

Unity and Diversity of Compliance Clauses: towards a Contractual Compliance System

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

Marie-Anne Frison-Roche

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“COMPLIANCE CLAUSE”: A NEW NAME, A BARELY “SPANISH INN”

- ✓ The expression is recent and already everywhere; it appears in no code and is defined by no statute
- ✓ A single term for very varied stipulations: persons concerned, situations, mechanisms, requirements
- ✓ Barely Spanish, so great does American influence remain (representations and warranties, flow-down)
- ✓ The regulatory obsession has left these clauses little observed, to the point of describing an “administered economy” with no room for contract
- ✓ As for the Compliance Obligation: distinguish, classify, name – nomenclature is the condition for the drafter to know what he stipulates and the judge what he interprets

OUTLINE



AN APPARENT UNITY

The stipulation taken en bloc in relation to the legislation



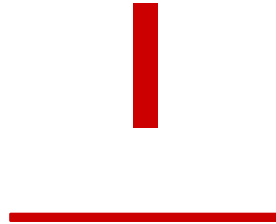
A GREAT DIVERSITY

Compliance clauses to be recognised, channelled by a nomenclature, preserved



A DEEP AND PROGRAMMATIC UNITY

The systemic goals served, and the building of a Contractual Compliance System



AN APPARENT UNITY
OF COMPLIANCE CLAUSES
BY TAKING THE STIPULATION EN BLOC
IN RELATION TO THE LEGISLATION

THE APPARENT UNITY

THE COMPLIANCE CLAUSE TAKEN EN BLOC



ONE SINGLE CLAUSE FOR THE WHOLE REGULATION: OBLIGING THE OTHER PARTY TO COMPLY WITH THE LAW

Copying the Law

- ✓ No content of its own: the substance lies in the text referred to
- ✓ Requiring the obedience of others: no corruption, no hateful conduct
- ✓ The stipulation restates the legal subjection

Educational value

- ✓ Restating the Law to the partner makes its importance known
- ✓ The smallest discover through the contract the requirements that weigh on them
- ✓ The first training tool

Evidential and extraterritorial value

- ✓ Each declares its subjection: verification is dispensed with
- ✓ The contractual source is added to the legal source
- ✓ Law spread along the chain: flow-down

The Compliance Obligation is not transferred: the clause consolidates the legal obligation, it never discharges it.

THE GENERAL COMPLIANCE CLAUSE, A STARTING POINT: THREE CHOICES

1

Referring to the other clauses

Information, audit, termination, sanction give it the means it lacks – provided there is an express cross-reference.

2

Referring to the *Ex Post*

Letting performance reveal what the clause required: flexibility, but the burden shifts to the judge.

3

Building a system

Making the general clause the starting point of precise clauses that answer one another around the goals of the Law.



The general designation sets the goal; the other clauses organise the path.

UNITY BORROWED FROM THE CORPUS: GDPR, SAPIN 2, VIGILANCE, CSRD CLAUSES

The method

- ✓ The clause takes the name of the statute: GDPR, Sapin 2, Vigilance, CSRD
- ✓ It follows its structure and vocabulary
- ✓ Readable by the regulator as much as by the co-contractor

Its cost the tracing

- ✓ The drafter who copies no longer chooses
- ✓ Neither the rest of the contract, nor the activity, nor the balance of power
- ✓ Public policy: one who is bound to less may bind oneself to more, not the reverse

Tracing loses the margin where the contractual art begins.

Article 1102 of the French Civil Code • freedom of contract within the limits of public policy

THE RULE-MAKER'S FAULT

- ✓ The contract presented as a delegation or a concession: an extension of regulation, not an instrument of its own (the CSRD first and foremost)
- ✓ A false premise: Compliance Law, like Regulatory Law, is the mark of a liberal economy, not of an administered economy
- ✓ Policy lies in the goals, not in the means (AFA, Sanctions Committee, 4 July 2019)
- ✓ Obligation of result for setting up the structures, obligation of means for obtaining the behaviours: the contract is one of these tools, not the execution of an instruction



THE GREAT DIVERSITY
OF COMPLIANCE CLAUSES,
TO BE HANDLED AND PRESERVED

THE GREAT DIVERSITY

OF COMPLIANCE CLAUSES



THE PRINCIPLE OF DIVERSITY: DE JURE AND DE FACTO

De jure

- ✓ The Legislator organises the structures and sets the goals, not the means
- ✓ Freedom of contract, the normal mode of implementation
- ✓ The audit clause: an administered economy would have a form, not a clause

De facto

- ✓ Porosity to the corpus, amended without the parties' consent
- ✓ Porosity to foreign systems: FCPA, sanctions, the Biomet case
- ✓ Porosity to the contract's purpose: supply, distribution, digital
- ✓ A group or sector clause book, not a standard clause



A diversity called for by the very structure of the system.

THROUGH ITS POROSITY, THE COMPLIANCE CLAUSE: ESSENTIAL OR ACCESSORY?

- ✓ On the answer depend the seriousness of non-performance, the termination clause, the stipulation that would empty the essential obligation, mistake as to an essential quality
- ✓ The ICC Anti-corruption Clause: a substantial or repeated breach, an opportunity to remedy, suspension or termination only failing that
- ✓ Cass. com., 20 Nov. 2019, Zimmer Biomet; CA Paris, 4 Dec. 2024: the essential character inferred from the seriousness of the breach, proven *Ex Post*
- ✓ Stipulating it: presumptions of essential character, justified by the Goals of the Legislation, without significant imbalance

*Qualifying the clause as an “essential clause” of consent,
or of the continuation of the negotium, in whole or in part.*

CHANNELLING DIVERSITY THROUGH A NOMENCLATURE: FIVE DIVIDING LINES

1

Conformity or Compliance?

 The purpose: obedience to a text, or a goal that goes beyond the contracting parties

2

Result or means?

 The nature of the Compliance obligation stipulated by the clause

3

Collect, build, use?

 The handling of information organised by the clause

4

Calm weather or high wind?

 The “contractual climate” the clause presupposes

5

Between the parties or beyond?

 The circle of persons the clause reaches

CONFORMITY CLAUSES, COMPLIANCE CLAUSES: A DIFFERENCE IN NATURE, NOT IN DEGREE

The conformity clause

- ✓ Aims at obedience: conforming to a text
- ✓ Sanction measures its effectiveness
- ✓ Complying with everything, and showing it, regulation by regulation
- ✓ The mark of submission

The Compliance clause

- ✓ Aims at a goal that goes beyond the contracting parties
- ✓ Preserving a system, protecting distant or future human beings
- ✓ “Contributing”, with the creditor itself, to achieving the Goal
- ✓ The mark of collaboration

In a teleological law, the clause is assessed according to the Compliance Law it implements.

COMPLIANCE OBLIGATION OF RESULT, COMPLIANCE OBLIGATION OF MEANS: BACK TO THE CONTRACT

Obligations of result

- ✓ Setting up and running Compliance structures
- ✓ Risk mapping, whistleblowing, third-party assessment, vigilance plan
- ✓ The structure exists or does not exist

Obligations of means for the expected behaviours

- ✓ No one can guarantee that no harm will occur
- ✓ The parties may stipulate a result
- ✓ Provided the clause is not unfair and does not shift the risk onto the weaker party

It is through the drafting of each clause that the intensity of the Compliance Obligation is set between the parties.

Dir. (EU) 2024/1760, recitals 19, 73 • Art. 1171, French Civil Code • Art. L. 442-1, I, 2°, French Commercial Code

INFORMATION, THE SUBSTANCE OF THE COMPLIANCE CONTRACT: THREE MOMENTS

Collect

✓ Transmission

✓ Audit

✓ Whistleblowing

Build

✓ Assessment

✓ Risk mapping

✓ Rating

Use

✓ Remediation,
sanction, termination

✓ Conversely, the
confidentiality clause,
which stops
information

A clause that collects with nothing to use it serves no purpose; a clause that strikes with nothing collected strikes blindly.

CALM-WEATHER CLAUSES AND HIGH-WIND CLAUSES

Calm weather

✓ Audit in good grace, spontaneous information, accepted remediation: they presuppose harmony

✓ Some produce it: monitoring committee, prior dialogue, mediation

High wind

✓ Penalty clause, immediate termination, expert appraisal, pre-trial measures, arbitration

✓ Written in harmony, for a discord no one imagines

Tying the clauses together

✓ Not providing for some without the others

✓ Calm weather alone: no recourse when the day comes

✓ High wind alone: a threat that discourages collaboration

The clause must be durable: it must hold in both times.

CLAUSES THAT OPERATE BETWEEN THE PARTIES AND CLAUSES THAT GO BEYOND THE PARTIES

- ✓ Contract aims at the parties, conformity at an external law, Compliance at the future world: exchange-contract and organisation-contract
- ✓ A ripple effect: the supplier's supplier, the partner's employee, the local population; a stipulation may give rise to a duty of supervision (Cass. com., 15 Jan. 2025, Dstorage)
- ✓ Beyond the business relationship: the consulted indigenous people, the internet user for whom the moderation clause is written
- ✓ The clause becomes an instrument of Regulation: it has settled in fact what the Law has not settled in law

**A DIVERSITY TO BE PRESERVED:
IT STEMS FROM THE VERY ACTIVITY OF THE CONTRACTING PARTIES**

1

The sector

✓ The Monumental Goal varies with the system to be preserved: banking, digital, extractive industries. A cross-sector standard clause would lack substance; the judge must have access to this technicality.

2

The contracting party's general policy

✓ Corporate project and raison d'être (Art. 1835 of the French Civil Code): support clauses for one who preserves a system, shifting clauses for one who fears sanction.

3

Intuitu personae

✓ In Europe, the Monumental Goal subsuming the others is the protection of the person: between operators of equal strength, and in the alliance between the State and the company.

***A diversity that is not a passing defect:
it must not be reduced, but respected.***



THE DEEP

AND PROGRAMMATIC UNITY OF COMPLIANCE CLAUSES

THE DEEP UNITY

A CONTRACTUAL COMPLIANCE SYSTEM



UNITY IN THE SYSTEMIC GOALS SERVED, WHICH WILL REMAIN STABLE AND SHARED

- ✓ Techniques vary from one contract, sector or era to another; the goals do not: preventing corruption, protecting data, preserving the climate, ensuring the soundness of the banking system
- ✓ Writing the goal into the clause: the legal goal it implements, and the company's own goal
- ✓ Declining the same goals from clause to clause: audit, information, remediation, sanction
- ✓ The judge will find there the teleological thread of his office; the co-contractor will know why he commits

FOUR TIMES TO BE MADE TO CONVERGE IN THE COMPLIANCE CLAUSE

1

The time of the Legislator

 A goal for the future, to be converted into dated obligations

2

The time of the Judge

 After the fact, but not too late: providing a remedy, not only damages

3

The time of the industrial project

 Increasing capacities, including the debtor's: staggering to obtain effects

4

The time of the contract

 Integrating the stipulated duration: survival, transfer to the acquirer, information beyond termination

THE CONTRACT AS A RESERVOIR OF EVIDENCE: CREDIBLE TRAJECTORIES

- ✓ The subject company must show that the required structures have produced effects converging with the goals, along a credible trajectory
- ✓ The contract organises the production of traces: audit reports, certificates, remediation plans, dated exchanges
- ✓ Stipulating the evidence, not only the obligation: who establishes it, in what form, within what time limits, to whom it is communicated
- ✓ All clauses, conformity and Compliance alike, will one day have to be proven: before the authority, the judge, the stakeholders

The trace produced in the time of the contract, dated at the pace of the industrial project, will be read by the judge in the light of the goal set by the Legislator.

BUILDING IN PRACTICE AN INTERLOCKING SYSTEM OF COMPLIANCE CLAUSES

Within the contract

- ✓ Express cross-references between clauses
- ✓ A framework clause stating the common goals
- ✓ And the rule to decide between two conflicting clauses

Between contracts

- ✓ Supply, subcontracting, distribution, licence
- ✓ Same definitions, same cross-references
- ✓ Same framework clause along the value chain

Beyond the contract

- ✓ Code of conduct, ethics charter, vigilance plan
- ✓ Commitments before an authority
- ✓ The clause gives them force, and receives its meaning from them



Put into a system, Compliance clauses are the future of Compliance regulation.

Conclusion

The contractual art of Compliance is yet to come, its materials are available

- ✓ The deployment of this art is only just beginning
- ✓ The materials, for their part, are in contracts, in a very dynamic practice, and in the need both to regulate and to loosen excessive regulation
- ✓ The available materials, general contract law, must therefore be taken and put to use
- ✓ The regulatory power of the State and of large companies can thus be expressed through clauses which, correlated with one another, form a contractual Compliance system, tailor-made for each crucial operator

The crucial operator today carries the spirit of European civilisation, which cares above all for human beings and for the Rule of Law that protects them.