**contract/约(Yuē)**

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| European Perspective | Jean-Luc Mathon | 17 Feb 2022 |

**Definition**

The word contract comes from the legal Latin “contractus” “convention, pact, agreement” derived from contrahere “to make commitment” which indicates the agreement of two or more intentions in order to create an obligation. It is often accompanied by an adjective or a supplement specifying the nature of the contract (marriage contract 1672). It enters the expression “to knock on the contract” (1877) (in historical dictionary of the French language of Alain Rey, Editions LE ROBERT).

**Subject matter**

The concept of contract, in the broad sense, includes private contracts, public contracts, statutes, partners’ pacts, collective agreements between social partners, treaties and international conventions.

All these acts have in common that they are the result of a negotiation, at least of acquiescence, expressing the consent of the parties with a view to common objectives.

Edicts, constitutional charters and laws can also be considered contracts, in the sense of “social contract” by which the people accept rules guaranteeing their security (Jean- Jacques Rousseau was inspired by the Republic of Venice when he was secretary to the French ambassador in Venice in 1743-1744).

This concept is understood differently in different cultural places. In each state, contract is governed by a specific legal system with its own legal rules which govern its formation and its performance.

Law being a language, the interlocutors think they are saying or writing the same thing by agreeing on definitions that they think are common when they conceal ambiguities and misunderstandings.

For Jean-Jacques Rousseau “misunderstanding is the normal form of exchange because intentions cannot be read even in your own words” (The misunderstanding in the Essay on the Origin of Languages by Rousseau, Jonathan Teschner, University from Reims Champagne-Ardenne, CIRLEP EA 4299).

**In the French context**

In view of its historical sources (1), the contract presupposes a common intention (2) having binding force (3).

**1-Historical sources**

The terms contract (contractus), convention (conventio), which are synonymous in European legal systems, or treaty (tractatus) come from Roman law.

The law of the Republic, and thereafter the law of the Roman Empire, is the fruit of a millennial doctrinal evolution. It was composed of a set of concepts such as those of the contract (consent, interpretation, object, error) and very methodically structured categories according to a logical construction inspired by Greek philosophy: private law / public law; property rights / obligations law; real / personal law; real estate / movable property; authentic writing / private writing; rule / fairness etc.

After the disappearance of the Empire, Roman law will experience a strong decline followed by a rebirth in the 11th century with the development of the University of Bologna and the rediscovery of the full text of the codification of the Emperor Justinian (the Digest).

The structure of this written law will be widely adopted over the centuries in the Roman- Germanic countries.

The European jurist has no difficulty in carrying out research in another family of law of Roman law in which he finds this scientific classification.

The unity of the family of Romano-Germanic rights – resulting from the reception of the scientific system of Roman law – allowed French law to become in the 19th century the law of Latin countries and a widespread model. The country of law (fa guo) in Chinese language.

**2- Common intention**

In a usual acceptance, one designates under the name of contract not only the convention, but the act which notes it. It is generally accepted that the word “contract” is used to designate not only the convention itself, the agreement between the parties, but also the document in which this agreement is written down. A distinction is thus made between the contract and the document which contains proof thereof: a sale is the agreement of the parties for the transfer of an object / an asset and its price, and not the writing which is drawn up on this occasion.

Contracts therefore have a form and a subject-matter. For Plato the form “orders the matter” and the contract expresses the consent and the common intention of the parties (Criton, initial theory of the social contract).

In continental law, some contracts are only valid under certain formal conditions (in writing, be signed with the words “read and approved”, be signed before a notary, etc.).

The French civil code provides that the sale of oil or wine is only valid after having been tasted (hence the humorous expression “drunk and approved”).

The common intention can be illusory if the parties have different visions of the subject- matter or the objective of the contract.

What is said or written may be different from what is intended.

In French, the word “more” can mean “more” or “no more”; “At the latest” can mean “even before” or “not before”, “attributed to” can mean that the object is not of the person to whom it is attributed, but also means that it can be. “Provenance” can designate the place where something is made and not the material it is made of.

In the French legal tradition, misunderstanding is an obstacle to the existence of the agreement “it is not a contract it is a misunderstanding” to use the expression of the eminent jurist Planiol. But everything will depend on the nature of the misunderstanding.

The husband who discovers the impotence of his spouse, obtains the annulment of the marriage for defect of the consent, but the error on the virginity of the wife does not justify it (in countries in which manners are not governed by law).

Many divorces were born out of a misunderstanding. But many marriages too… (Tristan Bernard).

**3- Binding force**

“Contractus” means what binds, tightens.

In Roman law contracts must be respected “pacta sunt servanda”. (for Umberto Eco, in his preface written for the French edition of the dictionary of Greek and Latin sentences by Renzo Tozi, « you have to be crazy to take a proverb literally ». Admittedly, but this is an adage here).

To return to the law, the formula of the French civil code (known as the Napoleon code) of 1804 is thus extremely strong: “The legally formed conventions take the place of law for those who made them …”.

In addition: “The conventions oblige not only to what is expressed there, but also to all the consequences that equity, custom or the law give to the obligation according to its nature”.

The freely expressed commitment must be rigorously respected, and classical interpretation has always disregarded fairness, considered as a residual consequence of the obligation, the application of which presents risks of arbitrariness.

For French case law, no consideration of time or fairness allows the modification of the agreement of the parties. If a validly formed contract subsequently sees its economic equilibrium disturbed, the judge may not modify its terms.

For Europeans, a contract is therefore set in stone and its punctual performance is a categorical presupposition.

**Practical advice**

**1- A mutual understanding is essential when drafting contractual documents.**

Initially proceed to the signing of a memorandum of understanding with no contractual force, then to a preliminary contract stipulating the fulfilment of preliminary obligations, the successive good performance of which will be the guarantee of good faith of the parties.

The memorandum of understanding is essential to present the subject-matter of the contract as clearly and precisely as possible. Grotius, in his method of interpreting treaties (in “the law of war and the law of peace”) saw in the search for the primitive aim of the treaty a decisive means for the most exact understanding of the intention of the parties.

The methodology consists of setting out in the contracts / documents, as a preamble, the history of the parties’ activity and relationships and defining very precisely:

* explicit and implicit objectives,
* definition of the terms of the contract
* provisions regarding unforeseeable circumstances; – the timetable and the binding force.

**2- Mutual realism in terms of performance**

Taking into account the economic transformations that can modify the balance of any contract, the French Civil Code of 2016, introduced a notable development with the concept of the unforeseen: “ If a change of circumstances, unforeseeable at the formation of the contract, makes the performance excessively expensive for a party who had not accepted to assume the risk, the latter may request a renegotiation of the contract… the judge may, at the request of a party, revise the contract or terminate it… ”.

Favouring the possible application of these provisions therefore supposes anticipating the three conditions laid down in the contract:

* foreseeable changes in circumstances;
* when the performance of the obligation becomes excessively onerous; -the nature of the risk that the parties intend to assume or not.

Admitting a logic of initial misunderstanding resulting from cultural particularisms to establish the basis of mutual trust, such is the stake.