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The Characteristic Aspects of the Reform

Penalties for Contractual Non-Performance: the Art of Doing Something New With Something Old, and Vice Versa

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The Law of 16 February 2015 empowering the Government to reform by way of Ordinance ordinary contract law, the general regime and proof of obligations, was intended inter alia to “*consolidate the rules relating to the non-performance of contracts*”. This was done, in theory, by the Ordinance of 10 February 2016 (1), in a Section V, *Non-performance of the Contract*, Chapter IV, *The Effects of the Contract*, in Articles 1217 et seq. of the Civil Code. That could be the end of the “*exploded*” presentation of contractual non-performance denounced by Dean Tallon (2).

Article 1217 opening Section V outlines the means available to the unsatisfied creditor, detailed by its sub-sections: defence of non-performance (Articles 1219 and 1220), enforced performance in kind (Articles 1221 and 1222), the reduction in price (Article 1223), termination (Articles 1224 to 1230) and reparation of loss (Articles 1231 to 1231-7) – for set-off claims, reference is made to the general regime of obligations at Articles 1347 et seq.

Article 1218 (3) defines contractual *force majeure* and provides for some of its effects. It is regrettable that the duality of unforeseeable circumstances and *force majeure* (under former Article 1148) should have been removed from the extraneous cause at former Article 1147, although said duality remains in special contract law. Nevertheless, the definition of the prevention of performance at Article 1218 is sufficiently flexible to allow judicial, variable-geometry assessments, restoring the hierarchy between *vis maior* and *vis minor*. As to the effects of the prevention, the alternative between suspension of the obligation and termination of the contract is reductive: the text omits the award of damages, but Article 1231-1 supplements it, as well as the reduction in price, although the latter’s fate is less obvious.

However, while the announced reform of civil liability has followed the course outlined by the proposals set out on 13 March 2017 (4), it would defeat all that the Ordinance does, since damages would be detached from subheading I, *The contract*, and move to subtitle II, *Civil Liability*. The legislature would thus take part in the controversies relating to contractual liability, one of several reasons for the disordered process of reforming the law of obligations (5). The Ordinance is already a step in that direction, the title of sub-section V relating to damages – *Reparation of loss resulting from non-performance of the contract* – being in line with the Catala preliminary draft and not the Terré preliminary draft (6). On the other hand, the substance of the provisions is almost intact, Articles 1231 et seq. essentially proceeding with a recodification of established law (7).

In reality, Articles 1217 et seq do not gather all the rules relating to contractual non-performance (8). Beyond the statement of the means open to the creditor, the rules governing non-performance must be sought out in other provisions, in which the omissions and innovations are of unequal scope.

Among the silences, non-performance is classically defined only as opposed to satisfaction, Article 1217 simply distinguishing between the absence of an act of performance and an incomplete act of performance. Article 1342 inadvertently restricts satisfaction to "*the voluntary performance of the act of performance which is due*", as if enforced performance were not satisfaction. Moreover, to present performance as that of the act of performance is an ellipse because performance concerns the obligation, for which the act of performance forms the purpose according to Article 1163. Conversely, by covering the non-performance of the contract, the undertaking and the obligation one by one, the Ordinance fuels the debate as to whether non-performance means that of the obligation or extends to the breach of the contract itself. It is equally unfortunate that the Ordinance does not define obligations, and claims to abolish the classifications thereof according to their purpose or its extent (9). Similarly, apart from Article 1186 on multiple contracts, the effects of non-performance against third parties are neglected, although Article 1234 of the proposals of 13 March 2017 is intended to fill this gap for damages. The contractual accommodation of non-performance is similarly neglected, with the exception of Article 1170 which prohibits the clause depriving the essential obligation of its substance, and Article 1171 authorising the courts to eradicate unfair terms in standard-form contracts, while the penalty clause is reduced to the bare minimum, at Article 1231-5.

Among the contributions, we can welcome the recognition by Article 1345 of the creditor's residence (10), even restricted to non-receipt of satisfaction or its prevention (11). The non-performance imputed to the debtor resurfaces in the concept of unforeseen non-performance, at Article 1218 defining force majeure, then at Articles 1351 and 1351-1 relating to the impossibility of performing – barely better written than the former articles 1302 and 1303, but the subject is challenging. The main contribution of the reform therefore concerns the effects of contractual non-performance between the parties, and yet that must still be qualified because it is less a revolution than it is a renewal. Technically, none of the means open to a dissatisfied creditor at Articles 1217 et seq. was ignored by the original Code, which contained illustrations of each. The progress made by the reform – if indeed advances have been made – lays elsewhere.

From the outset, two trends emerge. The first is clear and consists in the generalisation and/or dejudicialisation of penalties for non-performance. The generalisation results from the fact that those which do not already appear in provisions specific to certain contracts are now included in the provisions of the ordinary contract law. This is the case of the defence of non-performance and reductions in price. Dejudicialisation refers to a reversal of the trial charge. The judicial pronouncement of a measure requested by the creditor replaces, in case of dispute and at the request of the debtor, a judicial review of a measure taken unilaterally. The court is therefore not necessarily seised *a priori*, but possibly *a posteriori*. This is partly the case of performance at the expense of the debtor, the reduction of the price and the termination of the contract. However, this decline in referrals to the courts does not prevent the permanence of their role, which is illustrated by the second trend.

More discreet, this lies in the prioritisation and combination of penalties for non-performance. Their graduation according to their gravity is apparent from the conditions laid down for their exercise, extended by the powers granted to the court. This prioritisation of eligible penalties concerns them all, some (defence of non-performance, performance in kind and termination of the contract) more than others (the reduction in price and damages). The combination of penalties for non-performance consists in adding those that are compatible, and would require the

adjustment of additional damages. In this regard, Articles 1217 et seq. only sketch out the “overall” logic for which Dean Tallon argued.

On the other hand, neither of these trends reflects a strong conception of responses to non-performance. No more than the original Code, Articles 1217 et seq. do not refer to “*actions open to the creditor*”, contrary to Articles 1341 et seq. on the “*right*” to enforced performance and oblique and paulian actions. This can be explained by the trend towards dejudicialisation – from which forced performance is specifically excluded. The expression of “remedies for non-performance”, inspired by the “remedies for breach of contract” in common-law systems and present in the 2015 draft, has been removed. It is true that this much-criticised wording (12) is an ellipse: either the non-performance itself or, where it is irremediable, the situation born of the non-performance is remedied, as illustrated by the termination of the contract. Nor do the texts mention the “means” (*moyens*) available to the creditor; this is a translation of “remedies” by the various instruments of unification but little used by French jurisprudence. Article 1217, alone, refers to “*sanctions*”. The name is customary, the majority jurisprudence making the defaulting debtor the culprit and the dissatisfied creditor the victim. However, in a generic way, a sanction is devoid of punitive connotations. It seems to us that, subject to these nuances, the various labels are equivalent. Nevertheless, we will also choose, for its classicism and its plasticity, that of penalties – for non-performance, not the debtor – although this is still an ellipse because the penalty for non-performance is, moreover, that of the contractual obligation.

Having clarified the above, the clear trend towards the generalisation and/or dejudicialisation of penalties for non-performance (I) precedes and reveals the more discreet trend towards their prioritisation and combination (II).

I. Generalisation and/or dejudicialisation of penalties for non-performance

Following the order at Article 1217, termination – which leads to the disappearance of the contract (B) – should be isolated from penalties which either are neutral and do not presage the fate of the contract (such as the defence of non-performance) or tend to preserve the contract (such as enforced performance in kind or a reduction in price (A)). Only damages fall outside the scope of such generalisation and dejudicialisation since, *resulting from non-performance* (former Section IV), they already came under *The effect of obligations* (former Chapter III) and, unless otherwise agreed, their allocation remains the prerogative of the courts.

A. The preservation of the contract

If the defence of non-performance has become generalised, its dejudicialisation need not be: it is already a private remedy (1.). Enforced performance in kind is neither really generalised nor fully dejudicialised (2.), while the reduction in price is generalised and partially dejudicialised (3.).

1. The defence of non-performance

The defence of non-performance is provided in Articles 1219 and 1220 (13). Its generalisation is not accompanied by any dejudicialisation as it is an extrajudicial remedy. Prior notice is not even required. The texts are terse and lay down the principle of the defence, refusal or suspension, without setting the specific rules. Following them, we can distinguish between proven non-performance or suspension of performance.

a) Proven non-performance

Article 1219 generalises the defence of non-performance present in texts specific to certain contracts, with contracts of sale at the forefront of these. However, it boils down to a minimal codification of the case law *acquis*. Indeed, although commentators and the Court of Cassation have long systematised the defence of non-performance in synallagmatic contracts, questions remain as to its implementation. However, the contribution of the legislation is limited enough to leave the parties without guidance, and so that in the event of dispute, the court is free to copy (or not) existing solutions. Specifically, Article 1219 does not indicate whether it is confined to complete synallagmatic contracts, whether it presupposes the interconnectedness of reciprocal obligations, or on which party the burden of proof is incumbent. In addition, the requirement of "*serious non-performance*" merits further clarification. Only total refusal on the part of the creditor resulting from total non-performance of the debtor – thus disregarding the exclusion of a partial refusal against partial non-performance, would appear to be envisaged. In reality, it is necessary but it is sufficient that the defence be proportionate to the alleged non-performance – as indicated in the Terré draft. The sufficiently serious non-performance is therefore that which legitimises the refusal to perform notified by the creditor, which the court assesses in the event of a dispute.

b) Suspension of performance

Article 1220 allows the suspension of performance, or anticipation of non-performance. It is already included in provisions relating to domestic or international sales, and is found in judgments handed down by the Court of Cassation. Rather than being an invention, it is again a generalisation. In addition to the fact that the non-performance to come must be "*evident*" and its "*consequences ... sufficiently serious*" for the creditor, the creditor must notify the suspension of his performance "*as soon as possible*". In the event of a dispute, each of these standards requires judicial assessment.

Instead of the seriousness of the consequences of non-performance for the creditor – this wording being inspired by the Terré draft – it would have been preferable for Article 1220 to recall, no more and no less, the requirement of proportionality of the suspension of performance. It is also regrettable that the text does not say a word about the assurances of satisfaction that the debtor can provide to the creditor. It is they which, in the Vienna Convention, give meaning to the timeframe in which this preventive remedy is contained. The notification of the creditor allows the debtor to ensure future satisfaction before the deadline has been reached. Therefore, Article 1220 sets a deadline for which the sanction (a forfeiture, it is assumed) and the basis (we hesitate on the purpose of this incumbency) are indefinite.

The defence of non-performance constitutes a transitional penalty: sooner or later, the situation will be resolved, preferably by enforced performance in kind.

2. Enforced performance in kind

Enforced performance in kind of an obligation is the subject of Articles 1221 and 1222, dealing respectively with enforcement by the debtor himself, or with the creditor or a third party at the expense of the debtor (14). It turns out that performance in kind remedies both a lack of benefit and an incomplete act of performance, which it corrects. However, limits have not been set out (but can they be?) between performance and reparation in kind (15), performance by others and termination of the contract (16). The generalisation of enforced performance is more "advertised"

than it is effective because it comes with restrictions; its dejudicialisation is limited to performance at the expense of the debtor, and then only partially.

a) Generalisation “advertised”

Article 1221 clarifies the enforcement of non-pecuniary obligations, the uncertainty of which was enhanced by a sclerosing interpretation of the former Article 1142, appearing to disregard it for obligations to do and not to do.

From now on, the principle of performance in kind by the debtor is posited without distinction according to the purpose of the obligation (to do, not to do and to give), since formally this trilogy has been abolished. However, this principle suffers from the limits suggested by the Terré draft, and is likely to offend the proponents of the primacy of performance in kind. In addition to impossibility (to which is added uselessness), Article 1221 excepts performance by the debtor at a cost manifestly disproportionate compared to the interest for the creditor. Article 1222 makes performance by the creditor or a third party at the debtor's expense subject to its “reasonable” cost. Furthermore, Articles 1221 and 1222 require prior notice. The solution seems to disregard the distinction between the terms “imperative” and “indicative”, renewed by Article 1344. At Article 1222, the solution is best conceived if the formal notice does not concern the obligation due but, similarly to the German *Nachfrist*, gives the debtor the option of performing the same rather than assuming the cost of performance by others. Lastly, Article 1222 confines performance at the debtor's expense to a reasonable time period granted to the creditor; the function as a penalty remain unclear, and of such a nature as to run up against opponents to the multiplication of necessarily standard deadlines.

b) Limited dejudicialisation

Article 1221 does not dejudicialise enforced performance by the debtor himself: in the absence of voluntary performance, the creditor must “pursue” him for the purpose of obtaining an enforceable instrument, if he does not already have one. The same is true, at Article 1222, of the debtor being ordered by the court to advance the sums necessary for performance by the creditor or a third party, where a “request to the debtor” for their repayment would seem sufficient. Lastly, unlike the 2015 draft Ordinance, Article 1222 no longer exempts the creditor from prior judicial authorisation when the performance of the obligation requires the destruction of “*what has been done in violation of the same*” (17).

3. Reduction in price

a) A welcome generalisation

Article 1223 generalises a penalty that has so far only been included in the provisions of certain contracts, primarily the sale under the seller's guarantee. The Court of Cassation very early extended this sanction, for example with the judicial reduction of the price for non-conformity of the goods in a commercial sale, or the judicial revision of the fees according to the quality of the service rendered in the mandate or the business. The generalisation of the reduction in price in the event of defective performance is disputed (18) but welcome. However, the text contains (at least) two inaccuracies and one instance of awkwardness. Firstly, the acceptance of “*incomplete performance*” is not synonymous with the recognition of the benefit, which would be the discharge of the obligation and excluding any penalty for non-performance. It is only the acceptance of the act of performance on the basis of non-satisfactory payment (19). Secondly, Article 1223 provides no method of calculation and does not define the factor of proportionality. This causes little

difficulty when the reduction in price amounts to a partial termination of the contract for a partial benefit. This becomes more difficult when the reduction rebalances the contract because of the incomplete quality of the service provided. Thirdly, the requirement of an unsuccessful notice to correct the defective act of performance becomes useless when the non-performance turns out to be irremediable.

b) Ambiguous dejudicialisation

The Ordinance does not dispel the ambiguity born of the preliminary draft. Under Articles 1217 and 1223, the creditor *"requests"* the reduction in price, without knowing whether he must apply to the court or the debtor. The dejudicialisation of the reduction in price appears reserved for the assumption that the creditor, having not yet paid the price, has *"notified his decision"* to the debtor, and this *"as soon as possible"*. Again, it would have been necessary to state the function and penalty for the timeframe thus imparted. In any event, any dispute over partial payment or restitution of the price requires *ex-post* judicial review, at the initiative of either the debtor or creditor.

B. The disappearance of the contract

The ultimate sanction leading to the disappearance of the contract, termination for non-performance was already provided at former Article 1184 (20); no need, therefore, for generalisation. It is undoubtedly regrettable that it is admitted only for proven, not anticipated, non-performance. On the other hand, its dejudicialisation is the most striking. Article 1217, according to which the creditor may *"provoke" it*, announces the dejudicialisation of the methods of termination listed at Articles 1224 to 1227, to which must be added Article 1218. Articles 1229 and 1230 structure the consequences thereof more or less happily (21).

a) Striking dejudicialisation

Under Article 1224, sometimes the termination results from the application of a resolutive clause (Article 1225), as the conventional termination is not mentioned. Sometimes, but the non-performance must be serious enough, the termination remains judicial (Article 1227) or becomes extrajudicial and unilateral (Article 1226). If the Court of Cassation admits it in certain hypotheses, this dejudicialisation, which has become of principle, is bitterly discussed, especially in case of unequal parties. So it is accompanied by safeguards.

First and *"unless there is urgency"*, the declaration of the creditor requires that prior notice be given. Again (22), this is understood only to the extent that, as stated in Article 1226, said notice allows the debtor the opportunity *"to perform his undertaking within a reasonable time"* – the assessment of which falls to the court possibly seised. Formal notice therefore becomes useless when non-performance is irremediable. Next, reasons must be given for the declaration of termination. Lastly, in the event of litigation, the reversal of the burden of the trial, at the initiative of the debtor, is not replicated by a reversal of the burden of proof, that of the seriousness of the non-performance incumbent on the creditor. This is why the termination is, like any extrajudicial measure, decided *"at his own risk"*. In fact, contrary to the acquisition of a termination clause, judicial or extrajudicial termination is subject to the seriousness of the non-performance. This requirement, inherited from *Ceccaldi v. Albertini* (23), is therefore preferred to the more modern (but from experience, scarcely more manageable) criterion of the non-performance or essential breach of the unifying instruments. Quite beyond words, standards also converge: the debtor's failure must disappoint the creditor's expectations, ruin his interest in the contract, to justify a

sanction as radical as its termination. This was more or less the definition adopted by the Terré draft, which the new legislation does not deem fit to reproduce.

b) The ambiguity of termination *ipso jure*

Article 1218 provides for the termination *ipso jure* of the contract when the force majeure causes the "permanent (...) prevention" of performance (24). This wording, inherited from the Terré draft, is ambiguous: either the text only dejudicialises the termination for accidental non-performance, like Article 1226 for non-performance attributable to the debtor, and breaks with the case law established in *Ceccaldi*. *Ipsa jure* means that the court seized retrospectively has no discretionary power and the termination is binding; or, like the *ipso facto* avoidance under the Hague Convention, fortunately abandoned by the Vienna Convention, termination *ipso jure* automatically occurs without the knowledge of the parties. In either interpretation, Article 1218 fulfils the wishes of the proponents of the autonomy of risk theory (25). Still, one wonders whether such termination might be tantamount to lapse covered by Article 1186, which does not specify how it occurs. Above all, the reasons enunciated in the *Ceccaldi* decision against the dejudicialisation of the termination of the contract have not lost any of their acuity. In the event of dispute, it is up to the court to verify the existence of the force majeure, the definitive nature of the prevention of performance, and the seriousness of the non-performance because they are not synonymous, and there is no reason why termination *ipso jure* should elude that condition.

At this stage, the first trend discussed – generalisation and/or dejudicialisation of penalties for non-performance – is verified, albeit in a highly nuanced way, for performance in kind. The provisions examined so far presage the difficulties of concretising the second trend: the prioritisation and combination of penalties for non-performance.

II. Prioritisation and combination of penalties for non-performance

Article 1217 paragraph 1, which sets out the range of penalties for non-performance, does not formally prioritise them. Nevertheless, the following provisions outline a progression and graduation of the eligible remedies (A). According to paragraph 2, "sanctions which are not incompatible may be combined; damages may always be added to any of the others". While the combination of compatible penalties is affirmed, it remains unorganised (B).

A. The progression and graduation of the admissible penalties

The factors of prioritisation contained in Articles 1217 et seq. are enhanced by the powers devolved to the court.

a) Factors of prioritisation

Penalties for non-performance are subject to varying requirements – from which time limits will be omitted – which are all factors of prioritisation.

On the one hand, prior notice giving the debtor a chance to remedy his non-performance is a common condition, apart from the defence of non-performance (transitional), the so-called automatic termination in case of prevention, and judicial termination; if we admit that the assignment is equivalent to prior notice. Article 1231 also excludes it for damages where the non-performance is "final" (26), and this also applies to the reduction in price and the termination of the contract. In the light of Article 1344, it is less a question of establishing the enforceability of the obligation than it is of giving priority to performance in kind, the other penalties being

subsidiary. This is a paradox of the Ordinance, when one knows the limits assigned to this remedy when it is requested by the creditor: restricted performance by the debtor is excluded because of its clearly disproportionate cost compared to the interest of the creditor, while performance at the debtor's expense assumes that the cost remains reasonable.

On the other hand, the requirement of seriousness of non-performance or its consequences is common with the defence of non-performance and judicial and extrajudicial termination (certainly *ipso jure*), excluding reduction in price, and the award of damages – but there must be loss. The assessment of the seriousness of the failure varies depending on the penalty, in order to check their proportionality. The Terré draft expressed it differently, by the variety of wordings used and the definition of the seriousness of the non-performance justifying the termination.

Therefore, in the absence of a sufficiently serious non-performance, and in the presence of a clearly disproportionate or even unreasonable cost of enforced performance in kind, only pecuniary penalties – the reduction in price and damages and interests – are admissible.

b) Powers of the court

Article 1228 defining the powers of the court dealing with the termination of the contract is only slightly innovative. In line with the former Article 1184 and the various jurisprudential drafts, it leaves the court to decide on the termination or performance according to the "*circumstances*", if necessary by granting a final deadline to the debtor, or by awarding damages. The creditor wishing to terminate the contract may therefore, in certain cases, be required to accept performance of the obligation or damages. Conversely, can the person pursuing enforcement be subject to the termination of the contract where the cost is deemed disproportionate or unreasonable? The question remains open, too, where the non-performance is serious enough to justify termination while the cost of the performance in kind remains proportionate or reasonable.

Article 1228 does not envisage the alternative between termination of the contract and a reduction in price. Today, the Court of Cassation admits that in the absence of serious non-performance, the creditor must be satisfied with a reduction in price – if necessary in the form of damages. It is likely that despite the silence of texts, this outcome persists. The relationship between the reduction in price and performance in kind is no longer considered. The previous solution, favouring the reduction in price, could well be transposed to the scenario of disproportionate or unreasonable cost to the debtor.

Uncertainty remains, lastly, on the choice between performance in kind and damages: can the creditor seeking damages be ordered to accept performance in kind, and vice versa? Neither the Ordinance nor the proposals of 13 March 2017 say anything on this point (27).

B. The combination of compatible penalties

Despite the increase in penalties for non-performance, which is reflected in the requirement of formal notice, Article 1217 ultimately does not concern itself with their succession – for example, the defence of non-performance followed by an unsuccessful performance in kind preceding a request for termination. In the event of legal action, such a succession of penalties may give rise to difficulties because of the prohibition of new claims at second instance and the case-law principle of concentration of the means, or even of requests (28). The legislation focuses on the sole assumption of combining penalties for non-performance. Those that are compatible can be

combined, as is always the case of damages. But to say that is to say nothing at all, because while the principle goes without saying, its implementation can prove difficult. Here, the summary definition of “*sanctions for non-performance*”, considered in isolation, shows the limits of a system that is not one: the overall logic is lacking. Contrary to appearances, the articulation of penalties other than damages is simpler than the modulation of the latter.

a) Articulating different penalties

The imperative of consistency proscribes contradictory claims by the creditor. Thus, he cannot request the preservation and the termination of the contract at the same time: on the one hand performance in kind and/or a reduction in price; and the termination of the contract, on the other. It is also necessary to reserve the submission of principal and subsidiary requests. And yet, in the event of multiple failures, this must be tempered because the penalties are then of variable geometry, likely to be combined according to this or that act of non-performance. Thus, it is not absurd to claim the correction of the non-compliant part of the act of performance, and/or a reduction in its price, and the termination of the contract for the part of the act of performance not provided.

b) Modulating the award of damages

The difficulties here are more formidable. The assessment of damages varies according to whether they are allocated alone or in combination with other penalties because they alter the consistency of the contractual loss, which becomes residual. The principle of equivalence requires that the additional damages be modulated accordingly. This is the case, for example, with those accompanying performance in kind. On this highly disputed question, we shall confine ourselves to two observations.

Firstly, the insufficiency of Article 1223 relating to the reduction in price is confirmed. While the proportional reduction in price rebalances the contract by reason of the difference in value between the promised benefit and that provided, then the boundaries become diaphanous, with damages compensating for the same loss of value. However, unlike the Terré draft, the text does not take care to reserve damages for “*other loss*”. This precaution would have been salutary, knowing that the Court of Cassation has the greatest difficulty in separating the reduction in price and damages, the better to combine them (29).

Secondly, Articles 1231 et seq. essentially performing a recodification of established case law, and the proposals of 13 March 2017 not being concerned with it, the discussion continues as to damages supplementing the termination of the contract. Moreover, the debate remains unchanged as to whether such damages compensate for the positive interest of the creditor, the interest of performance, *i.e.* to obtain satisfactory performance; and/or its negative interest, the non-conclusion of the contract, *i.e.* not to contract with a defaulting debtor (30).

The renewal of penalties for contractual non-performance is quite relative. The technique of each of the penalties, inherited without much change from the old ordinary contract law or from the special law of contracts, is at least as venerable as the Napoleonic Code. The “rejuvenation” comes mainly from the Ordinance’s tendency to generalise and dejudicialise, to prioritise and combine these penalties. However, the brevity, vagueness and incompleteness of Articles 1217 et seq. sow the seeds of a rejudicialisation because the assessment of the various standards calls the arbitration of the courts. The provisions are quite flexible, even vague, so that the courts have as

much power as before. Consequently, here as elsewhere, the reform of the Civil Code will continue to be written in the *Bulletin* of the decisions of the Court of Cassation: new on the one hand, old on the other.

Notes

(1) For which, following that of 6 July 2016 rendered obsolete by the end of the previous legislature, a new bill of ratification was tabled in the Senate on 9 June 2017 (*texte n° 578, 2016–2017*), <http://www.senat.fr/leg/pjl16-578.html>.

(2) D. Tallon « L'inexécution du contrat : pour une autre présentation », *RTD civ.* 1994 p. 223.

(3) See H. Boucard « L'article 1218 : la force majeure contractuelle », *RDC* 2015 p. 779 sur le projet du 25 févr. 2015

(4)

http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf, and the preliminary draft of 29 April 2016, http://www.textes.justice.gouv.fr/art_pix/avpjl-responsabilite-civile.pdf; see in particular J.-S. Borghetti « L'avant-projet de réforme de la responsabilité civile. Vue d'ensemble de l'avant-projet », *D.* 2016 p. 1386, et « L'avant-projet de réforme de la responsabilité civile. Commentaire des principales dispositions », *D.* 2016 p. 1442 ; M. Mekki (dir.), *Avant-projet de réforme du droit de la responsabilité civile : l'art et la technique du compromis (Réponse à la consultation publique)* Lgdj/Lextenso 2016 ; P. Stoffel-Munck (dir.) *Avant-projet de loi portant réforme de la responsabilité civile, Observations et propositions de modifications*, *JCP* 25 juill. 2016, suppl. au n° 30–35 ; *Pour une réforme ambitieuse de la responsabilité contractuelle*, *RDC* 2016, Débats, p. 770.

(5) See H. Boucard "The curious process of reforming France's law of obligations", *Montesquieu Law Review* 2015 p. 62.

(6) P. Catala (dir.) *Avant-projet de réforme du droit des obligations et du droit de la prescription*, Rapport à M. Pascal Clément, Ministre de la Justice, Garde des Sceaux, 22 septembre 2005, La documentation française 2005; F. Terré (dir.) *Pour une réforme du droit des contrats* Dalloz 2009 ; *Pour une réforme du droit de la responsabilité civile* Dalloz 2011 ; *Pour une réforme du régime général des obligations* Dalloz 2013.

(7) For direct amendments only, see the *crescendo* of form and substance, Article 1231 (former Article 1146) on the requirement of formal notice, Article 1231–6 (former Article 1153) on the late payment of monetary obligations; Article 1231–3 (former Article 1150) codifying the case-law assimilation of gross negligence to fraudulent default, which precludes the requirement of foreseeability of contractual damage; Article 1218 (former Articles 1147 and 1148) abandoning the duality of the extraneous cause, mentioned in the text, and the disappearance of the article devoted to the penalty clause (former Article 1226 et seq.), with Article 1231–5 summarising the provisions of former Articles 1230 and 1231 only.

(8) Of the works commenting the Ordinance, see e.g. G. Chantepie et M. Latina *La réforme du droit des obligations, Commentaire théorique et pratique dans l'ordre du Code civil* Dalloz 2016 ; O. Deshayes, T. Genicon et Y.-M. Laithier *Réforme du droit des contrats, du régime général et de la preuve des obligations, Commentaire article par article* LexisNexis 2016 ; M. Fabre-Magnan *Droit des obligations* vol. 1 *Contrat et engagement unilatéral* Puf 2016 ; B. Fages et alii *Le Lamy, Droit du contrat* Wolters Kluwer 2016 ; C. Larroumet et S. Bros *Traité de droit civil* t. 3 *Les obligations, Le contrat* Economica 2016 ; *adde L'inexécution des contrats*, dir. O. Tournafond, *Dr. et patr.* 2016 n° 259 p. 38. Sur le projet du 25 févr. 2015, v. par ex. H. Boucard « Le nouveau régime de l'inexécution contractuelle », *La réforme du droit des obligations en France, op. cit.* p. 153 ; Y.-M. Laithier « Les règles relatives à l'inexécution des obligations contractuelles », *Projet d'ordonnance*

portant réforme du droit des contrats, du régime général et de la preuve des obligations, Observations et propositions de modifications, dir. N. Molfessis, *JCP* 2015 suppl. au n° 21 p. 47 ; M. Mekki « Les remèdes à l'inexécution dans le projet d'ordonnance portant réforme du droit des obligations », *Critiques constructives du projet d'ordonnance portant réforme du droit des obligations : parfaire sans défaire (réponse à la consultation publique)*, dir. M. Mekki, *Gaz. Pal.* 29–30 avr. 2016, nos 119–120, p. 37.

(9) See e.g. « Repenser la garantie d'éviction et des charges ? Du passé ne faisons pas table rase », *RDC* 2016 p. 528 ; P. Jourdain « Quel avenir pour la distinction des obligations de résultat et de moyens ? », *JCP* 2016 I 909.

(10) Assuming that it differs from a debtor's home (the creditor who is late in performing his own obligations) and from the creditor's obligations (*Obliegenheiten*), see H. Boucard *L'agrégation de la livraison dans la vente, Essai de théorie générale* Université de Poitiers diff. Lgdj 2005 préf. P. Remy n° 150, 492 et s.

(11) “Where performance is due, and without legitimate reason the creditor refuses to accept performance, or obstructs it by his own actions, the debtor may put him on notice to accept or permit performance” – the syntax featuring in the draft French version of the Ordinance was not corrected: it is ultimately the performance of the obligation in question.

(12) See e.g. Y.–M. Laithier *Étude comparative des sanctions de l'inexécution du contrat* Lgdj 2004 préf. H. Muir Watt nos 4 s.

(13) See in particular O. Deshayes *Rép. civ. Dalloz* v° Exception d'inexécution, 2016.

(14) See in particular V. Forti *Rép. civ. Dalloz* v° Exécution forcée en nature, 2016.

(15) See e.g. Z. Jacquemin « Pour une reconnaissance de la spécificité de la responsabilité contractuelle dans les effets de la responsabilité », *RDC* 2016 p. 808. The proposals of 13 March 2017 do not venture to distinguish between them, covering only reparation in kind as an effect of civil liability; see Article 1258 et seq.

(16) Cf. M. Faure–Abbad « L'article 1222 : la faculté de remplacement », *RDC* 2015 p. 784.

(17) On the limits of the contrast between positive and negative obligations in this respect, when “it is necessary (...) to destroy in order to rebuild according to the contract”, see M. Faure–Abbad « L'article 1222 : la faculté de remplacement », *RDC* 2015 p. 784.

(18) See in particular É. Savaux « Article 1223 : la réduction du prix », *RDC* 2015 p. 786.

(19) See our thesis above, specifically nos 22 et seq., 410 et seq., 545 et seq.

(20) See in particular T. Genicon *La résolution du contrat pour inexécution* Lgdj 2007 préf. L. Leveneur.

(21) See H. Boucard « Le nouveau régime de l'inexécution contractuelle », *eod. loc.* n° 16 s.

(22) i.e. in the light of the distinction between indicative and mandatory periods, to which reference is made at Article 1225 on termination clauses.

(23) F. Terré, Y. Lequette et F. Chénéde *Les grands arrêts de la jurisprudence civile* t. 2 *Obligations, Contrats spéciaux, Sûretés* Dalloz 2015 n° 180.

(24) See H. Boucard « Article 1218 : la force majeure contractuelle », *eod. loc.*

(25) On which see in particular O. Deshayes *Rép. civ. Dalloz* v° Théorie des risques, 2016.

(26) See Article 1252 of the proposals of 13 March 2017.

(27) Except to equate performance in kind with reparation in kind (which would be a new “reversal of perspective” – see J. Carbonnier, *Droit civil*, vol. 2 *Les biens, Les obligations* PUF–Quadriges 2004 n° 1070), only covered by the proposals of 13 March 2017, and which Article 1261 forbids imposing on the “victim”.

(28) On which see, lastly, M. Reverchon–Billot, *La question litigieuse en matière contractuelle (Essai sur le traitement procédural du droit des contrats)* Dalloz 2017 préf. É. Savaux.

(29) See H. Boucard *Rép. civ. Dalloz* v° Responsabilité contractuelle, 2014, nos 460 s.

(30) See *ibid.* and references; *adde* e.g. É. Savaux « Les dommages et intérêts en cas de résolution du contrat : des principes à la casuistique », *RDC* 2015 p. 845.

