How the contract takes part in strategy in companies seized by Compliance

In

Compliance and corporate strategies in the contractual organisation of value chains

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COMPANIES' CONTRACTUAL STRATEGY IN VALUE CHAINS: A SUBJECT HARD TO PIN DOWN

- Yesterday, a self-evident fact: companies organise their value chains through contracts – so obvious that it was not even worth stating
- Today, the Law of value chains is conceived from the angle of the regulations organising relations between operators
- Contracts are hardly grasped there as such, but rather through the regulatory provisions that apply to them

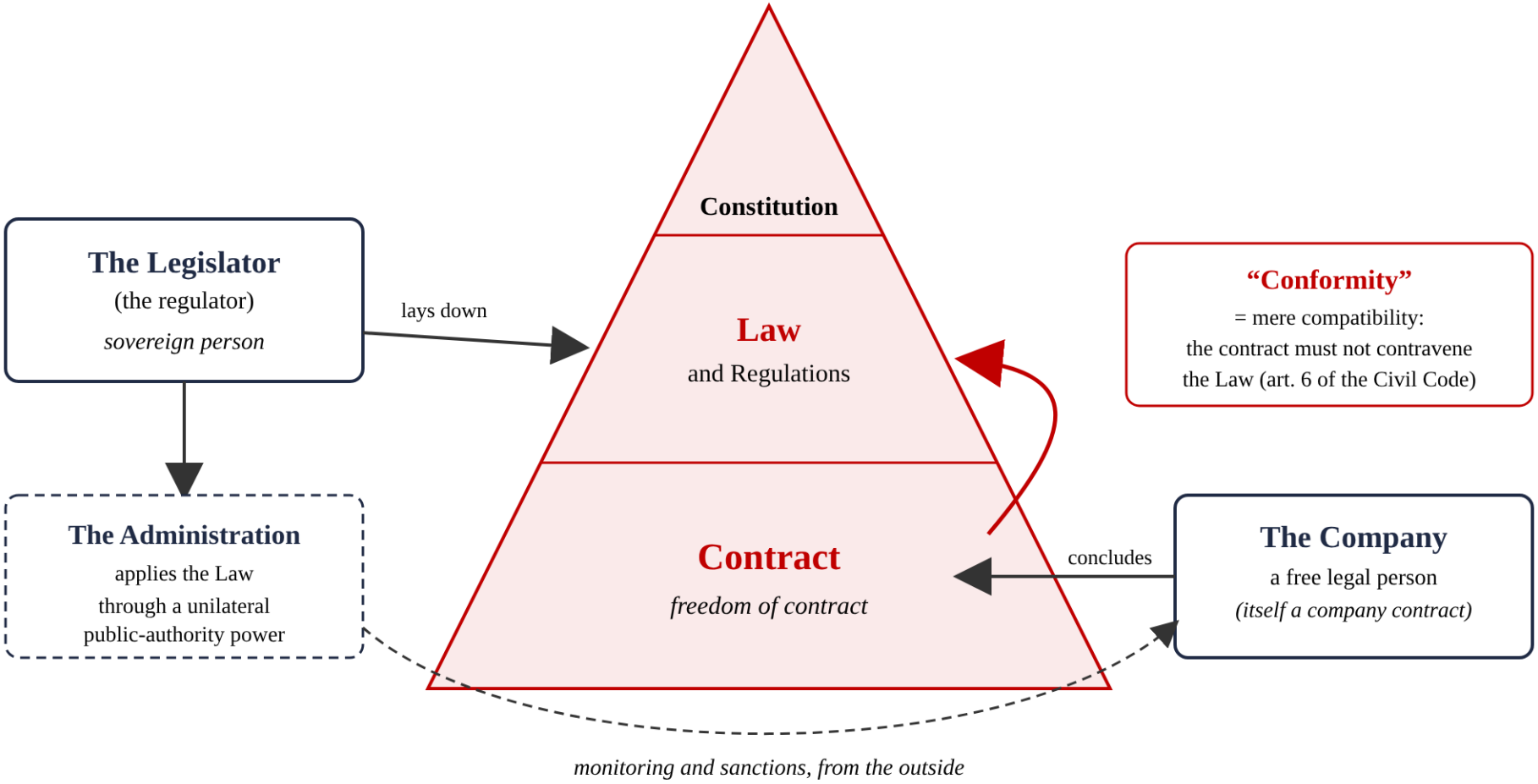
Contractual practice, as the expression of two wills exchanging their consent to produce reciprocal obligations in order to carry out a project of their own, must be studied insofar as it meets other wills.

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1. The classic scheme: two sovereign, hierarchically ordered sources,

the contract belonging to the lower source

Hans Kelsen, the Constitution, the Civil Code – a scheme that remains valid



Two sovereign sources, adjusted by the hierarchy of norms: the Law commands, the contract does not contradict it.

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2. Compliance Law:

THE CONTRACT CHANGES FUNCTION, AND THEREFORE PLACE

The State leaves its unilateralism behind and takes the contract as an instrument for applying its Laws

~~The Administration~~
~~*unilateral act*~~

The Legislator – the strategist State
Monumental Goals: preserving systems
and the human beings involved in them

A Law that is "strategic" by nature
an *Ex Ante* and teleological branch of Law

Sapin 2 Act, Duty of Vigilance, CSRD, CS3D, GDPR, DORA, NIS 2, AI Act…

"do your part"

writes, rewrites, strikes out "clause after clause"

The Company
"in a position to do so"
keeps its freedom
to contract

CONTRACT

Clause 1 – subject matter, price (the parties)

Clause 2 – clause imposed by the Law

Clause 3 – standard clause, to be copied

~~Clause 4 – prohibited clause~~

Clause 5 – audit, whistleblowing, exit

The co-contracting party
supplier, service provider,
subcontractor…

The contract becomes a direct means of applying Legislation

Forgetting Kelsen?

The co-contracting company comes to resemble the contracting State

whether it wants to or not

E.g.: clauses imposed on ICT service providers (DORA, art. 30); standard data protection clauses (GDPR, art. 28 and 46); contractual assurances and model vigilance clauses (CS3D, art. 10, 11 and 18); mandatory clauses (EGalim)

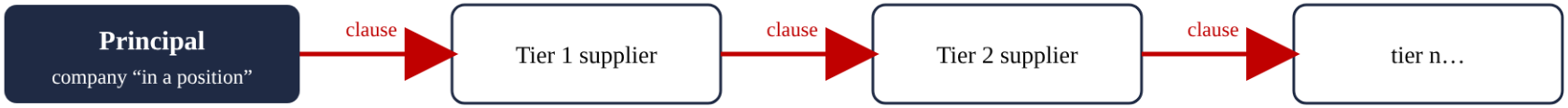
The State is no longer merely above the contract: it steps inside it.

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3. Value chains: from compatibility to convergence

The contract: two wills exchanging their consent to create obligations and achieve a purpose

The value chain: the Law's clause flows down from contract to contract



The system to be preserved and the human beings involved: employees, local residents, consumers, climate…

Today: compatibility

Kelsenian scheme – art. 6 of the Civil Code

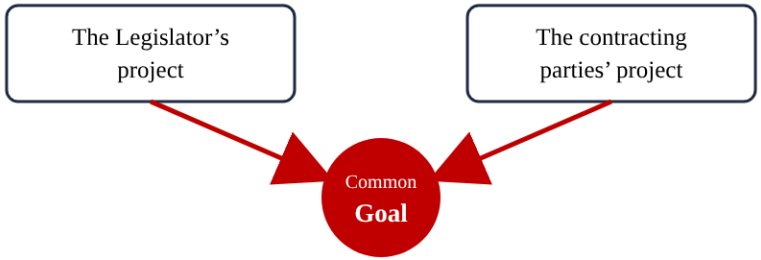


The company opens its contracts and **copies** the clauses.

Two projects side by side, never meeting

What Compliance requires: convergence

active design by both wills



Three open questions

1. Where is the freedom of contract?

2. How does the judge interpret the clause? the contract?

3. The Law does not use the contract as the parties use it

No longer merely refraining from contradicting the Law: designing together the contract that achieves its Goal.

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MANAGEMENT SCIENCES AND LAW, OPEN TO ONE ANOTHER

Management scholars	Lawyers	Where the two meet
A natural contractual construction, through the theory of organisations.	Observations focused on regulations, or on their extension through clauses; few on “organisation contracts” or on “regulatory contracts”	Management explains why companies have chosen “value chains” (subcontracting; supply chain), the place the contract takes in them because companies want it to, and in what form

A paradoxically limited place given to the contractual act

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OUTLINE

I

FREEDOMS CONVERGING TO BUILD SOMETHING SOLID AND TAILOR-MADE IN THE ORGANISATION OF VALUE CHAINS

A. Freedom of enterprise and freedom of contract · B. The value chain, an unknown quantity for the Law

II

THE POSSIBLE INADEQUACY OF THE CONTRACT FOR BUILDING APPROPRIATE VALUE CHAINS

A. Collective values not expressed through contractual construction · B. The contract, a bilateral act

III

THE PROSPECTS

A. The denaturing of contracts · B. Saving Private Contract

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I

FREEDOMS CONVERGING TO BUILD SOMETHING SOLID AND TAILOR-MADE IN THE ORGANISATION OF VALUE CHAINS

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A STRATEGIC CHOICE, WHICH THE LAW DOES NOT IMPOSE

Integration within the company	Pure and simple market	Value chain
Doing it oneself: several functions brought together within the company (a value chain across functions)	Relying on the market, and on its instability, through exchange contracts	Building tailor-made, through contracts, what seems most solid and most lasting: the “regulatory contract”

Once the choice has been made at the level of “governance”, it is contracts that translate this strategy, that integrate this strategy, that have this strategy as their object (framework contract)

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FREEDOM OF ENTERPRISE AND FREEDOM OF CONTRACT, THE LEGAL PATHS OF AN INITIAL STRATEGIC CHOICE

- The constitutional freedom of enterprise: deciding what one does oneself and what one has others do, setting the scope of one's activity and one's place among operators

- The constitutional freedom of contract: choosing one's partners and settling with them the content of their commitments, including over the long term

- Two freedoms of constitutional value, the one hardly going without the other

Freedom of enterprise provides the design; freedom of contract supplies the materials.

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THE VALUE CHAIN, AN UNKNOWN QUANTITY FOR THE LAW

- What management sciences have for more than forty years called the “value chain”: a structure that is solid because tailor-made, lasting because intended
- What the contract, through its binding force, will make possible
- But the value chain is neither a person, nor a group of companies, nor even a contract: is the contract the adequate legal instrument for strategies of external multiplication requiring unity and discipline?
- The Law would need to recognise the category of “value chain”, beyond distribution (a mix of contract law and competition law): the problem of its definition in management

A sequence of contracts whose unity receives no legal characterisation of its own.

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II

THE POSSIBLE INADEQUACY OF THE CONTRACT FOR BUILDING APPROPRIATE VALUE CHAINS

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TWO OBSTACLES TO BUILDING AN "APPROPRIATE" VALUE CHAIN

- A. The collective values carried by other legal norms are not expressed through the contractual construction of value chains
- B. More technically, more prosaically, but also more definitively: the contract is a bilateral act (can one reason as for the company contract?)
- C. The contract must be able to "envelop" third parties within a strategic unity

Thinking of the contract as a bilateral act would make it inadequate for building a value chain.

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III

THE PROSPECTS

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THE PROSPECTS: A CONTRACTUAL DYNAMISM

- A. The weak solution: the denaturing of contracts: the contract written by the law; the contract as an act implementing regulations; the contract erased in favour of a “Law of clauses”

- B. Saving Private Contract, so that companies continue to pave their value chains freely with it, converging with the Monumental Goals of Compliance

- To each company its strategy, to each company its contract. If, in its “global policy”, it adheres to a Monumental Goal to that extent, it will then be able to make it the substantial quality of the contracts that build its value chains, and thus to rely on it

- This presupposes that contracts are tailor-made not only to the technical object but also to the global policy of the contracting company (on the model of the public-law and/or public-service contract)

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CONCLUSION

A contractual dynamism drawing on freedom of contract, the very freedom that gave birth to value chains.

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