

The audit clause correlated with the Compliance Obligation

In

The Contractualisation of Compliance: Clause by Clause

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***DÉPLOYER LE DROIT DE LA COMPLIANCE
POUR
RENFORCER LA SOUVERAINETÉ
ET
ACCROÎTRE L'ATTRACTIVITÉ
DE LA FRANCE AVEC L'EUROPE***

Rapport au garde des Sceaux, ministre de la Justice

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The stipulation most often cited to help assess third parties in companies' fight against corruption

69.4%

of subject companies stipulate an audit clause in their contracts

AFA survey on third-party assessment, April 2024, question no. 22, 72 respondents

- ☐ Ahead of the subcontracting clause (56.9%) and the outsourcing clause (25%)
- ☐ Behind only the anti-corruption clause (100%) and the conformity clause (80.6%)
- ☐ And yet: few studies are devoted to it — why?
- ☐ Because the contractual practice of Compliance remains hidden by the obsession with the regulatory corpus
- ☐ Because companies' contractual strategies are still underdeveloped, owing to the attraction of sanction-related compliance tools (e.g. DPAs)

Outline



PRELIMINARY

Audit clause securing interests, conformity audit clause, Compliance audit clause



VIEWS FROM INSIDE THE AUDIT CLAUSE

Drafting the stipulation, building its limits and risks into it in advance



VIEWS FROM OUTSIDE THE AUDIT CLAUSE

Its backing onto the other stipulations — and its interpretation by the judge

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PRELIMINARY



One technique, three purposes — hence 2 regimes and 3 futures

Securing one party's interests

Protecting one's own interests: the network head checks its distributor. No legal obligation behind it.

Necessary accessory of one party's conformity

Putting oneself in a position to obey the Law: the subject party draws the other into the space of its own obligation.

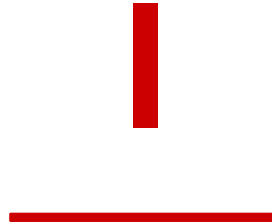
Necessary accessory of Compliance, so that both contribute to preserving systems

Associating the partner with the preservation of the system and the protection of the human beings involved in it.

The audit clause is the “necessary accessory” of the clause it serves: its purpose governs its regime.

Why the conformity and compliance audit clause: the legal obligation to be powerful through information

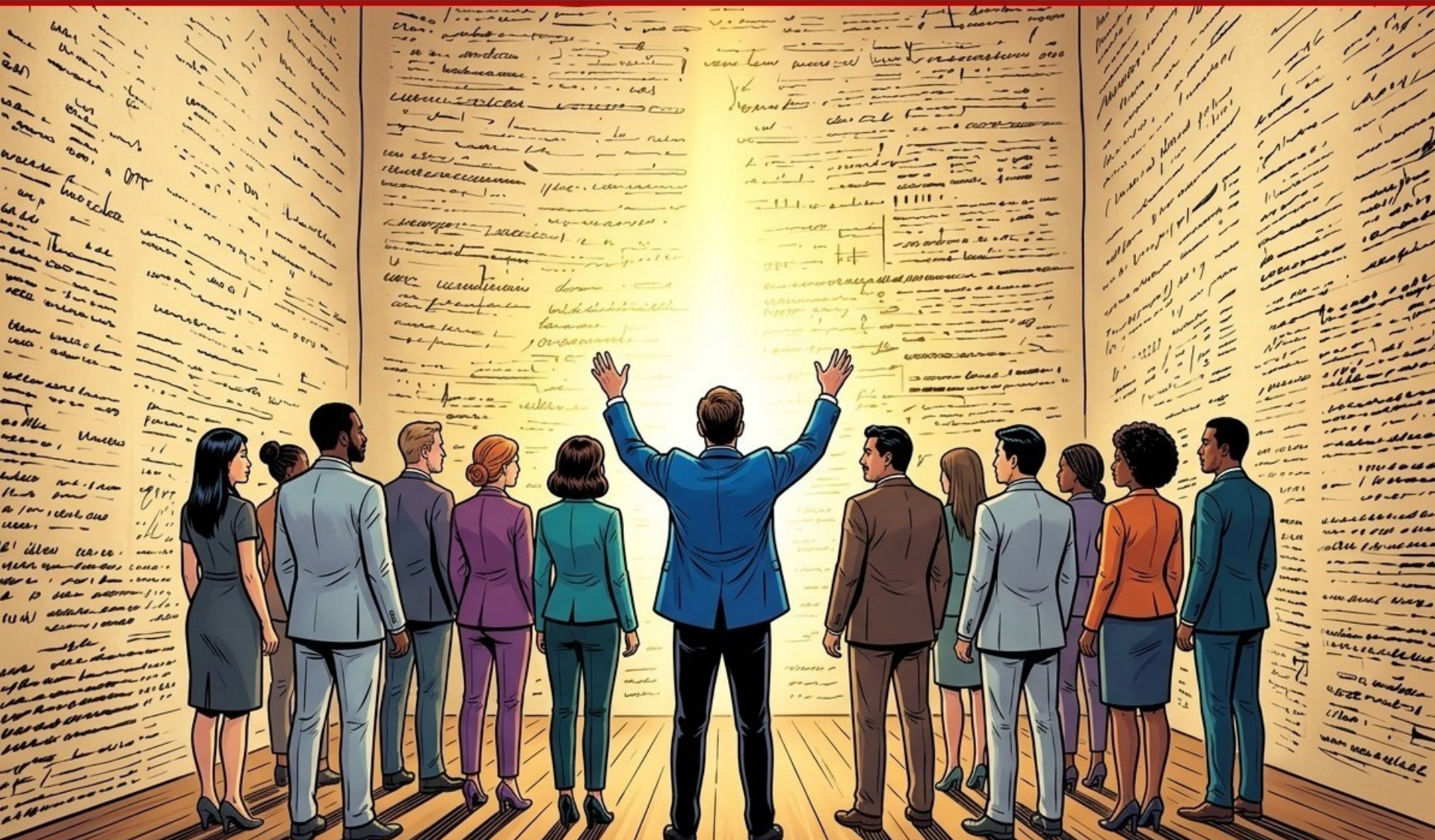
- ❑ The Compliance Obligation requires “detecting” breaches and systemic risks — hence being informed
- ❑ Yet the information is not at home: it lies with others (Sapin 2, art. 17, II, 4°: assessing customers, first-tier suppliers and intermediaries)
- ❑ The subject party therefore has, transitively, the obligation to obtain through the contract the legitimate power to obtain the information
- ❑ Through the conformity and compliance audit clause, the company treats another’s company as if it were its own
- ❑ The practical difficulty is constant: the AFA survey notes third parties’ lack of cooperation — the virtue of the contract is to bring back binding force



INSIDE
AN AUDIT CLAUSE
INSERTED TO FULFIL THE CONFORMITY
AND COMPLIANCE OBLIGATION OF ONE OF THE PARTIES

INSIDE

A COMPLIANCE AUDIT CLAUSE



Drafting the clause: determining 4 objects in turn

1

What information?

From whom, in which documents, in which places will it be sought

2

What trigger?

Periodicity aligned with reporting, or a red flag

3

Who conducts it?

Internal departments, the subject party's auditor, a third party appointed by mutual agreement (discovery)

4

On what terms?

Notice, duration, cooperation, costs, confidentiality, obstruction, report

Information: persons, documents, places

Persons

By functional category, by place, by name. Never “all persons”: the phrase seems to give everything and gives nothing certain.

Documents

The internal audit report is not communicable per se. Three degrees: production of documents, on-site visit, interview — where the audit becomes an investigation.

Places

Physical, intangible (messaging, hosting), and those of others: the cascade effect along the value chain.

The single criterion: the proportionality of the scope of the capture to the purpose that justifies it.

A drafting tip: the scale of legal normality

Within legal normality

Requesting documents the company already prepares for itself, checking a figured declaration, auditing once a year.

→ stipulated briefly, performed without discussion

What departs from it and requires an express, reasoned, accepted stipulation

Entering premises, accessing systems, interviewing persons, reaching non-party entities, surviving the end of the relationship.

The drafter who forgets this thinks he saves time by writing broadly; he obtains the opposite, for it is imprecision, not breadth, that general contract law sanctions.

Article 1171 of the French Civil Code · Article L. 442-1, I, 2°, of the French Commercial Code

The trigger: the calendar, or the fact

- ❑ Periodicity is aligned with the rhythm of reporting — sustainability report, vigilance plan, management report —, not with that of the service
- ❑ It creates a habit: the audit ceases to be an event and becomes a deadline, and the third party is treated as an internal department: the audit clause as internalisation
- ❑ The prompted audit: report, open investigation, press, NGO alert, anomaly in third-party assessment — the red flag
- ❑ The workable solution: a list of facts that trigger automatically, and a catch-all clause requiring a written reasoned request
- ❑ The open question of notice, all the more relevant in a conformity and/or compliance audit clause

The audit sits exactly where the suspicion of non-conformity or of failure in the compliance ambition is not yet a breach.

Who bears the audit: the concentric circles of the burden of the conformity and/or compliance audit

At the centre

The beneficiary bears everything: it triggers, organises, mandates, pays. The most costly, the most faithful — the legal obligation is its own.

First circle

The burden shifts to the audited party: questionnaires, self-assessment, certifications, costs. The information is then produced by the party being checked. Beware of judicial review (proportionality, to be assessed in the light of the purpose, the protection of systems).

Second circle

It passes along the chain: the last-tier supplier undergoes audits in numbers, with conflicting standards. Illustrates the porosity of the contract itself in a configuration where contracts are regulatory contracts.

*Transferring the burden must not transfer the compliance obligation.
Beware of reasoning · respect for proportionality.*

Building in advance what resists the audit

Limits

Legal autonomy of persons · confidentiality and trade secrets · inaccessibility of places.

Named in the clause, they cease to be failures attributable to the audited party and become the justifications of the result obtained.

The audit that has not seen everything, but says why, establishes diligence; the audit silent on its limits is an evidential weakness.

Risks

The tacit obligation to carry out the audit, which the clause creates against the very party that required it.

The objection based on the rights of the defence, as soon as the audit targets the conduct of an identified person.

Lateral or later use of the report: an audit report is a document usable by the co-contractor or third parties in strategies; it must be written as such.

Better a narrow clause, performed in the light of an explicit conformity and compliance purpose, than a broad, dormant clause, a trap for the beneficiary.



OUTSIDE

AN AUDIT CLAUSE

**INSERTED TO FULFIL ITS COMPLIANCE OBLIGATION:
ITS BACKING ONTO THE OTHER STIPULATIONS**



Backing rather than accessory

- ❑ General contract law knows no category named “accessory clause”: the theory of the accessory applies between assets, claims and contracts, not between stipulations of the same instrument — yet it is a factual reality
- ❑ It is legally captured by divisibility (Article 1184 of the French Civil Code): not which governs the other, but whether one can survive without the other; and the judge interprets the clause by reason of its backing
- ❑ The answer lies in the function each fulfils in the intended “Economy of the contract”, not only in the place it occupies in the instrument
- ❑ Two situations practice will meet: the conformity clause annulled while the audit is organised; the audit clause deprived of effect while the conformity obligation remains

Three states of the clause, depending on what it backs onto

1

Verify

Backed onto a conformity clause: a standard given in advance, a narrow scope, simple evidence. Maximum effectiveness, minimum ambition.

2

Monitor

Backed onto a Compliance clause: the standard is a goal, the audit looks for a vulnerability. Monitoring clauses give it its extreme form. Internalisation.

3

Ally

The third parties concerned cease to be the objects of the audit and become its sources, sometimes its beneficiaries. The audit becomes a bond: the move from conformity to compliance.

Control endured produces concealment; control shared produces information.

The third state: the European expression of Compliance Law

United States

The company, a relay of enforcement. Monitoring clauses: considerable volumes, transmission to the authorities, books open for years, costs borne by the audited party. Sanction remains the horizon.

China

The company, an instrument of control serving political power. The same techniques, for opposite ends: information flows up to a centre that is not that of the contract.

Europe

Monumental Goals are not the objectives of an authority the company would serve: they are a systemic ambition it shares, because the human beings to be protected are also its own.

The contract is the preferred instrument, information is shared.

*Elsewhere, the audit clause is a mechanism of submission,
and only the identity of the one to whom one submits changes.*

What the audit clause makes possible: striking, or bringing together

Striking

Dispute-anticipation clause · sanction clause · termination clause.

The audit establishes the breach, the breach feeds the formal notice, the formal notice triggers termination.

The report is authoritative as long as the audited party produces nothing.

Bringing together

The information collected serves as a basis for: remediation clause · corrective action plan · support for the defaulting partner.

From the same audit comes not a grievance but a programme: timetable, indicators, new verification audit.

Termination remains at the end of the chain, but it only comes afterwards.

The same audit, two opposite contractual economies, reflected in drafting, implementation and interpretation by the judge.

What distinguishes them is not the technique, but the purpose pursued.

The judge's interpretation of the “necessary accessory”

The clause will come before him in three ways: the audited party who challenges it, the beneficiary who seeks performance, the third party concerned who complains of the audit not done, or badly done, or of which he wants to know.

Assessment of the Effective

Accessory to the application of regulatory corpora: the standard is external to the parties, the scope is measured by the perimeter of the obligation.

Assessment of the Efficient

Accessory to the application of Compliance Law, efficiency being measured by the good brought to systems: the ratio between what the audit costs and what it brings to the preservation of the system.

Assessment of Coordination

Accessory to the application of the other Compliance clauses: Article 1189 of the French Civil Code, each clause in the light of the whole instrument.

Through its interpretation of the audit clause, the judge indirectly protects the various systems that the Compliance Obligation is meant to preserve, and the human beings involved in them.

The contracting systemic company, which also protects a system, must build this in from the drafting of the clause.

Conclusion

The carousel of the audit clause, an image of Compliance Law

It receives from upstream: from the legal obligation and the company's strategy, which give it its object; from the more general conformity and compliance clause it serves, which gives it its measure; from the governance structure within which the parties operate, which gives it its legitimacy.

It supports downstream: sanction, termination, remediation, which apply only to what it has established. It is a major evidential tool.

And the movement begins again, for what the audit reveals feeds the risk map, which redefines the scope of the next audit.

***The audit clause is worth the monumental goal it serves,
by producing proof of that service.***