations where the legality of one party's decision to terminate an indefinite contract is assessed²⁹.

SECTION II: Intrusion of contractual good faith.

The intrusion of the principle of good faith has been the subject of much discussion, with authors having a field day between advocates of this surprise introduction and opponents who see a threat to contractual stability³⁰.

SUTITLE A: The added value of good faith

The introduction of the principle of good faith breathed new life into a theory that had been exhausted over time. However, in reality, this principle has been known since Roman law, where it was initially associated with a religious and moral aspect³¹, as it is a dogma that individuals must follow, imposed by their conscience.

1- The upheaval of the normative construction of contract theory

The formalism became an obstacle to the fluidity of transactions between individuals, It was therefore imperative to free contracts from all restrictions and, by extension, to recognise good faith as the basis for certain duties³². The notion of fides³³, or faith in Latin, had a considerable influence on the behaviour of Roman society. The judiciary subsequently drew on the multiple meanings of fides to draw up contracts based on good faith.

2- Good faith: Algerian and Comparative Approach

The principle of good faith has been enshrined in Algerian law to varying degrees. Although the Civil Code does not give it pride of place. The manifestations of the principle of good faith have been more evident in some specific laws, such as the law on consumer protection and fraud control³⁴.

As for comparative law, it has recognised the principle of good faith since antiquity, whether influenced by the Latin system or the Anglo-Saxon system. As far as the Latin systems are concerned, several illustrations have been made: the French Civil Code, from its approval in 1804, clearly recognised the principle through article 1134 in its old wording³⁵, or by deterring conduct contrary to integrity, as illustrated in the defect of fraud in article 1116 of the same Code (old text)³⁶. But the French legislature has not totally ignored good faith, even if the trend towards the moralisation of contractual relationships has become more marked in recent times, both in the Civil Code and in special legislation.

As for the laws influenced by the Anglo-Saxon system³⁷, despite initial reluctance³⁸, signs of recognition have appeared in some legal texts, for example the content of article 304 §1 of the U.C.C.³⁹.

The Second Amendment to US contract law also has got to grips with the problem in section 205⁴⁰, which states that each party to a contract is obligated to perform and enforce its terms in a manner that demonstrates good faith and fair dealing.

SUBTITLE B: The use of good faith in contract law

In negotiations or during performance, the mark of good faith remains indelible⁴¹. The interference of the principle of good faith is established on functions that have been deduced by doctrine from an analysis of case law, which has identified four different functions of the principle.

1- Regulating the attitude to contractual action

The principle of good faith is closely linked to the conduct of contracting parties⁴², since the principle is generally used to deter any behaviour contrary to the integrity, honesty, fidelity and transparency required by contractors.

This meaning is clearly enshrined in the vice of fraud enshrined in article 86 of the Civil Code, which provides that when manipulative strategies by a party or their agent are proven to be the determining factor in contract formation, the agreement can be invalidated.

This concept is exemplified by the specific terminology employed in the legislation '*without which, the second party would not have entered into the contract*'. As a result, where the tricks used by the contracting party have not reached a degree of seriousness that affects the intention of his co-contracting party, the latter cannot demand annulment of the contract.

However, the intention to harm others may not be sufficient to establish that the contracting party has committed a fault from a legal point of view, as researchers⁴³ believe that it must be proven that it is linked to another objective element, namely the deviation of the behaviour from rationality (unreasonable) or its tendency to excess (excessive).

The fact remains, however, that the intention of the contracting party is not the cause of a sanction in contractual matters; a certain attitude may be imposed which the parties must follow on pain of

sanctions, even if their intention is not to harm the other party, without investigating whether the contracting party really wanted to harm his co-contracting party. For example, in the penalty clause⁴⁴, The judicial authority may exercise its supervisory authority to reduce the value of the penalty clause if it is 'excessive', without having to find out whether the creditor intended to harm the other contracting party.

1- How good faith concepts operate in contractual relationships

Legal experts conducted an in-depth analysis of case law, which enabled them to identify and understand the multiple functions of good faith in contractual relationships.

a- The interpretative function:

Academic writers have identified some functions of the principle of good faith, including its interpretative function. This has been explicitly recognised by some comparative legislations, such as the German legislation⁴⁵.

The interpretative role of good faith is arguably evident in legislative directives that prioritize the parties' shared intent over literal contract wording. As Dean Jean Carbonnier states in his 1991 work *Droit civil, Introduction, Les Personnes*: 'Good faith prevents any party from stubbornly maintaining the letter of the contract, but must reach its spirit or ultimate meaning'⁴⁶.

In the event that the interpretation of good faith is limited to an objective examination of the behaviour of the contracting parties, the judge's task is to determine the interpretation of the contract to be given in the normal course of events. Thus, the judge is obliged to analyse the behaviour of the parties, while ensuring that he does not deviate from the requirements of good faith⁴⁷. This position, upheld by the German legislature in Article 157 of the Civil Code, requires the judge to interpret the contract based on good faith and accepted business practices. In other words, the judge must focus on the contract itself rather than on the contracting parties.

b- The complementary function

The complementary function has given rise to considerable controversy among legal scholars, particularly those who are opposed to the principle of good faith. In effect, the magistrate can, through this function, accompany the clauses agreed by the parties with obligations and duties in order to execute the contract in all its fullness⁴⁸.

In France, case law has traditionally used the concept of good faith to impose new obligations on the parties to a contract. The decisions of the Court of Cassation, in particular the Social Chamber, illustrate this trend. For example, the Social Chamber imposed an obligation on the employer to adapt a worker's job⁴⁹.

In this situation where a company dismissed an employee due to the elimination of her position, but shortly thereafter hired another employee to perform billing duties, which corresponded to the duties that the dismissed employee was able to perform after a short period of professional training, it is necessary to examine the implications of this decision.

The Court of Cassation upheld the decision of the Court of Appeal, which found the company liable for the dismissal of the first employee. This decision is in line with the legal obligation of employers to adapt employees' positions in accordance with the principles of good faith and performance of the contract.

c- The restrictive function

The restrictive function, it's designed to prevent any breach by the contracting party during the initialling or performance of the contract⁵⁰. For example, the Civil Code of Québec enshrined this function⁵¹.

When analysing the restrictive function of good faith, it is essential to distinguish between situations where the individual's intention is to cause intentional harm to others and those where this intention is absent. In the first case, the existence of malicious intent on the part of the perpetrator of the abuse is determined on the basis of their will, as stipulated by the legislator in the first criterion for abuse of rights, as set out in Article 124 bis of the Civil Code.

In the context of this analysis, it is necessary to examine situations where the person's intention is not to harm others, but where their behaviour is nevertheless considered abusive because it violates good faith. In this second situation, it is clear that good faith plays a decisive role. Indeed, this concept makes it possible to sanction any breach of the rule, whether intentional or not⁵².

d- The adaptative function:

Finally, for the adaptive function, it gives the judicial authority the possibility of adjusting the contract to fluctuations that may occur between the conclusion and performance of the contract⁵³.

This function is aptly illustrated by the theory of frustration in contract law, as enshrined in Article 107(3) of Algerian Civil Code. According to this provision, if unforeseeable and exceptional events occur, rendering the performance of the contractual obligation so onerous for the debtor that it threatens him with considerable loss, the judge, depending on the circumstances and after taking into consideration the interests of both parties, may reduce the onerous obligation to a reasonable level. It should be noted that any agreement that contradicts this clause shall be null and void.

It follows from the adaptive function of good faith that it aims to restore the economic balance of the contract and preserve the expected interest of its conclusion for the debtor. However, the application of this theory requires the intervention of the judge in the obligations of the contracting parties, which may explain a certain reluctance to recognise the adaptive function of good faith in order to preserve the legal certainty of the contract and the stability of transactions.

Conclusion

The contract theory remains one of the theories most likely to develop in civil law in recent years, and that the pandemic of COVID-19, which has swept the world in recent years, may also play a role by using legal mechanisms to manage the period of performance of the contract.

The substance of fundamental tenets of contract has evolved considerably over time, this development has played a significant role in rekindling scholarly discussions about contract theory and the current challenges it faces.

Add to this the surprisingly aggressive introduction of the principle of good faith, which extends from the pre-contractual phase to the extinguishment of the contract. This fundamental change will reopen the field of research into the pre-contractual phase, a crucial stage in guaranteeing the exemplary effectiveness of contract performance.

It seems clear that the multifaceted crisis in contract theory can only be resolved through a serious and frank debate between conservative doctrine, which maintains the traditional principles of the theory, and reformist doctrine, which supports the idea of reforming contract law. However, this

debate is likely to drag on for a long time, given the obstinacy of each legal scholar in defending his or her own ideas in the search for a consensual solution that satisfies all parties.

¹ LE TOURNEAU Philippe, POUMAREDE Matthieu, *Droit de la responsabilité et des contrats*, Dalloz, Paris, 2020, p. 1186.

² This is also emphasised in Algerian case law: ‘...since the expression of will must be made by its owner in accordance with his free choice...’. When the trial judges obliged the appellant to appear before the notary to sign the contract of sale, they committed an error in the application of the aforementioned article, which exposes their judgment to cassation, without it being necessary to discuss the aspects raised’. Supreme Court, Civil Division, decision of 22 July 2010, no. 586766, journal of Algerian supreme court, no. 1, 2011, p. 109.

³ For more details, please see: FAGES Bertrand S/D, *Le Lamy droit du contrat*, Lamy éditions, Paris, 2020, §434.

⁴ This question will be developed later.

⁵ GHESTIN Jacques, LOISEAU Grégoire, SERINET Yves-Marie, *La formation du contrat*, T.1, *Le contrat- le consentement-*, 4eme éd., L.G.D.J.-Lextenso éditions, Paris, 2013, p. 182. In case law, the same prince is enshrined, see : Cass. Civ. 1ere, 11 septembre 2013, N° 12-20844, in <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000027951671&fastReqId=1658779480&fastPos=1/> consulted on September 15th, 2024 le 15/02/2017.«... ,de sorte que, la conclusion d'un nouveau contrat ressortant de la liberté contractuelle des parties et l'école privée n'ayant pas d'obligation légale de contracter, il n'y avait ni résiliation ni rupture abusive du contrat arrivé à terme, ni résiliation ou rupture du nouveau contrat qui n'avait pas été conclu... ».

⁶ المحكمة العليا، الغرفة المدنية، قرار بتاريخ 22 جويلية 2010، رقم 586766، مجلة المحكمة العليا، عدد الأول، 2011، ص 109.

⁷ Cass. com., 27 mars 2019, n° 17-20.083, bull. civ. N°3, 2017, p. 108. « L'exigence de bonne foi ne requiert pas, de la part de la tête d'un réseau de distribution, la détermination et la mise en œuvre d'un processus de sélection de ses distributeurs sur le fondement de critères définis et objectivement fixés»

⁸ Frédéric BUY et Jean-Christophe RODA, « De la liberté des têtes de réseau de choisir leurs distributeurs », *AJ Contrat*, n°6, 2019, p. 295.

⁹ Cass. Com., 05 juillet 1994, N° 92-20.064, Bull. Civ. N° 2, 1994, p. 204.

¹⁰ TRUCHET Didier, « La notion d'intérêt général : le point de vue d'un professeur de droit », *LEGICOM*, Victoires éditions, V 58, n°1, 2017, p. 6.

¹¹ Mekki Mustapha, *L'intérêt général et le contrat (contribution a une étude de la hiérarchie des intérêts en droit privé)*, L.G.D.J., paris, 2004, p. 1. « ... La hiérarchie sied bien la notion d'intérêt général conçu traditionnellement comme s'imposant, voir s'opposant aux intérêts particuliers » .

¹² CARBONNIER Jean, *Droit civil – les biens, les obligations-*, Vol. II, PUF, Paris, 2004, p.328.

¹³ COUTURIER Gérard, « L'ordre public de protection, heurs et malheurs d'une vieille notion neuve», in études offertes à Jacques FLOUR, Défrenois, Paris, 1979, p. 95

¹⁴ Under Article 1st of Ordinance no. 74-15 of 30 January 1974 on compulsory motor insurance and the damage compensation scheme, A.R.O.J. no. 15 of 19 February 1974, as amended and supplemented by Law no. 88-31 of 19 July 1988, A.R.O.J. no. 29 of 20 July 1988.

¹⁵ In accordance with Article 1 of Ordinance no. 03-12 of 26 August 2003 on compulsory insurance against natural disasters and compensation for victims, A.R.O.J. no. 52 of 27 August 2003.

¹⁶ In accordance with Article 06 of Law no. 83-11 of 02 July 1983 on social insurance, A.R.O.J. 28 of 5 July 1983, as amended and supplemented.

¹⁷ The principle was established by the Algerian legislator in article 106 of the Civil Code. Order no. 75-58 of 26 September 1975 on the Civil Code, A.R.O.J. no. 78 of 30 September 1975, as amended and supplemented. Art. 106 states that '*The contract is the law of the parties. It may not be revoked or modified except by their mutual consent or for the reasons provided by law*'.

¹⁸ LE TOURNEAU Philippe et Al., Droit de la responsabilité et des contrats régimes d'indemnisation S/D LE TOURNEAU Philippe, 12^e éd., Dalloz Action, Paris, 2021, p.1265.

¹⁹ This principle has its origins in the principle of contractual good faith. In the framework of Roman law, good faith is exemplified by the steadfast adherence to commitments made to others. LEFEBVRE Brigitte, « La bonne foi, notion protéiforme », Revue de Droit de l'Université de Sherbrooke, N° 2, 1996, p. 13.

²⁰ CHANTEPIE Gaël, Contrat : effets, D., Paris, janvier 2018, §200 s.

²¹ For more precisions, see : FRION Jean-Jacques, Le juge et le réforme du droit des contrats, Revue Lamy droit civil, n° 132, Paris, 2015.

²² As is shown by the terms of article 119-2 of the Algerian Civil Code on the grace period.

²³ The first time the obligation of safety appeared in the contract of carriage was in a 1911 decision of the Civil section of the French Court of Cassation, overturning a decision of the Algiers Council, which ruled that a passenger who had injured her foot during the performance of the contract of carriage was entitled to an obligation of safety, considering that the contract of carriage imposed an obligation of safety on the carrier. See:

Cass. Civ., 21 November 1911, in <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006953018&fastReqId=1669865116&fastPos=1>

²⁴ Including post-contract information and advisory obligations. For example, the French Court of Cassation ruled in a case where the chamber of commerce ordered the producer of an iron scaffold to compensate the buyer for failing to provide information and advice on the use of the scaffold and the risk of scaffolding in certain cases. See: Cass Com., 21 November 2006, n° 05-11.002, in <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007621979&fastReqId=651198562&fastPos=1>

²⁵ By bint of to the powers granted to the judge by the Civil Code, such as article 184 paragraph 2 on the penalty clause and article 107 paragraph 3 on the theory of foreseeability.

²⁶ Law no. 04-02 of 23 June 2004 laying down the rules applicable to commercial practices, A.R.J.O. no. 41 of 27 June 2004, as amended and supplemented.

²⁷ DOUCHE DOYETTE Nathalie, La sanction de la violation du droit de la consommation dans les contrats de consommation, Thèse de doctorat en droit, université de lorraine, 2012, p. 177

²⁸ PEGLION-ZIKA Claire-Marie, La notion de clause abusive au sens de l'article L.132-1 du Code de la consommation, Thèse de doctorat en droit privé, école doctorale de droit privé, université de Paris II Panthéon-Assas, 2013, p. 339.

Other forms can be deduced from the content of article 29 of the aforementioned law 04-02 or article 5 of executive decree 06-306, which defines the clauses considered unfair in the contract.

²⁹ This makes it possible to determine whether there has been any abuse on the part of the contractor who decided to unilaterally terminate the contractual relationship, one of the most important applications of this case is the abuse in the termination of established commercial relationships, which now occupies a large part of the doctrinal debate.

³⁰ MEKKI Mustapha, « Les principes généraux du droit des contrats au sein du projet d'ordonnance portant sur la réforme du droit des obligations », D., Paris, 16/04/2015, p. 818

³¹ CHARPENTIER Élise, « Le rôle de la bonne foi dans l'élaboration de la théorie du contrat », Revue de droit de l'Université de Sherbrooke, N° 2, Vol. 26, 1996, p. 302./ LEFEBVRE Brigitte, Op.cit., p. 13

³² CHARPENTIER Élise, Op.cit., p. 302.

³³ A goddess believed to exist in Roman society, her real name is *romani populi fides* meaning the goodwill of Roman society, see http://fr.wikipedia.org/wiki/Fides_%28mythologie%29 accessed on 31/10/2024.

The word 'fides' is made up of two parts of Greek origin, namely 'pisis', which means 'fulfilment' in Arabic, and 'pistis', which means 'faith', so in reference to its Greek origin, the word 'fides' in Arabic means 'faith in fulfilment', see: LEFEBVRE Brigitte, Op.cit., p. 13

³⁴ Law no. 09-03 of 25 February 2009 on consumer protection and fraud prevention, A.R.O.J. no. 15 of 8 March 2009. Art. 17 provided that: "*All parties involved must inform consumers of all information relating to the product they are placing on the market, by labelling, marking or any other appropriate means.*"

³⁵ The former article 1134 paragraph 3 of the French Civil Code provided that: '*...Elles doivent être exécutées de bonne foi*'.

³⁶ The former article 1116 of the French Civil Code provided that: «Le dol est une cause de nullité de la convention lorsque les manœuvres pratiquées par l'une des parties sont telles, qu'il est évident que, sans ces manœuvres, l'autre partie n'aurait pas contracté. ».

³⁷ American law has been more willing to accept the principle of good faith than British law, which has remained very reticent towards this principle. see in this regard: Hans-Bernd Schäfer and Hüseyin Can Aksoy, "Good Faith", Encyclopedia of Law and Economics, Springer Science+Business Media New York, 2015.

³⁸ CALAMARI John D. et PERILLO Joseph M., The law of contracts, 3ed, West Publishing Co., Minnesota, United States of America, 1987, p.508. « *This approach was solidified with the development 'during the nineteenth century, of the pure theory of contract, characterized by notions of volition, laissez-faire, freedom of contract, judicial nonintervention, and bargained-for-exchange'* »..

³⁹ Uniform Commercial Code of United States of America, in <https://www.law.cornell.edu/ucc/1/1-304/>. The article 304 §1 considers good faith to be a prerequisite for the performance of a contract when it states that the principle of good faith is embedded in the performance and enforcement of every contractual obligation outlined in the Uniform Commercial Code Consulted on October 26th, 2024.

⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS in United States of America, in <http://www.nylitigationfirm.com/files/restat.pdf/>, Consulted on October 27th, 2024.

⁴¹ MARKOVITS Daniel, "Good Faith as Contract's Core Value", Philosophical Foundations of Contract Law, Oxford University Press 2014, p. 272

⁴² Objective appearance gives the judge the power to impose different sanctions on a contracting party whose conduct violates the integrity and trust owed between the parties. Good faith cannot be separated from its opposite, bad faith, as a criterion for assessing an individual's behaviour. See: LEFEBVRE Brigitte, Op.cit., p. 77

⁴³ LEFEBVRE Brigitte, Op.cit., p.333

⁴⁴ The second paragraph of Article 184 of the Civil Code states: 'The court may reduce the amount of compensation if the debtor proves that the valuation was excessive...'

⁴⁵ In <http://www.gesetze-im-internet.de/bgb/index.html> , § 157 Auslegung von Verträgen : « *Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.* » consulted on October 27th, 2024.

⁴⁶ CARBONNIER Jean, Droit civil (les obligations), T4, 21eme éd., PUF, Paris, 1998, p. 218.

⁴⁷ LEFEBVRE Brigitte, La bonne foi dans la formation du contrat, Éditions Yvons BLAIS INC, Québec, 1988, p. 14.

⁴⁸ LEFEBVRE Brigitte, Op.cit., p.344

⁴⁹ Cass. Soc. 25 février 1992, N° 89-41.634, Bull. Civ. N°2, 1992, p.74

⁵⁰ GREGOIRE Marie Annick, Liberté, responsabilité et utilité : la bonne foi comme instrument de justice contractuelle, thèse de doctorat en droit civil, université Mc GILL, 2007, p. 344

⁵¹ Civil Code of Québec, in <http://legisquebec.gouv.qc.ca/fr/showdoc/cs/CCQ-1991/> consulted on October 27th, 2024. Art. 7 provides that: "*No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.*"

⁵² GREGOIRE Marie-Annick, L'impact de l'obligation de bonne foi: étude sur ses rôles et sanctions lors de la formation et l'élaboration du contrat, Mémoire présenté à la Faculté des études supérieures en vue de l'obtention du grade de Maître en droit, université de Montréal, 2001, p.36.

⁵³ STOFFEL-MUNCK Philippe, L'abus dans le contrat (essai d'une théorie), L.G.D.J., Paris, 2002, p. 77. This function is used, for example, to recognise the possibility of modifying the contract in the event of unforeseen circumstances.

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