

*Proposals for Reform  
of the Law of Obligations  
and the Law of Prescription*

Pierre Catala

English translation by  
John Cartwright and  
Simon Whittaker

## *Translators' Preface*

We would first like to thank Professor Pierre Catala for inviting us on behalf of himself and of the other contributors to the *Avant-projet de réforme du droit des obligations et de la prescription* to translate its provisions into English. We have very much enjoyed this opportunity of bringing this expression of French private law *doctrine* to a wider audience.

We early took the view that it was important to include in the scope of our translation all the elements of the *Avant-projet* as presented to the French Minister of Justice in September 2005 (and later published by the Ministry<sup>1</sup>), including both the introductory preambles of the contributors and the notes which accompany the provisions themselves. These materials explain the general approaches and guiding principles of the contributors to the *Avant-projet* and the thinking behind many of the specific provisions.

We have endeavoured to translate the French legal terminology in a way which is both accurate and faithful to French legal thought and yet comprehensible to readers of English, whether or not they are familiar with the concepts of the civilian tradition. We intend to explain elsewhere some of the choices which we have made and how the most difficult of them stem from differences in some of the fundamental structural features of French law and the common law (to which many available English terms are so intimately related).

Finally, we would like to thank Mlle Geneviève Helleringer of the Université de Paris I Panthéon-Sorbonne for her helpful comments on an earlier draft of our translation.

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<sup>1</sup> P. Catala (dir.) *Avant-projet de réforme du droit des obligations et de la prescription* (La documentation Française, Paris, 2006).

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# *General Presentation of the Reform Proposals*

*Pierre Catala*

(1) The bicentenary of the Civil Code has created a considerable stir in most of the countries which share the principle of codification, whatever their language. It has given rise to innumerable gatherings—on different scales, and with different objects—but at which the names of Portalis and Carbonnier have stood out. The founder and the reformer had the same perspective of history, a deep understanding of the customs and traditions which make up the ‘spirit of the centuries’ and the sense that ‘it is right to save everything that it is not necessary to destroy’. They did not themselves design the legal order, yet they had no doubt that legislation, rather than case-law, is the mother of legal order. ‘The art of the legislator consists in finding, in each area, those principles which are most conducive to the common good; the art of the judge is to put these principles into action, to develop them and extend them, by wise and reasoned application, to individual cases’ (Portalis, *Discours Préliminaire*).

Putting these two names side by side, we can be certain of two things: on the one hand, that the Code of 1804 always constituted an ideal model of civil legislation and, on the other, that it was possible to reform it without damaging either its structure or its form. This had been demonstrated by the evident success of Jean Carbonnier’s transformation of its first book. But beyond these remarks, which make pleasant hearing for French ears, there was another message for us, more often than not unspoken: what are you waiting for to continue the modernisation of your code?

(2) With the prospect of the great watershed of 2004, a **handful of civil law academics** started on this task a year earlier. This was triggered by a symposium organised by the Faculty at Sceaux, which set French law alongside the *Principles of European Contract Law* produced by Professor Lando’s working group. What appeared to emerge was that, although on certain points our law fitted, or could develop to fit, the framework proposed for Europe, on other points, the latter contravened our national tradition rather more. In the present circumstances this seemed to merit further investigation.

Those who gathered to deliberate on this had no underlying purpose of opposing anyone, or anything. The intention was to examine Titles III and IV of the third book of the Civil Code closely, to determine where it was silent and to distinguish, among those provisions currently in force, those which merited being left as they were from those which needed to be rewritten, or quite simply abandoned. In this, we were following the example of our German and Dutch neighbours who had

just reformed their codes, as had our transatlantic cousins in Quebec and Latin America.

At the heart of this opening debate was the place of the Civil Code within the private legal order. Does it form the fundamental, general principles of law, the civil constitution of France? If not, could it be re-established as such, at the centre of a system of legislation which is proliferating at the whim of national and European Community politicians and growing in such complexity that the knowledge of particular areas becomes the prerogative of the few? To answer these two questions, we need to form **a clear idea of civil legislation.**

(3) ‘Civil legislation’, said Portalis, ‘deals with relationships, whether natural or contractual, forced or voluntary, of a defined type or created to suit the occasion, linking each individual to another or others’. These simple words serve to delineate its general purpose in the absolute. Whereas commercial law gives merchants every freedom in the pursuit of their deals, and consumer protection is specifically dedicated to the consumer as against the business or professional, the civil law deals with these same persons beyond their roles of merchant or consumer. The Civil Code addresses all citizens alike, looking after them with Republican equality from their first breath to their last.

When it comes to contracts, its vocation is to temper the freedom available to merchants with a concern for a degree of contractual justice, without becoming the over-protective guardian of consumers. The civil law is a law of equilibrium, concerned equally with all the interests before it without favouring *a priori* one party over the other. It is the concern of other codes or laws to regulate the contractual balance towards greater efficiency or certainty depending upon the legal contexts in question and their requisite social utility.

Undertaken in this spirit of the golden mean, the modernisation of the Civil Code will maintain this as the central tenet of private law, the robust trunk of a tree whose branches grow and spread out in turn without losing touch with their roots. To this end, the Title ‘Obligations’ should be the repository of maxims which will set out an updated statement of the general law to be applied, whilst at the same time subsuming specific new laws. In this way the Code will remain **the natural recourse of a judge faced with silence in the specific statutes or contracts, the common basis of our legal reasoning.**

(4) Sponsored by the *Association Capitant*, **the project set up in 2003 has now been completed**, with the assistance of the Ministry of Justice, thirty months after its conception. Those who were there at the outset were too few for the project to succeed within this time; it was essential to spread the load and gather together those with other expertise. Our first task was to divide up the material and to entrust sections to colleagues who were particularly well qualified, whilst imposing a clear set of rules regarding time and form. We soon came to the view that it was necessary to form two distinct teams, one for contract and quasi-contracts and the other for civil liability. G. Viney moved from the initial group and, with G. Durry, formed a team of six academics in total who collectively took on civil liability. For contract and quasi-contracts, on the other hand, a purely collective approach seemed impossible, given the mass of topics to be handled. The initial group was to ensure therefore the oversight of a collaboration and was at the same time

afforded by a sufficient number of co-contributors. Twenty-six academics and three senior judges who had retired from the *Cour de cassation* took on the rebuilding of Title III (Contractual Obligations), subdivided into eighteen topics. Two other contributors devoted themselves to quasi-contracts and prescription respectively. In total, **the project called thirty-seven people into action.**

There were **four phases**, in all, in carrying out the project. These sometimes overlapped. The first phase (February to July 2003) was dedicated to preparing the programme: determining the objectives, dividing up the material and gathering together the contributors. In a second phase (September 2003 to April 2004) they accomplished their task which consisted in drafting the articles of the chapter or section with which they had been entrusted and producing a text for presentation.

Each of these contributions was then presented to all the participants requesting their advice, suggestions and criticism: this third phase comprised a sort of ‘forum’ which was richly rewarding thanks to the part played by most contributors. Gaps and duplications were discovered as well as particular articles of the present Code which had not been reorganised following modifications to the plan. There were also some conflicts of opinion, rarer than one would have thought, most of which found a solution by agreement.

The third phase should have been completed by autumn 2004 but in fact continued through to the end of the project. It is fair to say that the fourth and final stage ran in parallel from summer 2004. Its initial objective was the harmonisation of around twenty contributions which were inevitably heterogeneous in form, given the personal style of each contributor. In addition there was the task of resolving those differences which became apparent during phase three and re-touching numerous texts in response to the advice given during the ‘forum’; this was undertaken by the original group of participants supplemented by volunteers depending upon the subject under debate; certain chapters required up to ten versions... G. Cornu played a primordial role in the task of rewriting; any well-versed reader will recognise his style.

While the law of contract and the law of quasi-contracts were taking on their new form, the Viney-Durry group completed their reconstruction of civil liability and P. Malaurie that of prescription. Thus it would become possible to present successfully completed Reform Proposals to the public authorities and the legal community in early summer 2005 in its entirety, as you see. An initial overview of the project will be followed by a specific introduction to contractual obligations by G. Cornu. Then a preamble in which each contributor will present the part of the Proposals on which he or she worked. This will all be followed by the text of the new articles 1101 to 1339. The second part will comprise an introduction by G. Viney on civil liability, followed by the new articles 1340 to 1386. The third, relating to prescription, will contain an introduction by P. Malaurie, followed by articles 2234 to 2281.

(5) These few pages will not encroach on the explanations which will be offered to the reader by better informed minds. The intention is just to highlight some characteristics which weave together **the logic** of a project of such a considerable magnitude and diversity of subjects.

First of all we must pay respect to our sources, beginning with the first of these—legislation. Our study has shown that numerous solutions in the Napoleonic Code still retain their value after two centuries of application; they will be found either in just the same form as they were cast by our ancestors or re-drafted to suit present day taste better. In this connection, **the Reform Proposals do not propose to break away from the original, but to adjust it.**

In this the Proposals are indebted to **academic writing** and the **work of the courts**. The former was the source of much of the terminology for fundamental innovations; obligations ‘to take necessary steps’ and ‘of result’ to name but one. The Reform Proposals also owe to academic writing the numerous definitions which it has seemed desirable to set out in the legislation, because definition, if not *stricto sensu* normative, constitutes an incomparable tool for analysis and characterisation.

But however great the debt to academic writing, the Reform Proposals owe far more to the work of the courts. Clearly the robustness of Titles III and IV is explained in part by the appearance of codes and legislation which have grown up around the Civil Code, but even more so by the work of the *Cour de cassation* in interpreting the Code against its own letter. This court has given substance to the precontractual period, discovered the liability for the ‘actions of things’, moulded stipulations for the benefit of third parties, etc. It will be seen at almost every turn in the following pages.

(6) But the stamp of the Napoleonic Code and borrowings from interpretive sources, however considerable, are far from reducing the Reform Proposals to merely a low level of a codification of the law as it stands today.

On certain points—and not the least significant—there are **new rules which run counter to current case-law**. A unilateral promise to contract obliges the promisor to conclude the contract if the beneficiary accepts within the option period (article 1106); the function of the doctrine of ‘cause’ is fully explored in the formation of the contract without interfering with its performance (articles [1124] and [1125] taken together). In a case of delegation the undertaking by the delegate in favour of the beneficiary of the delegation renders the right of the delegator unavailable against the delegate, so that it can no longer be subject to distraint nor assigned (article [1281]). Elsewhere, the proposed texts do not contradict case-law, but aim to **clarify** it (restitution), **provide a framework** for it (consent, assignment of contracts), **temper** it with a rule of proof (fixing of the price, articles 1121-4 and 1121-5), or **open up new solutions**: direct actions (article 1168), interdependent contracts (articles 1172 *et seq.*), and assignment of future rights under obligations (article 1252).

Lastly, we must take into account matters which are beyond the power of courts where **legislation alone can create or transform the law**. It alone can substitute in place of article 1142 of the Civil Code a contrary disposition (the proposed article 1154), offer the unsatisfied creditor the right to terminate a contract unilaterally (article 1158), or permit the court to order the renegotiation of a contract which has lost all point for one of the parties (article 1135-2). Equally a legislative provision is necessary in order to give priority to creditors exercising *actions obliques* or *actions pauliennes* (article 1167-1), and likewise to reduce the

substantial formalities for the assignment of rights under obligations (article 1254-2).

Within the law of civil liability, it is for legislation to confirm the existence of contractual liability; to create a regime of liability which is more favourable to victims of personal injury (articles 1341, 1351, 1373, 1382-1); to broaden strict liability in the case of abnormally dangerous activities (article 1362) and to open the way to punitive damages (article 1372). On the question of **prescription** only the legislator can determine the time periods or redefine the respective roles of interruption and suspension.

(7) The fact that, for the purpose of presentation, this palette runs through every shade from continuity to change, perhaps masks the **unity of the Reform Proposals**. It is nonetheless to be seen in the many thematic strands which have come together to guide its construction.

The same **principle of consistency** links the conditions for the validity of a contract to their sanctions (articles 1122 and 1124-1) and inspires, in particular, basic rules such as article 1125 paragraph 2, and those of interpretation (article 1137) and of proof (article 1293). Beyond these obvious manifestations a latent consistency which the following introductions will bring to light, unites the different elements of the Reform Proposals.

**The power of the human will** is proclaimed. Its omnipotence is the overriding principle in the case of exchange of consent (articles 1127 and 1136), including in the matter of proof (article 1289), liability (article 1382) and prescription (article 2235). In parallel, the effects recognised for unilateral acts of will have been strengthened (articles 1101-1, 1121-4, 1121-5, 1158).

But if it gave in completely to freedom of contract, the Civil Code would lose the virtue of balance which is its essence; the affirmation of this freedom could not proceed without a counterweight to generate legal certainty. Thus a **duty of loyalty**, implicit or expressed, runs from one end to the other through the subject-matter of contractual obligations (articles 1104, 1110, 1120, 1134, 1176).

Going further, **this same spirit of solidarity** brings civil legislation to the rescue of the weakest party through general provisions which are not limited to consumer law. Such are the rules relating to form, capacity and power to act, which the Reform Proposals develop markedly by comparison with the Civil Code. Alongside these, some particular measures, in the same spirit, concern the conditions of validity of contracts (articles 1114-3, 1122-3, 1125 *et seq.*), their interpretation (article 1140-1), their performance (articles 1154, 1175), their assignment (article 1165-4) and their proof (article 1289 paragraph 3 and 1299). Likewise, civil liability covers the behaviour of those whose condition calls for special supervision (articles 1356, 1357) and the law of prescription spares those who are prevented from acting (article 2266).

(8) As presented, the Reform Proposals aim at an equitable balance between the spirit of the centuries and the needs of the present, as did the fathers of the Code in their day. As this same balance is necessary for every society today, it is not without interest to see, now we have completed our project, how far its outcome

matches the principles advanced by Professor Lando. The answer appears to be mixed.

There is clear convergence on formation of contracts, defects of consent, and representation (although the Reform Proposals are more comprehensive on the last of these). Equally, during the stage of performance, we find a shared preference for enforcement of the contract in kind, the trilogy of ‘measures’ available in the face of a debtor’s default (performance, termination, damages), and likewise the power of unilateral termination. The similarity of viewpoints on the subject of prescription will be even more pleasing.

However the *European Principles* do not include the doctrine of ‘cause’ as a justification for undertakings; they confer on courts the power to remake contracts (which the authors of the Reform Proposals overwhelmingly reject), and allow the annulment of a contract by notification to the other contracting party. These same Principles allow the proof of a contract by any form of evidence, and make joint and several liability the principle in civil matters. They provide that the assignment of a right under an obligation requires neither writing nor any other formality and that it takes effect at the point of agreement without settling the question of its effect as against third parties. These solutions, potentially dangerous in civil matters and increasing judicial intervention in contracts, will, no doubt, inspire some reservations on the part of French civil lawyers.

(9) A legislative act is not a unilateral act, but a collective one. Our common intent was to give substance to a general reform of the law of obligations and prescription, the urgency of which should be impressed upon the mind of the national legislator. Our hope is that the Reform Proposals serve the purpose which will give France a civil law adapted to its time and a voice at the table of Europe.

‘Will the plan which we have outlined for these institutions fulfil the objective which we set ourselves? We crave indulgence for our poor endeavours, in consideration of the zeal which has supported and encouraged us in our work. No doubt, we shall still fall short of the worthy hopes which were conceived for our task; but we are consoled by the fact that our errors are not beyond repair: formal discussion, enlightened discussion will repair them.’ With these same words Portalis concluded his *Discours préliminaire*.

# BOOK THREE

## TITLE III

### OBLIGATIONS

# *Introduction*

*Gérard Cornu*

What is said, in these Reform Proposals, about contracts and about contractual obligations in general, is not the result of a completely new construction on a blank canvas. It is a revision, a **comprehensive revision**. And it is precisely because no examination has been undertaken of it on this scale since 1804, that this blue-print for action is entitled now to make its legislative debut.

**The durability of the general doctrine of contract** in the Civil Code does not prove its obsolescence – it is lucky to be the inheritor of this legislative monument. But nor is this a guarantee of inviolability. A new age opens up new perspectives.

In accordance with the idea which has governed since 1965 in the reform of matrimonial property regimes and, in the same spirit, in the recasting in the Code of family law (as regards both family assets and other rights),<sup>1</sup> **the law of contract, in its turn, requires to be recast within the legal framework to which it already belongs**. At the heart of the Civil Code, recodification of this part has to be done taking into account the other parts, so that harmony may reign between them. The general provisions concerning restitution after destruction of the contract have been constructed bearing in mind those which govern the joint ownership of property, transfers between spouses, hotchpot, and the setting aside of acts of generosity (amongst many other examples). The same notions, in the same terms, run throughout. This is a benefit which flows from the reform.

**Contract remains the central figure**. Once the formation and conditions of validity have been dealt with, the general doctrine of contractual obligations is introduced: interpretation, performance, non-performance, effects as regards third parties, the modalities of obligations, extinction, proof. However, before dealing with this main part, an opening presentation gives an overview of the sources of all obligations: not only contractual obligations, but all extra-contractual obligations (quasi-contracts and civil liability). **This picture puts in perspective the major division between juridical acts and juridically significant facts** under the aegis of which each species is organised. Within juridical acts contract takes its place alongside unilateral juridical acts and collegial juridical acts. Amongst juridically significant facts, by contrast, quasi-contracts and civil liability respectively give rise to obligations as a result of benefits received without right, or loss inflicted without right. This re-uses, in an extended and re-emphasised form, the key provision of the existing article 1370.

These various forms of juridical acts and juridically significant facts are defined, as are the different kinds of contracts in the sections which follow. But the use of

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<sup>1</sup> Guardianship of minors, the law of adults under legal protection, parental authority, descent, divorce, estates in the course of being wound up.

legal definitions is far from systematic. Only legal terms of reference have this privilege, as they are the keys to the law of contract: types of obligation, modalities, grounds of extinction, kinds of evidence, transactions relating to rights under obligations, etc. Obligations form a coherent doctrine because of the system imposed on these concepts in practice.

## Fundamental directions

Essentially, opening up to a modern perspective does not involve rejecting the maxims which are still the real strength of contract. Article 1134 is still the same mainstay. It is the citizen's birthright.

- However, freedom of contract and the binding force of contracts must take into account the **desire for contractual fairness**. These days we expect progress in this direction. This is, essentially, one of the guiding ideas of the reform. The Reform Proposals give as much impetus to contractual fairness as is compatible with legal certainty. For fully competent adults, rescission for gross undervalue remains restricted, as does mistake as to value. But duress has a new look: it is not limited to physical or moral pressure, but can also result from an improper threat to take legal proceedings, or to take advantage of the state of extreme weakness in which one of the parties finds himself, where the other exploits it to obtain a manifestly excessive advantage. Fraud is taken into account not only where it emanates from the other party, but also if it is done by his agent or even, in certain circumstances, by a third party (article 1113-2). Above all, in referring to particular cases in which a protective legislative rule authorises the judicial review of contract terms which create an excessive imbalance to the detriment of one party, the Reform Proposals open the way to a doctrine of unforeseeability in private law, in cases where the initial balance of the content of the parties' obligations is gravely upset in contracts involving performance successively or by instalments. Where the parties do not first come to an agreement, new negotiations can be ordered by the court, and if no agreement is reached, unilateral termination for the future can follow (article [1135-1] *et seq.*). The same concern for balance explains why, where a contract has been formed under the dominant influence of one party, it must be interpreted in favour of the other (article 1140-1).

- All these advances in contractual fairness are accompanied – in direct correlation – by the **greater significance given to good faith**. First laid down to govern the performance of the contract (art. 1134, para 3), the principle of good faith extends its legislative sway also to cover the formation of the contract (negotiations, discussions, article 1104 paragraph 1; agreements on prescription periods applicable, article 1162). Obligations to inform make a sensible addition to the Code and, in the section dealing with the modalities of obligations, satisfaction of a condition is placed under the overriding requirement of loyalty (article 1176). This preference for good faith appears throughout the provisions (see also article 1120). 'Freedom and integrity' is our motto—a motto with a fine history.

- A more recent phenomenon, the creative dynamism of practices within the growing network of economic activity, required us to meet the challenge of **the increasing complexity of contractual relationships**. The hallmark of the rule of relativity of contract remains: contracts bind only their parties (article 1165). But

contracts are often linked in a group operation which gives them an interdependence with significant consequences (article 1137). In fact, it is in this context – although there cannot generally be a transfer of just a debt– that there can be a transfer of a contract (in particular, in a corporate merger or division) entailing the substitution of a contracting party (article 1165-2). In the same field, three-party transactions flourish. Of course, stipulations for the benefit of third parties and standing as surety have long had their rightful place. But an economic reality of major significance gives new life to this subject. Within a person’s wealth, a right under an obligation constitutes an asset, an object of ownership, which can be used as security, and is part of economic currency. The Reform Proposals regard it as essential to bring together all transactions relating to rights under obligations and highlight them in a new chapter (articles 1251 *et seq.*). Although subrogation and novation retain their well established bases, delegation (hardly touched upon in the Code) is used in its many forms (articles 1275 *et seq.*) and, in this time of electronic transactions the assignment of rights under obligations is given the simplicity it needs. Abolishing, as between the parties, the requirement of delivery for its effectiveness, the drawing-up of a written document which records an assignment has the effect, in and of itself, of transferring the right, and the transfer is deemed effective, without notification, as regards third parties (article 1254). In the same spirit, the strict rules flowing from individualism are also suppressed on other points. There is now a place for creditors to have direct actions (article 1168). Given its place within juridical acts, collegial juridical acts must be interpreted in the light of the common interest (article 1136). And finally, when the Proposals recommend that it should be stated that contracts which are lawfully concluded may be invoked by and against third parties and that third parties must respect them, they do so along the same lines but in this they refer to other settled legal elements.

- Without doubt, the recognition of these real elements goes hand in hand with bringing to the light of day—as the fisherman says about bringing in his net—the unspoken elements shown to be already present in legal thinking. Our revision has drawn on interpretations given by both courts and writers, as well as on creative sources, the **shared understanding of legal science** which sanctions a recognition of the law (*communis opinio doctorum*). It has not transferred into legislative form all the riches of case-law and academic writing, but has only filtered the core of their shared understanding – leaving many elements to their own fate. And so the Proposals recommend that the following should be established—indeed, declared: that juridically significant facts may be proved in any way (article 1287); the principle of consensualism in the parties’ choice of the form of the contract (article 1127); the correspondence of form between the original contract and that which modifies or revokes it (article 1127-6); the existence of a public policy of protection of individuals (article 1129-1); allowing a person lacking legal capacity, acting alone, to use juridical acts which are customarily available and juridical acts which concern him personally (article [1117-2]); and confirming amongst the general provisions that, to make a valid contract, one must be of sound mind (article 1109). And so it has given substance in the Code to the doctrine of classification (here, the classification of juridical acts, which is the key to the analysis of contracts (article 1142 *et seq.*)), and to the general doctrine of representation (article 1119 *et seq.*); it has established the power

to act in the name of another as a special condition of validity of juridical acts entered into by a representative appointed by law, by the court or by agreement (articles 1108, 1119 *et seq.*); it has defined the legal capacity of enjoyment as contrasted with the capacity to exercise a right (articles 1116 and 1117); it has indicated the links between incapacity, and support and representation ; it has made provision for legal persons; it has given a general meaning to unlawfulness which allows it to cover public policy, public morality and mandatory rules of law (articles 1126, 1162-3); it has defined an obligation of value (article 1148). etc. On all these points of agreement, custom has in fact been welcomed into legislation and the Code, drawing on these authorised sources, comes out revitalised.

On three controversial points, one might in reality doubt that there is any reliable common view. The Reform Proposals remain faithful to the doctrine of ‘cause’ (articles 1124 *et seq.*), to obligations to give and their performance by the simple exchange of consents (articles 1121, 1145, 1152 *et seq.*), and to the retroactive effect of conditions (article 1182). After the arguments had been weighed up, we became convinced that, according to the prevailing interpretation, the double function of ‘cause’ in justifying an undertaking is well established, as are obligations to give and their performance, together with sensible nuances which qualify their application. In fact, retaining these notions creates significantly fewer problems than the roundabout measures that would be necessary to fill the gap left by their removal.

- Continuing with this ‘declarative’ action, the Reform Proposals recommend that **several gaps should be filled**, by introducing into the Civil Code rules which rest on lines of thinking which come together to a similar point and make them ripe for incorporation. They invoke specific enforcement of an obligation as a first principle (article 1154); make a place for unilateral termination of the contract for non-performance (articles 1158 *et seq.*), give rights of retention a legal basis in the Code, and state this as a matter of principle (article 1156); and they make a shower of other proposals on certain points. Laying out general doctrines of the shape of negotiations (articles [1104] *et seq.*), framework contracts (article 1102-6), agreements in principle (article 1104-1), offer and acceptance (articles 1105 *et seq.*), unilateral promises to contract (article 1106), pre-emption agreements (article 1106-1), standard-form contracts (article 1102-5), periods for reflection and periods for a change of mind (article 1110-2), rights of withdrawal (article 1134-1); and they give substance to **the totality of rules which give shape to contractual negotiations and the formation of contracts**, which is a notable addition to the Code.

## Methodological issues

The filling of gaps, in which the purpose is **to embed in the Code new provisions**, leads on to the method of our revision. And it is because the method underpins the whole of the general theory that its application, from one chapter to another, proceeds by explanations of clarification and of the significance and of correspondence of the new texts, presentations which open the way, within this framework, to many harmonious innovations.

- Thus the Reform Proposals **remodel** a number of things. Setting out the trilogy of sources of set-off gives a context for the four essential conditions of set-off by

operation of law (article 1241-1) in relation to which set-off by order of the court, and set-off by contract take their proper place. Deposit with a public depositary of what is due under a contract by way of performance can result in the discharge of the debtor once the required formalities (tender of performance, giving notice to accept performance) put on the creditor the onus of taking steps in default of which a reasonable outcome can be given effect under the control of the court (articles 1233 *et seq.*). Hitherto limited to the contrast between suspensive conditions and resolutive conditions, the doctrine of conditions is enriched by a third type, the extinctive condition which, operating for the future without retroactive effect, is a notion employed for its usefulness, and not only to fit with the concept of an obligation being extinguished at the end of a period (article 1184-1). Amongst these same specially qualified obligations figure only indivisible obligations, noting that between creditor and debtor the debt is deemed to be indivisible (a straightforward rule of satisfaction: article 1224) and that by operation of law it is divisible between their heirs (a straightforward rule of succession). Finally, the bipartite classification of obligations by reference to their subject-matter—on the one hand, obligations to give, on the other hand obligations to do and not to do—lends itself to a natural further development which leads to the emergence of a third type of obligation defined by its subject-matter, obligations to give for use. And it is because it is of the essence of the use of a thing belonging to another to require the person who is its temporary holder to restore it, that an **obligation with a content of this kind cannot be reduced to the alienation of property rights in the thing** (as in the case of obligations to give), and similarly that the person who holds a thing for use does not receive from the other any labour, works or service (nor the benefit of any abstention from doing something, as in the case of obligations to do or not to do) but **specifically a thing to be restored to its owner after use**, which is a distinct concept (articles 1102, 1121, 1146, 1155 *et seq.*).

- On the other hand, **rules** which have hitherto been dispersed have been **brought together**, and identifying their common links shows their true nature. And so the formal requirements for contracts provide the occasion for drawing things together in general provisions (articles 1108, 1127 *et seq.*). Restitution after destruction of a contract (by nullity or termination) now forms a point of reference (articles 1161 *et seq.*). Making connections between notions hitherto not written in the Code gives the same result. Introduced together into the Code, the general lack of effects of contracts in relation to third parties, lapse and regularisation of defects in a contract are distinguished, each being defined (articles 1131 to 1133), as are, respectively, obligations to take necessary steps and obligations of result (article 1149). Setting out these things is clearly a step forward.

- Finally, when subjected to a thorough review, even the most tried and tested settled rules of the law of obligations invite slight **retouching** which removes, by emphasising the essential, minor problems which affect them. And so it is sufficient to tidy up the legal definitions to make clear the basis of all presumptions (article 1314); what need not be proved in the case of legal presumptions (article 1317); the rebuttable nature of those which are left to the discretion of the courts (article 1318); the significant—but at the same time imperfect—effects of the ‘beginning of proof in writing’ which allows all other

types of evidence to be admissible but needs to be corroborated by one other of them (article 1312); the consensual nature of the release of obligations (articles 1237 *et seq.*); the sophisticated mechanisms of stipulations for the benefit of third parties (articles 1171 *et seq.*); the moral duty in natural obligations (article 1151); and the duty in judges to act as they think right, following their inner conviction (article 1287). We should not exaggerate the significance of what has been achieved by this drafting (it is the re-drafting of the Code that has given us the opportunity to do it). But, along the way, there was an opportunity to respond to certain current expectations; for example, by giving a significant place to the wills of the parties where they agree—within the limit of what is reasonable—on certain variations to the rules (contractual variation of the rules of proof: article 1289; or prescription periods). The same aspirations invited us here and there to give direction and flexibility by the use of guiding principles: for example by making clear that a contract should be interpreted rationally and equitably (article 1139); that innominate contracts should be linked with similar nominate contracts by analogy (article 1103); that, in cases of doubt, the more likely position is the appropriate and workable test (articles 1287, 1293, 1314, 1317).

In a similar way, comprehensive revision gave us the opportunity to provide necessary **points of clarification**, often opening up new solutions: for example, to define satisfaction (article 1219), to make clear that it can be proved by any form of evidence (article 1231); to identify as a common requirement of the defects in consent that they are decisive of the party's consent (article 1111-1); to extend to the unilateral juridical act an exegetical principle of interpretation (article 1136); to assess the significance of silence in the formation of a contract (article 1105-6); to provide that the absence of consent gives rise only to relative nullity (article 1109-2); to establish a principle that it is the receipt of acceptance that has the effect of completing the formation of a contract (article 1107).

These various modifications are inseparable from other proposals. Indeed, whether it is viewed in relation to its substance or its methodology, the **comprehensive revision** which we have just described is **based on two fundamental ideas**.

The areas of the general theory have been considered together. The **principle of consistency** is the first link between them. Where the context so requires, this does not exclude certain differences in drafting. But the same ideas permeate the text and, beneath the text, the substantive notions always reoccur with the same significance. The general doctrine of contract is, of its very nature, the organisation of a diversity—from the simple to the complex. This is not to impoverish it; it is enriched by taking on what is new, together with simplification, amplification and re-alignment, but always in a structure without which contractual obligations in general could not exist. Rail and road make their progress through their networks. So it is too for the contractual network. The tool is modernised for the benefit of the user.

In relation to other rules, within the Code or outside it, the provisions of the general doctrine are still united by their one purpose: **they form the general law for contracts**. They allow the rules that are relevant to each particular kind of contract to have their own place. But they have their own place, on the one hand,

to set up as model forms the principal elements of the law of contract which are at least landmarks; and on the other hand to open up the application of the law of contracts fully (as far as may be) to unilateral juridical acts and collegial juridical acts (article 1101-1), and to give a default solution to questions which are left unanswered by the silence of other legislative texts—by way of back-up. From the very beginning, article 1103 sets out the principle. It plays its part in the destiny of the Civil Code, whose bicentenary we have celebrated.

## *Preamble*

### *The Source of Obligations – Definitions* (articles 1101 to 1103)

*Gérard Cornu*

#### **I. The source of obligations (articles 1101 to 1101-2)**

A new provision, the preliminary chapter with which Title III ('Obligations') opens, is the consequence of a new title in the Code bringing together contract, quasi-contracts and civil liability. To be precise, its object is **an initial presentation of the three principal sources of obligation**.

Giving an overview, article 1101 takes on and enlarges upon the key provision of article 1370 in the present Code. This provision on which we have drawn introduces, with a major division, 'the personal actions of the person who becomes subject to an obligation' (referring to juridically significant facts), that is, on the one hand quasi-contracts, and on the other hand delicts and quasi-delicts; having also separated out (with examples) 'the undertakings which arise merely from the authority of legislation'.

Article 1101 of the Reform Proposals does not fail to recall the existence of such obligations, but its principal object, placed as it is at the beginning of the Title 'Obligations' is to give a unity to juridically significant facts and juridical acts, and in particular, to contracts.

This introduction to the principal sources of obligations seeks to **put them in perspective**. It is certainly essential to connect each of the **fundamental notions which are linked**. More particularly, to make clear the place of contract in the more general category of juridical acts and, in the same way, that of quasi-contracts and other circumstances which give rise to obligations in the whole field of juridically significant facts.

Thus our **legislative choices are made** which declare their loyalty to the traditional French conception. Contracts are certainly a form of juridical act, but, in the prevailing view, here confirmed, **contracts are and remain the central figure**. That is why the first sub-title of the Title *Obligations* focuses on contracts, and it is for the same reason that, to give a proper order, all the forms of act and facts are first placed in the coherent whole in which they are incorporated.

The provisions of article 1101-1 set out first to define juridical acts in general (paragraph 1) and to give each of the trilogy its own definition (paragraphs 2, 3 and 4). The general definition, and that of contractual juridical acts, are classic; rather newer are the definitions of unilateral juridical acts and collective juridical acts.

The nature of the person who makes a juridical act is a primary concern in distinguishing between them: two or more persons for a contract; for a collective act, the members of the association (whether or not having separate legal

personality). Generally created by a single person, unilateral juridical acts can also issue from more than one person, if they are united in furthering the same interest (the unity of interest showing that it is a unilateral act, in spite of the plurality of the people making it).

It is above all their sphere of activity which distinguishes them. For contracts it is general, in accordance with the principle of freedom of contract. By contrast, the object of collective decisions depends upon the particular purpose and special powers of each type of grouping (co-owners, associations, companies, etc.). **A person's unilateral will, however, has not been raised to the level of a general source of obligations.** It can work only within the principles established by legislation or (this is new) custom.

Fundamentally, given that they are acts of the will, all juridical acts are characterised by the direction taken by the will (because juridically significant facts can also be voluntary). In the case of juridical acts, the will is always directed towards the legal consequence which is deliberately realised and sought by the person who makes it (which is the meaning of the key words 'intended', 'with the aim').

In its final paragraph, article 1101-1 implicitly relates unilateral juridical acts and collective acts to special provisions which govern respectively their validity and their effects. But, whenever necessary, **as a secondary matter it makes the general contractual regime applicable:** this therefore appears, in this connection as the **general law of juridical acts.** Amongst this group, the contracts are certainly the shining feature.

Article 1101-2 makes clear that, if juridically significant facts are themselves very diverse, whether as behaviour (individual or collective) or events (various particular happenings—economic, political, natural, etc) it is always legislation which attaches to them the legal effect which it determines (which is not of course the case for voluntary actions, done intentionally).

The article finally announces the major division between harmful and unlawful actions, which give rise to civil liability (Sub-title III) and lawful, useful acts, which give rise to quasi-contractual obligations (on the person who benefits from them without any right to do so) (Sub-title II).

## **II. Definitions (articles 1102 to 1103)**

The general definition of a contract at the very beginning of the Sub-title 'Contract and obligations created by agreement in general' is an idea of the draftsmen of the Code in 1804. So is the idea to follow it with particular definitions of several types of contract, each of which is categorised, in a striking fashion, by comparison with its contrasting type: synallagmatic contracts by contrast with unilateral contracts; onerous contracts by contrast with gratuitous contracts, commutative contracts by contrast with aleatory contracts. This initial categorisation follows the intention to put in place **the large families of contract, within which will be lined up manifold other contracts,** known as 'special' contracts.

In their exactness and their clarity, some of these definitions simply require to be retained (synallagmatic contracts) or retouched (unilateral contracts). The contrast

between onerous contracts and gratuitous contracts derives from the emphasis placed on the key element of intention (“expects”) as to what is expected in return (*animus donandi* for gratuitous contracts; pursuit of something in return for onerous contracts). For a related, but more pronounced, amendment, the issue of the initial equivalence of the content of the obligations, as the parties see them, is the criterion which distinguishes between commutative contracts and aleatory contracts.

**The present list has been filled out only** by giving new definitions, following the same method, not for the interpretation of the text, but in accordance with the proper nature of each type of contract, within the whole of the legal system. And so the contrast—already well known, but not hitherto written in the Code—is offered between consensual contracts and formal contracts. The very great practical significance of standard-form contracts and framework contracts required their definition to be elaborated so that, in particular, in standard-form contracts the difference could be made clear between the imposed kernel of the contract and any supplementary part which may have been negotiated; and, similarly, in framework contracts the difference between the basic agreement and the implementation contracts.

In article 1103 we find the affirmation that **the rules set out in the title on Contract constitute the general law of contract**. Giving particular examples by way of illustration, the text reserves the application of particular rules for certain contracts, but it notes within this reservation that the role of the general rules extends to all kinds of contract, nominate or innominate. In relation to the latter, it sets out a valuable **appeal to reasoning by analogy** in order to fill in a discriminating manner the gaps in what the contract has provided.

It will have been noticed that, in article 1102, there is no longer any reference to the traditional trichotomy (obligations to give, to do and not to do). But their elements will be found in article 1121, which defines the subject-matter of a contract. Transferring them to that position avoids unnecessary repetition, and especially has the benefit that **the trichotomy can be supplemented**, because contracts can also have as their subject-matter the grant of permission to hold a thing, with or without a right to use it, **a specific content of obligation which cannot be reduced to giving, doing or not doing**.

## *Formation of Contracts* (articles 1104 to 1107)

*Philippe Delebecque,  
Denis Mazeaud*

Although they were very detailed about the conditions for the validity of contracts and their effects, the draftsmen of the Civil Code of 1804 said nothing about the conditions for the formation of contracts—that is, about the phase where the parties’ wills must meet. This is a striking contrast with the wealth of detail demonstrated by the French legislator of today, particularly in the field of

consumer contracts, and the European harmonisation projects relating to the law of contracts, which regulate in minute detail the different stages leading from the simple intention to contract to the formation of the final agreement.

The promoters of these Reform Proposals therefore thought it right to fill this lacuna in our Code, and to include provisions covering the formation of contractual relationships. This is the object of articles 1104 *et seq.* in this section entitled 'Formation of contracts'.

As regards the structure of this section, its draftsmen have differed from the texts drawn up at the European and international level which aim to harmonise or to codify the law of contracts, and have deliberately opted for general rules which are destined to give shape to the meeting of wills, rejecting any very detailed regulation of the process of the formation of the contract. They have done so because in this area the freedom of contracting parties in the future must be maintained as widely as possible, and a certain margin of evaluation must be left to the court which has to decide on the existence of a contract. Moreover, one must keep in mind the different ways of proceeding and steps along the way leading to the creation of a contract. Therefore, the proposed provisions have as their subject-matter the different unilateral or bilateral juridical acts which are most commonly employed and made use of with the prospect of concluding a contract.

As to the substance, the rules as drafted draw on a number of sources: first, French case-law in this area over the last two centuries; then certain recent codes from countries in Europe and elsewhere (Germany, the Netherlands, Quebec); lastly, the European and international harmonisation projects relating to the law of contract (the draft European Contract Code of the Gandolfi group; the *Principles of European Contract Law* of the Lando commission; the *Unidroit Principles*). And these rules are based on a trio of principles: freedom, loyalty and certainty.

First, **freedom** in the period of precontractual negotiations (articles 1104 to 1104-2). The negotiating parties are free to enter into discussions, to carry on their negotiations and to end them how and when they see fit. In principle, they will not incur liability in this negotiating phase. In particular, there will be no liability simply because the negotiations have been broken off and this breaking-off has caused harm for one of the negotiating parties. Freedom, in the second place, at the stage of offer and acceptance. On the one hand, the offeror has a significant unilateral power of revocation. On the other hand, the recipient of the offer cannot, save in exceptional circumstances, be bound contractually by proof of his failure to react on its receipt. Freedom, in the third place, as regards the instruments that the negotiating parties can use with a view to concluding their final agreement: a contract to negotiate; an agreement in principle; a unilateral promise to contract; and a pre-emption agreement. Of course this list is not exhaustive, and recourse can be made to other contractual mechanisms.

Secondly, **loyalty**. Precontractual freedom is indeed tempered and limited by a requirement of loyalty which is intended to impose a certain code of ethics in the period leading towards the conclusion of a contract, in so far as contractual negotiations are often marked by their length and often involve significant financial outlay. Also, the requirement of good faith provides guidance for negotiating parties during the negotiations, and especially at the moment of

breaking them off. Similarly, the freedom to enter into minor contracts which mark out and provide a framework for the negotiations is constrained by the requirement of good faith.

Thirdly, **certainty**. The proposed rules are driven by the imperative to ensure legal certainty during the precontractual period. And so, first, an offeror's unilateral power of revocation is negated when his offer, addressed to a particular person, carries his undertaking to maintain it during a specified period. In such a situation, the revocation of the offer will not prevent the formation of the contract if it is accepted within the specified period, nor will the offeror's death or incapacity during the period for acceptance. Just as certainty is assured by this provision for the recipient of the offer, and in particular respect for his legitimate belief that the offer will be maintained, so certainty for the offeror is promoted by the rule which provides that the contract is concluded only at the moment of receipt of the acceptance. Thus, the offeror is contractually bound only once he has actually been able to have notice of the will manifested by his partner, and cannot be bound in law without such knowledge. This solution, moreover, automatically reinforces his power to revoke his offer unilaterally. Secondly, the new rules aim to protect the legitimate expectations of the beneficiary of a pre-emption agreement or a unilateral promise to contract. In harmony with the provisions to the effect that one party may not unilaterally revoke a contract, and with the provisions governing enforced performance, and motivated by a concern not to undermine the preliminary contracts which are most commonly used in practice, the withdrawal by the offeror is sanctioned in the strongest possible manner. Indeed, the offeror's refusal to conclude the promised contract, or his concluding with a third party a contract of which he had given a preferential or exclusive right to the offeree, are not an obstacle to the conclusion of the promised contract with the offeree.

## *Validity of the Contract – Consent* (articles 1108 to 1115-1)

*Yves Lequette,  
Grégoire Loiseau,  
Yves-Marie Serinet*

Everyone agrees that the provisions relating to consent currently in force in the Civil Code (articles 1109 to 1118) give only an imperfect and incomplete account of the matter.

The provisions, whose original wording has remained unchanged since 1804, address only the qualities of clarity and freedom that the consent must possess in order for the will of each contracting party to result in a valid undertaking.

Clearly this chosen perspective is limited in two respects with regard to the questions raised by this essential condition for the formation of contracts in the law today.

On the one hand, the presentation adopted by the draftsmen of the Code results in the process of the expression and meeting of the wills of the parties being passed over in silence, thereby masking the particular difficulty of total absence of consent.

On the other hand, it gives to the party who would not have contracted if he had had full knowledge, and had been free, only the remedy of annulment for defect of consent. Recent developments in consumer law, however, have shown, at the edge of the Civil Code, that other means of protection could take a preventive form and fulfil—often in a more effective manner—the same protective function.

In fact, in the most classical areas of the doctrine of defects in consent, it is clear today that the original wording conveys the law as it really exists only on the surface. The concepts of mistake, fraud and duress have undergone very significant changes under the influence of lively academic debates since the end of the 19th century. Following on from these, an abundant and subtle case-law (sometimes too subtle) has added significantly to the legal rules governing each of the defects in consent to the point where that has become the place to find the core rules. Although, on certain points, the judicial developments are still debated, it is still the case that, overall, the edifice built by the judges has reached a sufficient degree of maturity and detail to serve as a source of inspiration for the drafting of new provisions. This is all the more so, given that in this area the law as presently applied in France gives a greater degree of protection, and displays a higher degree of technical perfection than the various alternative proposals that have been published on this subject.

For these different reasons, the drafting of a new section of the Civil Code containing provisions on consent (articles 1109 to 1115-1) would need, in the view of those to whom the task has been entrusted, on the one hand, to fill in the gaps in the approach taken by the draftsmen of the 1804 Code to the topic, by drafting new provisions concerning the existence and integrity of consent; and, on the other hand, to draw all the conclusions from the main developments made by case-law to build up the rules governing the several defects of consent, by modifying and supplementing the provisions presently in force.

Therefore, in a first sub-section, it is proposed to adopt a number of general provisions dealing with the question of the existence of consent. In this, two difficulties can arise which are not the most common, but which are usually dealt with in a hardly satisfactory manner by cross-reference to individual provisions outside the core of the law of obligations, or by links to neighbouring concepts which, however, are distinct.

The first concerns the absence of consent of one of the parties. It corresponds to the situation where one person, with legal capacity, suffers a change in his mental faculties and so finds himself incapable of giving true consent. The contract can then not validly be formed because of the lack of a real will within the declaration of will. To deal with this situation, it is intended to generalise to all juridical acts a solution set out in article 901 of the Civil Code for acts of generosity, and which already appears in article 489 of the Civil Code within the provisions dealing with adults as a result of the Law of 3 January 1968, drafted by *le doyen* Carbonnier. This generalisation had also already been contemplated by him, and allows a uniform

treatment of the question of juridical acts performed under the influence of a mental problem in a new article 1109.

The second difficulty relates to the absence of a meeting of consent, when the two parties have not intended the same thing. There is certainly the appearance of a contract, but this is based on a misunderstanding, which is usually discussed under the heading of mistake preventing a contract coming into existence. In order to provide for this situation which is most commonly studied within the doctrine of mistake, article 1109-1 is included.

Finally, a uniform sanction for the situation of absence of consent is proposed in article 1109-2 of the Civil Code. This is relative nullity which already follows the wider modern doctrine of nullities, and results from the reform of 3 January 1968. In addition to putting an end to the uncertainty and debate over a possible revival of the notion of the inexistence of the contract, this choice provides the advantage of harmonising the sanctions with those which are classically retained for defects in consent.

Next, in a second sub-section, the proposals are intended to set out, in a more detailed manner, the rules designed to guarantee the quality of the contracting parties' consent in two paragraphs which are not equally novel in their provisions.

In a first sub-division there are new provisions relating to positive measures designed to protect the consent. Their preventive function justifies the title of the sub-division, which deals with the integrity of consent. Here are set out two mechanisms which are currently used by consumer law to achieve this, even though the first is not confined to that: the precontractual obligation to inform, on the one hand (articles 1110 and 1110-1); and, on the other hand, the techniques which tend to delay the final formation of the contract: periods allowing for reflection and for a change of mind (article 1110-2). At each stage it is necessary to promote the contracting party's ability to reflect, allowing him to take an informed decision and giving him enough time before he is finally and irrevocably bound.

It appeared necessary to give a general framework to these notions, going beyond their different origins (judicial or legislative) and their separate regimes. Fixing their meaning and their principal characteristics within the general law of obligations in the Civil Code gives the Code again a real coherence and standing whilst also creating an anchor-point for the more technical specialised areas of law, and in particular consumer law. Re-modelling the Civil Code as a legislative beacon would also be a way to respond to critics who say that the general rules of contract law have lost their force and their creative power in favour of consumer law which, having been codified more recently, embodies the living law.

A second, more classical, sub-division redraws the scheme of the defects in consent that were originally provided by the Civil Code, by integrating into it the most significant contributions made by the law as it is today, by taking a position on certain points which are still subject to debate, and by aiming to find the common threads between, and to bring together, the elements which link the remedial measures which further the protection of consent.

At the very beginning and then at the end of the sub-division are placed four general provisions. Taking up the original formulation of the Code of 1804,

praised for its particularly strong expressive value, a new article 1111 gathers together the trio of the defects in consent, changing only their order so as to respect what follows in the detailed presentation. Following this, article 1111-1 sets out, for all the defects in consent, the requirement of decisiveness in relation to consent, in a provision which takes its inspiration from a famous decision on the subject of decisive mistake (Civ. 28 January, 1913, S. 1913, 1, 487). The absence of any distinction between principal and incidental defects is also emphasised, whereas it is made clear that the test of decisiveness is subjective, the effect of the defect in consent being assessed in relation to the person who alleges it. Moreover, articles 1115 and 1115-1 are a reminder that mistake, fraud and duress give rise classically to an action for relative nullity for which time starts to run only from the day when the defect has ceased or has been discovered, given that it aims to protect the party who has been its victim. The closeness of the forms of legal action which are caught by the traditional description of the defects of consent as 'interchangeable' allows them to be procedurally connected. Finally, annulment of a contract is without prejudice to any damages that might be awarded cumulatively with it, or in the alternative. Fraud and duress have of course always had a double aspect: a civil delict for the one who commits them, and a defect in consent for the one who suffers from them. But today it is even admitted that a mistake induced by the other party's conduct which constitutes a fault justifies reparation in the delictual domain. This is summed up by article 1115, paragraph 2, in a general formula derived from (former) article 1382 of the Civil Code.

To these generally applicable rules are added specific provisions for each defect in consent.

And so the rules governing mistake are set out first, with the same two objects that the (former) article 1110 of the Civil Code has provided for since 1804: the substance of the thing and the person of the other party to the contract (article 1112). In each, the essential quality in respect of which the misunderstanding must have been made is that in consideration of which the parties have contracted (the agreed quality) or which was in the contemplation of one to the knowledge of the other (or should it be a quality which might be said to have entered the 'contractual sphere?'). In accordance with well-established case-law, developed within the field of the sale of works of art, the rule has been retained that if one party accepts the risk as to a quality of the thing, this excludes mistake (article 1112-1, paragraph 2). Other solutions, which are generally agreed upon, have also been retained: mistakes of law and of fact are treated as the same; and a mistake of one party which, in the light of the behaviour of both parties, was inexcusable is not taken into account (article 1112-3). In a similar spirit, a simple mistake of value or of motive has no effect, on the basis established by a long series of developments by the courts (article 1112-4).

In the area of fraud, the proposals give effect to the enlargement of the traditional definition of this defect in consent from the (former) article 1116 of the Civil Code to fraudulent non-disclosure (article 1113-1). This is of great practical significance, and allows a link to be made to the obligation to inform which has been set out earlier (article 1110). The relationship between these two notions is again made clear because it is provided that, where there is no intention to deceive, breach of the obligation gives rise only to a liability on the part of the one who was

subject to the obligation. To the principle that fraud which does not originate in the other contracting party has no effect on the validity of the contract, article 1113-2 makes certain adjustments, some of them already well-known, in order to take into account the possible intervention by a third party in the formation of the contract. To fraud of one of the parties is assimilated that of his representative, as is that of a person who intervenes in his affairs without authority, his employee, or one standing surety for him. In addition, article 1113-3 provides that a mistake caused by fraud will be more easily sanctioned than a spontaneous mistake, because it is always excusable and it gives rise to the right to nullity even when it is a mistake simply of value or of mere motive. However, the wording reserves this extension for the sole case of a mistake ‘provoked’ by fraud which, strictly interpreted, will not extend to fraudulent non-disclosure. Implicitly, this provision leads to the ratification of the *Baldus* decision (Civ. (1), 3 may 2000, Bull. civ., I, n° 130), at least if it is given a literal reading.

Duress is left. In this area, the proposed provisions repeat, in essence, the present provisions of the Civil Code (former articles 1111 to 1114). There are just a few refinements to take account of, in particular, adjustments that the case-law has already made with regard to the illegitimate use of legal process. The real innovation is the acceptance of the idea of the wrongful exploitation of a situation of weakness caused by a state of necessity or dependence. Whether this should be treated as a case of duress has been the subject of recent debate, but the opportunity has been taken to recognise it, in the form of a new article 1114-3 which also defines the criteria by reference to which this particular form of duress will be assessed.

## *Validity – Capacity and Power to Act* (articles 1116 to 1120-2)

*Jean Hauser,  
Guillaume Wicker*

The capacity of legal actors as regards the making of juridical acts was dealt with strangely by the authors of the Civil Code. They considered only the positive aspect of capacity, whereas modern society, preoccupied—sometimes over-preoccupied—with principle, has considered more the negative side of the subject. Capacity is first and foremost a question of the law of persons. And so we can wonder whether part 1 of the Reform Proposals on the capacity of enjoyment should not rather be placed in the leading articles of the Code (now article 16 *et seq.*) than in the articles dealing with the law of obligations. The notion of ‘natural capacity’ is now familiar to writers in that context, and would deserve to be treated separately.

However, since there is to be no overall revision of the Code, it was not unhelpful to confirm the link between the capacity for enjoyment and the person himself, and in this context to mention the exceptional cases of lack of capacity for enjoyment which can affect certain persons, essentially (as will be noticed: article

1116-2) for limited reasons where there are competing considerations. At the same time, it was not unhelpful either to mention the particular capacity for enjoyment of legal persons of which the Code made no particular mention but making clear the contents of this capacity in a formula on which the courts could draw. The text could form the beginnings of a general doctrine of capacity of legal persons, which would certainly have a place in a modernised civil code where these persons (who have come into existence after the 1804 Code) would at last have the status they deserve. Finally, the effect of a lack of capacity for enjoyment of one party arising during a contract would also justify clarification.

The most significant place, of course, should be given to lack of capacity in respect of the exercise of legal rights. Article 1117, which affirms both the principle and the exception, could certainly have been included elsewhere because it contains a general principle which goes far beyond the formation of juridical acts. Two practical consequences follow. First, this provided an opportunity to recognise formally, at least in theory, that a person may make arrangements for a future loss of capacity in respect of the exercise of legal rights, which was provided for in the proposal for the reform of the law of incapacity, currently in the process of being adopted, under the name of mandates for future protection.

Secondly, this provided an opportunity to reaffirm and generalise what legislation and case-law have gradually made clear: the protected person's residual capacity to enter into juridical acts for his own protection, juridical acts permitted by law or custom, and juridical acts relating to his own person. On this past point, which is particularly sensitive, it seemed desirable to make clear the necessary distinction between the personal consequences of such juridical acts, subject to the principle of autonomy, and their consequences for his estate, which remain within the scope of representation. Case-law will inevitably have to settle this borderline.

It seems necessary to make clear the effect of a lack of capacity which flows from minority, and its legal status is clearly strengthened. The conditions required for rescission for substantive inequality of bargain, and its consequences, are quite clearly set out, as are the right of different parties to a juridical act to sue for annulment. Setting parameters for this right to sue for annulment or rescission could indirectly lead to some widening of the doctrine of everyday transactions, in that third parties would find themselves with better protection against possible actions for restitution by the protected person.

The addition of a significant legislative provision in relation to representation flows from a concern to clarify a technique which, after all, is studied rather too little, on the basis that every representation resembles a mandate—which is certainly false in the case of legal or judicial representation—and has given rise to serious confusion, even in the case-law. Therefore, we have made the task of any representative clear by reference to the categories of juridical acts to be entered into where the document creating the representation does not contain sufficient particularity. The effects, too, of representation on the powers of the person represented are laid out, distinguishing—and this was not always clear—between the effects of legal or judicial representation and the effects of contractual representation. In relation to this last form, the principle is affirmed that one

cannot allow a person to act as one's representative against oneself, without fulfilling a minimum standard of loyalty in favour of the intended representative.

The repetition and generalisation of the rules governing conflict of interests, well known by specialists on the law of capacity, should give rise to a genuine general doctrine, never hitherto constructed, given that the examples concern all the diverse forms of representation, and not only the case of representation of a person who lacks capacity.

As mentioned at the outset, the question of capacity forms part of the law of persons, more than of the law of obligations. The capacity to be party to a relationship within the law of obligations is only one element of the much larger question of the capacity of a person to have a role in the legal sphere, and in the sphere of contracts in particular. The Reform Proposals, limited simply to the law of obligations, therefore leave untouched the question of a complete reform of the Civil Code, although the generality of this subject is symbolic.

## *Validity – Subject-Matter* (articles 1121 to 1123)

*Jérôme Huet,  
Rémy Cabrillac*

In the present arrangement, the subject-matter of contracts appears in section 3 of Chapter II of Book 3, under the heading 'The subject-matter and contents of contracts', which comprises five articles (1126 to 1130). These provisions are essentially inherited from Pothier, Domat not having been very forthcoming on the question of subject-matter.

'Subject-matter' is not much used in recent codifications, whether official or unofficial. The *Civil Code of Quebec*, for example, gives it only two articles (1412 and 1413). The *Principles of European Contract Law* and the *Code of the Academy of Private Lawyers* refer only to the content of contracts.

A preliminary question therefore needs to be addressed: whether or not the notion of subject-matter should be maintained. Maintaining it, and the other provisions which follow upon it, seemed to be necessary because of the significant consequences which flow from it, as witnessed by a wealth of case-law in recent years, in particular on the questions of the existence or lawfulness of subject-matter, or, again, the determination of the price. Moreover, the notion of the contents of contracts, which is sometimes substituted, did not seem to be sufficiently accurate to guarantee the certainty of contractual relationships.

In consequence, the Reform Proposals recommend that Section 3 of Chapter II of Sub-title I of Title II, headed 'Subject-matter', comprising ten articles (1121 to 1122-3), should be devoted to the subject-matter of contracts. And, in this section, the traditional terminology has been retained as far as possible, whilst being

adapted to the new categories of obligations recommended by the Proposals: to give, to give for use, to do, or not to do (article 1121).

The present provisions first needed to be tidied up. It was appropriate, in combining it into article 1121, to modify the present article 1127 which refers by implication to the obligation to give for use—now recognised in its own right by the Reform Proposals. On the other hand, the present article 1130 paragraph 2, dealing with the prohibition of agreements for future rights of succession, has been deleted: it no longer belongs within the doctrine of obligations now that this prohibition appears in article 722.

The present article 1128 concerning ‘things which may not be owned or alienated’—the famous expression which is part of our legal heritage—has been preserved. We preferred to keep it, rather than to set out a detailed list of things which cannot be owned or alienated, which would have been hazardous and, inevitably, incomplete. The meaning of the legislative wording is sufficiently wide and, at the same time, sufficiently clear, as is shown by case-law. It appears almost unchanged in article 1121-1.

Similarly, the possibility for a future thing to be the subject-matter of an obligation has been preserved (article 1121-2, paragraph 3).

An article setting out the characteristics which must be fulfilled by the subject-matter has been added by way of transition: the subject-matter must be lawful, possible, and must exist at the moment of formation of the contract (article 1121-2). Similarly, an article has been added making clear its accompanying sanctions, distinguishing in particular between unlawfulness of subject-matter (which is sanctioned by absolute nullity) and absence of subject-matter (article 1122).

Beyond these amendments, the principal innovations contained in the Reform Proposals concern the three following points:

1. Undermining an essential element of a contract:

The case-law which culminated in the *Chronopost* decision had to be incorporated into the Civil Code. Even though article 1133 was given as its formal legislative foundation (and this relates to ‘cause’), it is more concerned with the subject-matter and now appears in article 1121 paragraph 3.

2. Ascertainment of the subject-matter:

This question has given rise to disagreement amongst academic writers, and to initiatives by the courts which it is not necessary to repeat here.

It seemed wise to maintain the principle of ascertainment in the same terms in the Code, just adding by way of explanation that the requirement is aimed at not leaving one of the parties at the mercy of the other party’s choice (article 1121-3).

But it appeared to be necessary to set out two kinds of exception to this principle. The first concerns the situation of framework contracts, particularly those in the field of contracts of distribution. This provision gives the contracting parties a certain freedom, subject to possible judicial control afterwards, a solution inspired by the decisions of the *Assemblée plénière* of the *Cour de cassation* on 1 December

1995 (article 1121-4). The second is peculiar to contracts, such as the hire of services or mandate, which include an obligation to do, the extent of which cannot be fixed at the time the contract is concluded: the provision given here is written along the lines of the current case-law (article 1121-5).

### 3. Lack of equivalence in the content of the parties' obligations:

The lack of equivalence in the content of the obligations of the parties to a commutative contract is at present provided for in the Civil Code only in one provision dealing with substantive inequality of bargain, which appears in a section on the defects in consent. The decision to place it there is criticised by a majority of writers, and it appeared that the subject belonged rather in the section relating to 'subject-matter' (article 1122-1), where a specific provision is now dedicated to unfair terms.

But, to avoid any risk of ambiguity, the case of the lack of equivalence in what the parties have to do under a commutative contract where this arises after the performance of the contract has been moved to the provisions concerning the effect of contracts which are placed in Chapter III.

## *Validity – Cause* (articles 1124 to 1126-1)

*Jacques Ghestin*

### *Article 1124*

This confirms that, in accordance with our legal tradition, a real and lawful 'cause' remains a condition for the validity of a contract. However, choosing this course makes it necessary to avoid two pitfalls at opposite extremes: a definition either so restrictive that it would lose all practical relevance, or so wide that it would endanger legal certainty.

It is the '*cause of the undertaking*' which is taken into account. This relatively recent formulation avoids, in particular, the use of the language—questioned by some, and no doubt it is open to question—of the 'cause' of the obligation (said to be objective and abstract), as opposed to the 'cause' of the contract (said to be subjective and concrete). In particular, we have seen that, as soon as the most recent decisions of the *Cour de cassation* held it to be sufficient that one of the parties had pursued an unlawful or immoral purpose in order to justify the annulment of the contract, even though the other did not know of it, it seemed difficult to limit to this concept the characterisation of the 'cause' of the contract, rather than the 'cause' of just the obligation of one of the parties. Moreover, as a 'manifestation of will (offer or acceptance) by which a person undertakes an obligation' (*Vocabulaire Juridique*, edited by G. Cornu), an undertaking seems more appropriate to identify the act which gives rise to a contract seen in the round as a juridical (or even economic) transaction, and not only, in a technical, analytical manner, one or more juxtaposed obligations.

Article 1124 gives a unitary notion to ‘cause’. It is the justification for an undertaking, or in other words the reason why the law today recognises it as having legal consequences (some writers give it this meaning and call it the ‘efficient cause’). In accordance with the traditions of Canon law, an obligation arises simply from the will of the person subject to it, as long as it has a ‘cause’ which explains and justifies it. We shall see that, in defining ‘cause’ as what is agreed to be given in return in order to understand its real significance for onerous contracts, the Reform Proposals also take into account, at least implicitly, the ‘final cause’ of an undertaking, which is the benefit sought from it.

The requirement of a real and lawful ‘cause’ keeps separate its two functions: checking the existence and the lawfulness of the ‘cause’: the specific sanctions are set out in the following article.

#### *Article 1124-1*

*The different forms of nullity, relative and absolute, correspond to the two functions of ‘cause’.* In the absence of a ‘cause’ of the undertaking—that is, under article 1125 of the Proposals, where ‘from the beginning what is agreed to be given in return is illusory or derisory’—there is only a question of ‘the safeguard of a private interest’ (article 1129-1, paragraph 2), which limits to the protected party the right to ask for annulment or to confirm the transaction (article 1129-1, paragraph 3). Where the ‘cause’ of the undertaking is unlawful—that is, under article 1126, ‘where it is entered into, at least by one of the parties, with a purpose contrary to public policy, public morality, or, more widely, a mandatory rule of law’—the safeguard of the public interest’ (article 1129-1, paragraph 1) provides that the annulment can be ‘invoked by any person who can demonstrate an interest, as well as by the magistrate representing the public interest’ and that it can ‘also be raised by the court on its own initiative’ (article 1129-2).

#### *Article 1124-2*

This provision reproduces in substance article 1132 of the Civil Code and makes clear the sense that is given to it today unanimously by case-law and academic writing.

#### *Article 1125*

**1) The first paragraph is fundamental.** It constitutes a reminder first that ‘*cause*’ is the justification for an undertaking and that it must be real. It then makes clear that the assessment of the reality of the cause must be made at the moment of formation of the contract. As a condition of validity, ‘cause’ is therefore expressly restricted to this, and does not apply to performance of the contract, in which the balance between the parties is preserved by other means. Finally, and most importantly, it defines, in accordance with the present case-law of the *Cour de cassation*, the conditions for finding an absence of cause: *it is necessary and sufficient that what is agreed to be given in return is illusory or derisory*. On this definition rests the balance between contractual fairness and legal certainty.

Article 1102-2, paragraph 1, of the Proposals provides that ‘a contract is onerous where each of the parties expects to receive a benefit from the other in return for

what he provides'. In this contract the undertaking of each party must therefore be justified by 'a benefit', that is, the fulfilment of an interest which is the 'final cause' of the contract. To make clear what this means, it is necessary (on the one hand) to reject an unduly abstract construction, not taking into account the motives of each party, which have in fact been decisive in each giving his consent in pursuit of his own individual interests; and (on the other hand) to preserve the present two-sided process of contracts in refusing to make their validity depend on personal motives which were not included in what is often called the 'contractual sphere' and which it is better to define, more accurately, as what is agreed to be given in return. Indeed, for 'cause' to be characterised as having contractual effect, the decisive motive of one of the parties must be not only known, not only taken into account, by the other party, but it must be included in the definition in the contract of the subject-matter of the exchange. It is the subject-matter of the obligation or its contents promised by the other party—or performed by him, where performance accompanies the formation of the contract.

The case-law of the *Cour de cassation* shows that it is by interpretation, most commonly subjective (looking for the parties' common intentions), and exceptionally objective (a compulsory determination of the contents of the contract), that what is agreed to be given in return is first identified. After that, its reality, that is, its not being illusory or derisory, determines whether the 'cause' of the undertaking of the party claiming annulment is held to exist or not.

The case-law of the *Cour de cassation* shows also that it defines, always by way of interpretation, the limits within which the reality of what is agreed to be given in return must be assessed. Although the *Cour de cassation* does not accept the need for an exchange for each and every obligation in the contract, nor for every term in it, it does still often take into account a group of contracts which are inseparable. The absence of real subject-matter of the exchange stipulated in one of them, for example a purely symbolic price, will not allow the annulment of that contract for absence of 'cause' if it is established that the claimant would at the same time benefit from an agreed exchange by means of another contract which is inseparably connected to it. The review of the reality of 'cause' therefore in practice goes beyond the review of the existence of the subject-matter of the exchange.

**2) The second paragraph** is intended to confirm the *Chronopost* decision, and the later decisions which have applied it. It puts in place, without needing to spell it out, a necessary, consistent logic. Its eventual connection with a 'principle' of consistency will be for academic writers to achieve.

#### *Article 1125-1*

In accordance with what is accepted by a consistent line of case-law, and the unanimous writings of scholars, 'delivery of the thing or the money to the party subject to the obligation' will also include delivery to the latter's agent, or even to a third party who is indicated in the contract.

In Roman law the borrower who had not received the sum of money which he had undertaken an obligation to repay, or who had received it only in part, could use the challenge 'that the money had not been paid over'. An obligation to make

restitution is linked to delivery of the thing, which was also a condition, inherited from Roman law, of the formation of real contracts. The underlying principle of this category of contracts is today, rightly or wrongly, disputed and the most recent case-law of the *Cour de cassation* tends to exclude from the category loans made by finance houses which until recently were one of the most common areas for nullity for lack of cause. Article 1102-5 of the Reform Proposals defines only consensual contracts and formal contracts. It is true that real contracts are not defined in the Civil Code either, and that their formal recognition was deduced by the courts from the definition of a certain number of special contracts, such as loan for use (article 1875), loan for consumption (article 1892), deposit (article 1919) and pledge (article 2071).

As for ‘cause’, in any case, it is certainly the undertaking to return the thing which is particular to real contracts. It is indeed very generally accepted by case-law and scholars that it is the delivery of the thing which is the cause of the obligation to return it, since, as emphasised by one writer (G. Rouhette, *Contribution à l'étude critique de la notion de contrat*, doctoral thesis, University of Paris, 1965, n° 147, p. 467), ‘it is only good sense that one could not return something that has not first been delivered’. Such an undertaking would therefore have no justification.

Frequently a preliminary contract, a promise to enter into a contract, sets out the essential modalities of real contracts that are to be entered into by delivery of money or a thing—such as, for example, the remuneration of a deposit or, in the case of a loan of money, the rate of interest and the date for repayment. Article 1106 of the Reform Proposals deals in general terms with ‘a unilateral promise to contract ... by which one party promises to another (and the latter accepts in principle) to give him the exclusive right to conclude a contract of which the essential elements are settled, but for the formation of which only the consent of the beneficiary is required’ (paragraph 1). Contrary to the present case-law of the *Cour de cassation*, but in accordance with the broad majority of scholars, it makes clear that the promisor, ‘during the period allowed to the beneficiary to express his agreement’ may not by revocation prevent ‘the contract which was promised from being formed’ (paragraph 2) and that a ‘contract concluded with a third party’ does not prejudice ‘the beneficiary of the unilateral promise’ (paragraph 3). This provision, in spite of its general wording, does not seem to be directly applicable to all promises to enter into a real contract, in particular a loan, whose formation will later occur on the handing over of money or a thing. Such promises are in effect often synallagmatic, and not unilateral; they do not have as their object an exclusive right to conclude a contract; and, finally, it is not the ‘consent of the beneficiary’ which is alone required, but the handing over of the money or the thing—which is a different matter. It is, however, possible to deduce by analogy—or even *a fortiori*—that a promise to enter into a real contract requires (on the conditions that it sets out) the handing over of the money or the thing which will conclude the contract. It is enough to make clear here that this preliminary contract is also valid only if ‘the undertaking has a cause which is real and lawful which justifies it’ (article 1124).

### *Article 1125-2*

In synallagmatic commutative contracts it is exceptional for the parties to agree that what is to be given in return is for the benefit of a third party. This happens, however, where the exchange is defined in a contractual grouping, for example, to explain the existence of a genuine exchange on the sale of a plot of land for the symbolic price of one franc, because on this plot was constructed a factory belonging to a company of which the seller was one of the shareholders and whose liabilities the buyer was accepting. The decisions of the *Cour de cassation*, which accept this exchange as being the ‘cause’ of the disputed undertaking, find an indirect interest of the debtor in it without, however, making it a condition of validity of the contract.

As the text makes clear, it is potentially applicable to all stipulations for the benefit of third parties. In practice, it is mainly in the field of surety contracts that case-law has pronounced on this question. What is agreed to be given in return, for the benefit of a third party, in contracts of guarantee, for example, can be defined as the giving of credit, or any benefit agreed by the creditor in favour of the principal debtor which was conditional on the provision of this guarantee. This agreed benefit may exceed, if the parties so agree, the sum immediately paid by the bank to the account of the third party, and may include, for example, his undertaking in return to maintain a certain level of financial support for a period which is more or less defined (as long as it is at least definable). The guarantee would be lacking a real ‘cause’ if it appeared—such as by an immediate closure of the account—that, from the formation of the contract, the bank did not intend to take security in case of insolvency of the principal debtor, but only to substitute the solvent debtor for the latter. The agreed exchange would in reality be illusory (See P. Simler, *Juris-Classeur Civil, Fasc. 20: Contrats et obligations - Cause - Rôle pratique*, 15 June 2002, n° 33, text and case-law there cited).

Article 1125-2 is intended to make clear that, in accordance with the case-law of the *Cour de cassation*, and in particular in relation to guarantees, the benefit agreed for the principal debtor constitutes the necessary and sufficient ‘cause’ of the guarantor’s undertaking, regardless of any moral or substantial interest that the guarantor party may find for himself because of his relationship with the debtor.

### *Article 1125-3*

Contrary to an expression often used—even by the *Cour de cassation*—it is not only an absence of risk which can be characterised as an absence of ‘cause’ in such agreements. Synallagmatic aleatory contacts, such as sales of property providing for the payment of a life annuity, are annulled for absence of cause only where it is established that, from the moment of formation of the contract, the absence of risk made what is agreed to be given in return illusory or derisory for one of the contracting parties. This is so, in particular, where the level of annuity is lower than the income from the property transferred, or where the life expectancy of the annuitant, as the other party knew, rendered the sums to be paid from the beginning derisory.

#### *Article 1125-4*

The question arose as to whether ‘cause’ in acts of generosity, and especially in testaments, which are not contracts, should be dealt with in this section, either directly, or by reference to the special provisions on acts of generosity. The fact that the provisions relating to the lawfulness and morality of ‘cause’ are common to the two categories of transactions argues for a definition of the existence of ‘cause’ in gratuitous transactions, set out alongside that relating to onerous transactions.

The proposed wording is inspired by article 911 of the proposals by Professor Jean Carbonnier, Pierre Catala, Jean de Saint Affrique and Georges Morin, to reform the law on acts of generosity.

According to article 1102-2, paragraph 2, of our Reform Proposals, ‘a contract is gratuitous where one of the parties expects to provide a benefit to the other without receiving anything in return’. In consequence, first, it is the abstract gratuitous intention which allows gratuitous transactions to be so characterised: gifts and, a fortiori, testamentary acts of generosity (first paragraph). Secondly, it follows that in the case of acts of generosity the existence of ‘cause’ cannot depend on the existence of something agreed to be given in return. So the second paragraph takes into account, by way of justification for the undertaking, the interest—essentially moral, in acts of generosity, in the absence of anything substantial in return—which is its ‘final cause’. The imperative of transactional certainty, designed to protect the other party in onerous contracts, does not have the same intensity with regard to the beneficiary of an act of generosity, which allows us to retain here, as justification and ‘cause’ of the undertaking, the donor’s decisive motive.

Examining gifts and ‘other contracts where one party does or gives something, and where the other party does and gives nothing’, Domat in his time observed that ‘the undertaking of a person who gives has its basis in some rational and just motive, such as a service that has been performed, or some other deserving quality of the donee, or simply the pleasure of doing good’. This motive, added Domat, ‘takes the place of ‘cause’ on the part of the one who receives and gives nothing’ (Domat, *Les lois civiles dans leur ordre naturel*, 1st part, title 1, section 1, p. 235).

#### *Article 1126*

This article is intended to confirm the present state of case-law on the subject, which seems satisfactory. It indicates, in particular, that an unlawful purpose pursued by one of the parties is sufficient to give rise—for ‘the safeguard of the public interest’ (article 1129-1, paragraph 1 of the Reform Proposals)—to absolute nullity of the contract for absence of lawful cause, without the need to ask whether the other party pursued the same purpose or had knowledge of it.

On the other hand, this provision does not make any assumptions about the contents of the requirements of public policy or public morality, such as in relation to acts of generosity made to encourage adulterous relationships.

### *Article 1126-1*

*Restitution* following the retroactive annulment of a contract is governed by the general provisions of articles 1162 (first paragraph) and 1162-3 of the Reform Proposals.

Article 1126-1 is intended to correct the injustice which could result from harm caused to the innocent party by annulment of a contract. It applies to this particular situation article 1162 of the Proposals, under which ‘Where annulment or termination is attributable to one of the parties, the latter must also’ (in addition to the restitution) ‘compensate the other for all his losses’. It sets out, however, *the conditions of this compensation*. According to the first paragraph (‘without the knowledge of the other’), clarified by the second paragraph, the simple knowledge of the unlawful purpose is sufficient to exclude—even for the party who does not himself pursue that purpose—any claim for compensation for loss caused by the annulment of the contract.

## *Validity – Form* (articles 1127 to 1128-2)

*Pierre Catala*

In the chapter dealing with the essential conditions for the validity of contracts, the Civil Code contains no provision relating to form. Form was placed mainly in the chapter dealing with proof and, here and there, in the provisions which govern the effects of contracts in relation to third parties. Formalities required for validity were found set out, juridical act by juridical act, and varying from one to another: from handwritten documents, to signed documents and those in publicly authenticated form. No one doubted, however, that in French law consensualism is the principle, and formalism the exception. So was it necessary to write into the section of the Reform Proposals dealing with the formation of contracts a section dedicated to their form? In taking this course we were not alone, because the European code proposed by the Pavia Academy devotes its Title IV to contractual formality (articles 34 to 38).

There was a decisive argument in favour: the equivalence of electronic writing to traditional writing, recognised by the Laws 2000-230 (13 March 2000) and 2004-75 (21 June 2004).

The recent history of electronic writing is fascinating in several respects. As required by a first European Directive, the Civil Code had to recognise the probative force of electronic writing and electronic signatures. It accepted the principle, and laid down conditions in the new articles 1316 to 1316-4, stemming from the law of 13 March 2000. At that stage it was only a question of formality by way of proof, and did not recognise the validity of electronic forms for juridical acts for which writing was required on pain of nullity. But the same Law, in the new article 1317, anticipated that an authenticated instrument ‘may be drawn up in an electronic medium, if it is created and stored in the circumstances fixed by

decree by the *Conseil d'État*. Now, although authenticated instruments are placed in the chapter on proof in the Civil Code, it is clear that the formality requirements relating to authentication require writing on pain of nullity, and not only with a view to proof. Article 1317 paragraph 2 thus foreshadowed, for electronic writing, the passing from formality by way of proof to the higher requirement of formality by way of validity.

This was done by the Law of 21 June 2004 on the digital economy, which integrated into French law the European directive on electronic commerce. Two new articles (1108-1 and 1108-2) appeared in the Civil Code in the chapter on the essential conditions for the validity of contracts. From that point formality made its entry into the list of those conditions, and from that (as a context to introduce it) deserved its own section in the Reform Proposals where the two articles mentioned above take their place as numbers 1127-2 and 1127-3.

The first of these texts provides that when electronic writing is required for the validity of a juridical act, it can be created and stored in electronic form in the circumstances provided for by articles 1316-1 and 1316-4 of the Civil Code (or 1285-1 and 1286 of the Reform Proposals). From this comes an equivalence of the form for validity and the form for proof: a single form may satisfy several ends. It was already clear from a comparison of texts: the publicly authenticated form, required on pain of nullity in the case of donations, is also required in land transactions for the purposes of their being relied on as against third parties. Given this versatility, it is necessary that the law sets out the purpose of the formality that it requires; this is the meaning of article 1297 of the Reform Proposals which retouches article 1426 of the Civil Code.

The proposed section is not included only to provide a context for the introduction of the new technologies of writing. Its purpose is more general.

Article 1127 proclaims in express terms the principle of consensualism. Article 1127-4, consistently with the adjacent section on nullities, provides that the regime of the action for nullity for absence or defect of formality depends on the nature of the interests which the formality is intended to protect. It therefore applies a general principle set out in article 1129-1, which articles 1122 (subject-matter) and 1124-1 (cause) equally respect.

Article 1127-5 confirms that there are, alongside the forms required for validity, forms required for the separate purposes of proof or for reliance as against third parties, which do not affect the validity of contracts.

Article 1127-6 lays down the principle of parallel formalities, which applies to documents modifying or abrogating an existing contract. Its position, at the end of the section, shows that it applies to all types of formality, and not only to formalities required on pain of nullity.

Paragraph 2 of section 5 is confined to incorporating, under the heading of electronic formalities, articles 1369-1 *et seq.* of the Civil Code, which the Law of [21] June 2004 on the digital economy introduced in a new title of the Code headed 'Contracts in electronic form'. These provisions, inspired by consumer protection concerns, deal with the formalities which protect the circumstances of the offer and acceptance to ensure that the contract is validly concluded.

## *Sanctions* (articles 1129 to 1133)

*Philippe Simler*

The provisions under this heading are mainly concerned with the **nullity of juridical acts** (§ 1) and replace those of articles 1304 to 1314 of the present Civil Code, as well as articles 1338 to 1340. In addition, but limited to giving a definition, there are three articles concerning the concepts of **lapse** (§ 2), **invalidity and third parties** (§ 3) and **regularisation** (§ 4), which were not as such included in the Code of 1804.

These provisions have found their natural place at the end of the chapter dealing with the conditions of validity of contracts. This position is certainly more appropriate than that of the present articles 1304 to 1314, which follow the grounds of extinction of obligations, and even more so that of articles 1338 to 1340, curiously placed in the chapter dealing with proof of obligations.

Moreover, the present articles 1304 to 1314 essentially relate to a case of lack of capacity (10 of the 11 articles and even, in part, the 11th). This gives rise to specific sanctions, which obviously belong in their own section (which leaves untouched the question of the fate of the present texts, which would remain to this extent from the law as it is presently applied, if the present Reform Proposals are adopted).

In fact, the provisions of this section owe very little to the existing provisions. But very largely, and in particular in relation to the doctrine of nullities, they formally establish the solutions of the law as it is presently applied.

### § 1 Nullity

The proposed provisions form an explicit establishment of what is generally called the modern doctrine of nullities, as contrasted with the so-called ‘organic’ doctrine which was generally accepted in the 19th century and which prevailed until recently in certain cases (for example, for absence of ‘cause’). This follows clearly from the distinguishing criterion between absolute nullity and relative nullity, proposed in article 1129-1; that is, the safeguard of (respectively) the public interest or a private interest. It is, however, made clear that if the private interest raises an issue of a fundamental value, such as the protection of the human body, nullity is absolute.

The regime of nullities, so defined, is in accordance with the solutions of the law as it is presently applied. Absolute nullity may be invoked by any person who can demonstrate an interest, and may be raised by the court on its own initiative. It is not susceptible of affirmation, and becomes prescribed after the general time period set under the present law. Relative nullity may be invoked only by a person protected by the relevant legislation, and who may renounce it by affirming the vitiated juridical act, expressly or impliedly, for example by performing it with full

knowledge of the defect. Except as otherwise specifically provided, it becomes prescribed after a shorter period—presently five years, but this would be reduced to three years.

In all cases, nullity is decreed by the court. But it is provided that—and this seems at first sight to be novel—the parties may establish it by common consent. In reality this is already the case, but what goes without saying is sometimes worth being expressly stated. If the parties to a valid contract may renounce it by an agreement to dissolve the agreement—which no one doubts—how much more certain is it that they can establish that a vitiated contract shall have no effect. The explicit recognition of this power is meant to encourage parties to avoid unnecessary litigation. On the other hand, we have ruled out the possibility of a unilateral annulment which would be simply notified to the other party, with the latter then having the right to challenge it. Such a solution is proposed for termination (article 1158). If nullity has not been able to be settled by the parties' mutual agreement, mentioned above, litigation is unavoidable and it then seems fairer to require the party who seeks nullity to take the first steps, rather than the party who challenges it.

The Reform Proposals aim, moreover, to fill a gap in the legislative provisions relating to the question of the scope of nullity. We know that the courts have arrived at satisfactory solutions by a convergent interpretation of articles 900 and 1172 of the Civil Code—although it hardly respects their letter. Expressing the idea of favouring the validity of the contract, article 1130-2 of the Proposals sets out the principle of partial nullity of the juridical act of which only one term or one part is defective, unless there is proof of the decisive character of this term or part. This subjective requirement, which calls for an investigation of intentions, is however itself removed in a situation where a legislative provision strikes out a clause, or again if the protective purpose of the rule which has been violated requires the continuation of the juridical act.

The retroactive character which is recognised for nullity, and which gives rise to the principle of restitution of what has already been done in performance, is in accordance with the solutions already in force, whilst referring to a section dealing with restitution in a more precise manner.

## § 2 Lapse

Lapse exists in many forms: lapse of acts of generosity, in various circumstances; lapse of a juridical act which depends on another which is itself annulled or retroactively terminated; even lapse of a marriage in case of change of sex of one spouse, etc. It cannot be assimilated to any other concept, such as nullity or termination. It therefore deserves a place in the Civil Code.

Its definition is, however, difficult. Although it is easy to distinguish it from nullity or termination, it is less so to define it in positive terms. Its grounds are very diverse. Its effects, moreover, vary, since it is sometimes retroactive, sometimes not. It appears in some sense to be a residual form of ineffectiveness for grounds other than absence of a condition of validity, or non-performance. And it is proposed to write into the Civil Code only a definition, in terms sufficiently wide to allow it to include the different cases.

### § 3 Invalidity and third parties

The definition of the general lack of effect of contracts ('inopposability') with regard to third parties is that which is generally accepted: it distinguishes clearly between the contracting parties and third parties, the latter of whom are alone protected by this concept.

We have to recognise, however, that it is not in conformity with its usage, often disputed, moreover, in different situations. The formulation of a precise definition could make a useful contribution by way of clarification.

### § 4 Regularisation

This concept calls for similar observations. Regularisation is mentioned in various legislative provisions. The definition which is proposed is meant to permit its application in other situations, which have not been expressly provided for.

## *The Effects of Contracts; Contractual Interpretation and Contractual Classification* (articles 1134 to 1143)

*Alain Ghozi*

Chapter III sets out the rules governing the effects of obligations. It organises them in a logical order in seven sections. So the following are set out in turn: the contents of agreements; the way in which they should be interpreted; the classification of contracts as so interpreted; the different types of obligations which they create; the rules applicable to performance and non-performance of these obligations; and retroactive termination of the contract on non-performance. This chapter benefits from a number of new provisions so as to be able to regulate problems which have become apparent in practice: while it is true that some of these may be found implicitly within provisions of principle governing the area, others are added to them and are completely new. This is the case in particular as regards the regime governing rights of withdrawal; the treatment of difficulties of performance as a result of a change in economic circumstances; the framework for unilateral lawful behaviour; the formal recognition of the various forms of contractual groupings; and the introduction of obligations to give for use. This is also true of the treatment given to the unilateral right to terminate the contract prospectively on the ground of contractual non-performance; of the clarification of the regime governing termination clauses; and of restitution consequential on the destruction of the contract. And the effects of contracts as regards third parties, of promises to stand as surety and of stipulations for the benefit of third parties are also properly arranged and finally the principles governing the assignment of contracts are declared. Each of these points deserves some further

elucidation. So, to start with, the binding force of contracts and contractual interpretation.

Articles 1134 and 1135 have furnished the axes around which great areas of the relationship created by contracts have been ordered: the binding force of contractual undertakings, the content of these undertakings and the power of the parties' wills over them, together with a necessary further treatment in section 2 of the rules governing the interpretation of undertakings.

Without changing this overall framework, whose principles have been approved by time-honoured practice, it appeared appropriate to elaborate it both as regards the content of undertakings (which is dealt with in section 1) and the creation of a link between contractual interpretation and contractual classification (which is dealt with in section 2).

As regards the former, two innovations are introduced: the power of the parties' wills to provide for their release and to provide for the consequences of problems of performance which are so serious that the contractual relationship has lost its point.

## The regime governing the right of withdrawal

Article 1134-1 explicitly acknowledges the possibility of withdrawal by the parties. While such a right of withdrawal is mostly unilateral, it is not unusual for it to be bilateral, each of the parties reserving the possibility of withdrawing from the contract if it suits his interest. Developing the position set out in article 1134, article 1134-1 means that withdrawal is not possible unless both its existence and the circumstances in which it may take place are authorised by the agreement of the parties, by custom or by legislation as the case may be. By way of corollary, article 1134-1 invites the parties to make express provision for withdrawal, which gives formal recognition to their power over their binding undertakings, but it does not rule out the possibility that such a right may arise by custom, as is the case for example in certain commercial contexts. A theoretical link is in this way maintained with those legal provisions which concern the extent of a party's undertaking; indeed, it is reinforced by putting the provisions which are at present rather awkwardly arranged in the Code into a proper order. So article 1135, which forms the basis for incorporation into the agreement of a contract's incidents attaching to it by law, custom or equity is taken to its logical conclusion by adding the former article 1160 as its second paragraph to the effect that, even if they are not expressly included, terms which are customary may supplement the contract.

## The consequences of a supervening serious imbalance arising in the course of performance of the contract

The parties' power is invoked in another area: the prevention by express contractual provision of future difficulties in performance, or, in its absence, the organisation of a procedure for renegotiation of the contract at the direction of the court. This is introduced into our civil legislation by articles 1135-1 *et seq.*

Those who do not tire of regretting the absence of rules governing the effect of supervening unforeseeable events in French civil law should remember that a

contract is a juridical act which is by its nature an act of foresight and must therefore itself foresee and provide for such difficulties, and that there is no better solution than one which will have been negotiated by the parties in question themselves. Therefore, there is deliberately no provision made for supervening circumstances. The success of settlement as an alternative means of resolving disputes which has always been recognised and in our own day calls for the development of mediation as another negotiated means of resolution of disputes bears sufficient witness to this. Furthermore, practitioners know this well, and include renegotiation clauses to deal with the situation of supervening serious difficulties. Also, negotiation by the parties is once again to be encouraged by placing it at the centre of the law itself, though it was thought necessary to structure the circumstances in which negotiations should take place in these situations so as to deal both with cases where the parties themselves have been silent on the matter and where the parties' negotiations have broken down. This is the purpose of the provisions as proposed.

Parties to contracts are encouraged to include renegotiation clauses in their contracts to govern cases where a change of circumstances has the effect of disturbing the original balance of what is required of them under the contract to the extent that the contract loses any point for one of them (article 1135-1). In order to guarantee the certainty of transactions, modification is tied to the loss of point to the contract, and this test acts both as a measure of the seriousness of the imbalance and as its proof. The solution to the problem of supervening circumstances is therefore found in negotiation, thereby solving a contractual difficulty through contract itself. In the absence of an express renegotiation clause (a possibility which ought not to be ignored), a party for whom a contract loses its point may apply to the court (specifically, to the President of the *tribunal de grande instance*), which may order a negotiation aimed at saving the contract (article 1135-2). If this fails, and putting aside cases of bad faith, either party would have the right to claim the prospective termination of the contract without payment of expenses or damages (1135-3): once the point of the contract has disappeared, so too should the contract itself. Implicit in this is that a person who wishes to see the contract maintained will have to make those concessions which are necessary to allow the other party a minimum of benefit to encourage him to carry on with their contractual relationship.

This innovative provision echoes those found in article 900-2 of the Civil Code by its taking into account the burdensome nature of the situation in question. It therefore establishes the same way of thinking underlying the solutions governing the consequences of changes in circumstances, and this ensures consistency in the law as a whole.

## Contractual interpretation; unilateral juridical acts; interdependent contractual groupings

Once reinvigorated in this way, the general provisions which define the content of the parties' contractual undertakings find their logical development in other provisions which deal with their interpretation, and, as has been said, in the

relationship which they bear with the contract's classification. This is the concern of section 2.

Contractual interpretation is the means available to judges to draw out the significance of a party's undertaking and the legal provisions governing interpretation have been brought up to date by drawing on the considerable contribution made by the courts, here used as the necessary testing ground for rules to see if they satisfy contemporary needs. These provisions are also faithful to the Code's general method, for the Reform Proposals set out analytically and in turn the methods of interpretation of obligations and of juridical acts; unilateral acts (article 1136 paragraph 2), and collective acts—a new category which includes all decisions and resolutions of a group (article 1136 paragraph 3); then juridical acts and contracts; and then finally (and again an innovation) contracts and contractual groupings (article 1137, paragraph 2). In this way, the various innovations arising from practice, as regards collective acts and the structure of contractual arrangements in particular, would in future be formally alluded to and given effect by our law. These rules are nicely supplemented by those governing the effects of interdependent contracts (article 1172 *et seq*) with the result that our Code would contain a complete framework for these innovations arising from contractual practice, and this would confer on them a predictability and a clarity which they have hitherto lacked.

These provisions are also innovative in that they create the tools by which the balance of the contract can be reviewed. Since contracts must not serve as an instrument of slavery, they must be interpreted first rationally and then equitably. As a result, a court should look for the rationale of a party's undertaking, for this gives a clear indication of what the parties intended, the real point of their contract; but their intention should not be allowed to spill over into the unfair (article 1139).

## The control of lawful dominance of one party over the other

In the same spirit, a juridical act which is made under the dominant influence of one of its parties, which is often the case in consumer contracts and standard-form contracts, but also especially in distribution contracts, must be interpreted in favour of the other party (article 1140-1). This rule complements consistently a new and innovative provision which sets a legal framework for the unilateral determination of the price by one of the parties to a contract by requiring that party to justify his decision if it is challenged (articles 1121-4 and 1121-5). This reversal of the burden of proof rebalances the parties' relationship, as a party who possesses the power to act unilaterally is forced to behave moderately as he knows that he has to justify himself merely on being challenged.

## Contractual classification

As a corollary, it is appropriate to remedy the silence of the Code on the subject of the classification of contracts (article 1142 *et seq*). These provisions are necessary now that innovations in contract-making give rise to lots of fresh patterns, relying on the idea of nominate contracts so as to construct new unnamed and even sui

generis agreements. The Reform Proposals set out the principles which the courts must use as their guide for the classification of these arrangements and these principles will reduce the uncertainty surrounding the courts' involvement. In particular, it makes formal provision for the technique of judicial reclassification of a contract if the parties' own classification cannot be given effect (this being termed 'conversion by reduction', and given effect by a new article 1143). Also, care has been taken to relate these provisions to those found in the New Code of Civil Procedure. As these new rules are carefully coordinated, the resulting body of law is able to set certain boundaries for the parties' contractual imagination and so give it the certainty needed to ensure its development.

## *The Various Types of Obligations* (articles 1144 to 1151)

*Didier R. Martin*

The classification of obligations, or their distribution into species, is a difficult exercise. For its aim is to give expression in a few words and notions to general categories within which are ranged, or to which are related, despite their extraordinary diversity, all legal or voluntary obligations. Was it the difficulty of this undertaking which led those who conceived the Civil Code to avoid risking it? Nevertheless, the experience of teaching and of legal practice bears witness to the major interest of such a work which would illuminate the doctrine of obligations and at the same time enrich the fundamental concepts of its very subject-matter.

Traditionally, obligations are divided into three elementary kinds. An obligation which requires an action, a positive act, is an 'obligation to do.' Inversely, an obligation which requires an abstention, is an 'obligation not to do', this being the obverse and antithesis of the first. Finally, there is an obligation termed 'to give' and while its distinctiveness is denied by a line of thinking in legal scholarship, this obligation cannot be reduced to any other in order to give expression to what one agrees to do in transferring a real or personal right. A process of refinement of the thinking behind these traditional categories has led today to an understanding that between the two archetypes (obligations to do/not to do and obligations to give) there lies a further variety of obligations, one which had previously lain undetected, but which it is now agreed should be classified, if for no other reason than for its numerous and important practical applications. This third category is 'obligations to give for use' and its distinguishing and entirely special feature is that it brings with it a duty in those who benefit from its performance to restore the thing or its equivalent at the end of the period of the use which was agreed.

These universal categories are, moreover, themselves liable to possess particular or common characteristics which the classification of obligations at a second stage—at second blush—must reflect. In this respect, two major terms with two elements have become current owing to their structural qualities and force. The first relates to the nature of the subject-matter of a debtor's obligation and contrasts monetary obligations with those which do not concern a sum of money and which are

called—rather laconically and abstractly—obligations ‘in kind’. Here, it is the nature of money—which acts as a universal measure and equivalent of everything—which does not lend itself to a legal treatment which is shared with other kinds of subject-matter of obligations. The other centres on the purpose of obligations and contrasts ‘obligations of result’—to produce the benefit which was promised—and ‘obligations to take necessary steps’, which are to do as well as one can with the use of appropriate care. The pure product of our nation’s legal genius, this distinction, which allows intermediate nuances between its two poles, transcends the different kinds of obligations whose full significance it governs.

This leaves at a secondary level the specification of three untypical varieties of obligations. First, ‘obligations of value’ which are concerned, if in money, with the value of property on its maturity; or, if in kind, with what is necessary for a person’s maintenance or looking after a thing. Secondly, ‘safety obligations’ which, in the context of a careful society, reflect an aim of an active contractual safeguarding of the integrity of a party’s person and property. Finally, ‘natural obligations’, which concern those duties which one’s conscience imposes, and which exist at the edge of the law’s frontiers and which take up their potential for reality only with the goodwill of the debtor. Such an obligation is no more than a virtual requirement, a dotted-line where the very concept of obligation wears thin.

## *The Performance of Obligations* (articles 1152 to 1156-2)

*Laurent Leveneur,  
Hervé Lécuyer*

The third chapter of Title III will be more logically organised by including a section entitled, ‘The performance of obligations’ (an area of the law which is at present dealt with in two sections dedicated to obligations to give, and then to obligations to do and not to do). This section will come after the one concerning the various types of obligations, and before the provisions governing the non-performance of obligations and retroactive termination of the contract.

### The performance of obligations to give (articles 1152 to 1153-1)

It is not proposed that the fundamental principle of transfer of title by the mere exchange of consent should be modified, as this does not give rise to difficulties in practice and as it is also found in articles 938 and 1583 of the Civil Code. At the very most articles 1152-1 and 1152-2 have been drafted in the interests of greater clarity using the words *délivrer* and *délivraison* instead of *livrer* and *livraison* (as are used in the current articles 1136 and 1138), as the latter are possibly ambiguous: *livraison* for the purposes of the current article 1138 is actually in reality *délivraison*, that is to say, the act of putting the thing at the disposition of the other party to the contract. The draftsmen of the Civil Code used the words *délivraison* (article

1603 *et seq.* and *livraison* as synonyms, but it is proposed that only *délivraison* should be used.

The principle of immediate transfer of title to which reference has already been made raises even fewer difficulties given that it is always permissible for the parties to postpone transfer by an express term. Terms of this sort are very widespread, above all in the context of land transactions. In addition, there are some legislative exceptions to the principle, for example, in the case of sale of generic property sold by weight, number or measure as provided by article 1585 of the present Code. These qualifications are retained by the new article 1152 as drafted.

The obligation to look after the thing until delivery using all the care of a good head of household which is currently found in the famous article 1137 is set out in article 1152-1. Notice to the contractual debtor to perform and its effects on the incidence of risk (at present contained in article 1139) are to be found in articles 1152-2 and 1152-3. Articles 1140 and 1141 are renumbered as articles 1153-1 and 1153.

## The performance of obligations to do or not to do (articles 1154 to 1154-2)

A radical modification is proposed in redrafting the well-known article 1142. The point of the change is to take account of the fact that the exceptions and qualifications made to the rule set out in article 1142 as currently drafted have become so considerable that the reality is better reflected by stating the principle in the opposite way from the present position. It would be indeed very difficult to continue to proclaim that ‘a debtor’s non-performance of an obligation to do or not to do gives rise to liability in damages,’ especially since legislative provisions (the Laws of 5 July 1972 and then of 9 July 1991) have formally recognised monetary penalties for disobedience of court orders.

Doubtless such monetary penalties provide merely an indirect means of constraint on contractual debtors to perform, and this generally allows scholars to try to reconcile them with the principle found in article 1142, which only forbids the direct and personal constraint of debtors. But this does not prevent every court order of a debtor to perform his obligation specifically from being backed by a monetary penalty for disobedience, and since the scope of application of monetary penalties is very wide indeed, it is no longer possible to let it be understood from the Civil Code that contractual non-performance gives a creditor only a right to damages.

Furthermore, it may be observed that direct constraint is itself quite often possible, as in the case of the eviction of a tenant who has to give up possession of the property at the end of the lease, and the mechanism of distraint of movable property which a debtor is under an obligation to deliver or restore.

The new version proposed for article 1142 (which becomes article 1154) therefore sets out the principle of performance in kind where it is possible (this being a direct allusion to article 1184 as currently drafted, which provides for specific performance of an agreement ‘where it is possible’ as an alternative to its retroactive termination for non-performance). Implicitly, this leaves to the law of

civil procedure (at present, essentially the Law of 9 July 1991 and the Decree of 31 July 1992) the task of regulating the procedural mechanisms of direct constraint (for example, eviction or seizure of movable property) and above all indirect constraint (monetary penalties) by which performance may be obtained on a debtor's failure to perform.

Most awkward is how to give expression to the limitations on the creditor's right to specific performance by direct constraint on the one hand, and by means of the imposition of monetary penalties for non-performance on the other, as while these limitations rest on the same idea, they appear to do so to a different degree: one cannot constrain by force a building contractor to perform the works which he has promised as this would be an excessive restriction on personal liberty, but one can order him to do so on pain of monetary penalty; but monetary penalties themselves cease to be possible if the subject-matter of the debtor's obligation possesses an eminently personal character (the classic example being of an artist undertaking a commission).

On the other hand, the right to obtain substitute performance at present provided for by articles 1143 and 1144 can be retained almost as it stands. It can pass muster as a means of making up for the lack of availability of direct specific performance; a fortiori it is clearly also consistent with the new principle of a right to performance in kind, of which it forms one type. The proposed new article 1154-2 in substance picks up the provisions at present found in articles 1143 and 1144.

Finally, it is not proposed that article 1145 (which provides for damages for failure to perform an obligation not to do something without any prior notice to perform) should be modified, but its content is integrated into article 1154-1.

## *The Non-Performance of Obligations* (articles 1157 to 1160-1)

*Judith Rochfeld*

The proposals advanced within this section find their foundations in the present state of law in the area resulting in the original articles of the Civil Code and from the work of the courts (section 1). They attempt to remedy existing gaps and to respond to the needs for development which have come to light since 1804 (section 2). To this end the proposals follow a number of directions (section 3).

### §1 The present state of the law

The law concerning non-performance of obligations and retroactive termination of a contract (governed by article 1184 of the Civil Code) rests on several traditional foundations:

- termination is justified by recourse to the technique of a 'resolutive condition';
- termination is implicitly written into all synallagmatic contracts;

– termination is conceived of as requiring judicial intervention.

The legal theory which surrounds it demands our attention as it is rather special, reflecting clearly the thinking of the draftsmen of the Civil Code and turning on two central ideas:

– the fundamental principle of the binding force of contracts and contractual morality: a contract must still be applied whatever the circumstances or difficulties encountered. As a result, the destruction of a contract is justified only in the case of very serious non-performance, or indeed, a complete failure to perform. It is therefore necessary for recourse to be had to the court so that it may make sure that the threshold of seriousness needed for termination is satisfied;

– protection of a debtor in breach and contractual humanity; a debtor must not suffer a sanction which is inflicted by the other party to the contract too quickly and without any external control.

## §2 Gaps in the present law and the need for change

### *(a) Gaps in the original provisions of the Code*

– retroactive termination for non-performance is the only measure provided for all types of contracts;

– other measures are referred to only by a few particular legal provisions, even if these have been generalised into principles applicable to all synallagmatic contracts by the case-law and legal practice (as in the case of the defence of non-performance, and the consequences of *force majeure* on the contract as a whole);

– no legal provision governs termination of a contract under an express contract term even though this is also very widespread in practice.

### *(b) Gaps in the conditions required for termination for non-performance*

– article 1184 sets the foundation of termination on the debatable technique of ‘resolutive condition’;

– this foundation determines its position in the Code, within the rules governing conditional obligations (Chapter IV ‘Different types of obligations’, section 1 ‘Conditional obligations’, sub-section 3 ‘resolutive conditions’). As a result, this position is equally debatable and invites reassessment;

– article 1184 does not set out the detailed conditions for termination of the contract: it says nothing about the threshold of seriousness of non-performance appropriate to attract termination, limiting itself to the ‘situation where one of the parties has not satisfied his undertaking’. This same point could also be made as regards the defence of non-performance where there is also a need to set out clearly the threshold for intervention.

### *(c) Gaps concerning the effects of termination*

– article 1184 sets out no details as to the extent of the consequences of this measure, whether or not it is retroactive and whether it affects all or only part of the contract;

- termination is traditionally understood as being retroactive, following its stated basis in a ‘resolutive condition’;
- both legal scholarship and the courts have nevertheless created a variant on this position by recognising prospective termination which is not retroactive, taking effect only for the future. Nevertheless, the criterion on which the distinction between complete and retroactive termination of the contract and termination which is partial because prospective is drawn is not very clear. Where a criterion is suggested, it is found in the successive character of performance of the contract, a criterion which is debatable as it rests on reflections about the particular difficulty found in dealing with restitution in contracts continuing over a period;
- nothing is said about the consequences of these various measures, notably, the basis of and rules governing restitution.

*(d) Influences of European law*

- the *Principles of European Contract Law* make provision exclusively for unilateral termination of the contract by the creditor on the ground of non-performance following the model of a number of our neighbouring countries (Chapter 9, paragraph 9:301) and this shows French law to be out of step with others.

### §3 The directions proposed

*(a) The direction proposed for the position in the legislation of the provisions governing termination*

- once the reference to ‘resolutive condition’ disappears, it becomes possible to place the section governing non-performance after the one dedicated to performance of the contract (Section 4 – The performance of obligations, articles 1152 to 1156-2; Section 5 – The non-performance of obligations and termination of contracts, articles 1157 to 1160-1).

*(b) The directions proposed to remedy the gaps in the original provisions of the Civil Code*

- it is proposed that legislation should establish the defence of non-performance and its conditions of application (notably as to the threshold of non-performance it requires (total non-performance; article 1157);
- it is proposed that the wider consequences of *force majeure* should be integrated into the law governing termination of the contract for non-performance, in as much as the latter will constitute the measure in response to non-performance of the contract, whatever was the cause of this non-performance (article 1158);
- it is proposed that legislation should establish the possibility of parties to a contract agreeing to a termination clause, setting the conditions for its application and its effects (article 1159).

*(c) The directions proposed as to the choice between termination of the contract by the court and by unilateral act of the creditor*

- it is proposed to opt for the maintenance of a choice for a creditor between specific performance, damages and termination of the contract (art. 1158);
- it is proposed to grant to a creditor who chooses termination an option between termination by the court and termination by his own unilateral act. In the situation where he opts for the latter, termination takes effect after giving the debtor notice to perform and after the expiry of a reasonable period of delay for this purpose. Where performance is not forthcoming, termination may be effected by notification by the creditor setting out his reasons for the break-up (article 1158);
- it is proposed to grant to a debtor the possibility of contesting in retrospect before a court the creditor's decision to terminate, on the basis of denying the existence of the failures to perform which are alleged against him (article 1158-1).

*(d) The directions proposed as to the regime governing the effects of termination*

- it is proposed that legislation should establish the point in time when termination of the contract takes effect, putting it at the time of bringing an action for termination where the latter is judicial, and putting it at the time of receipt of the creditor's notification where it is unilateral (articles 1158 and 1160-1);
- it is proposed that legislation should establish the consequences of termination of the contract, by providing in principle for termination for the future, except for the case of contracts of instantaneous performance where termination is to be retroactive (article 1160-1 and see Section 6 for the rules governing restitution);
- it is proposed to set a basis for the tailoring of the effects of termination according to the divisible character of performance of the contract (article 1160).

## *Restitution Following the Destruction of a Contract* (articles 1161 to 1164-7)

*Yves-Marie Serinet*

The rules concerning restitution after the retroactive destruction of a contract resulting from its annulment or its termination are not at present the subject of any provision of their own in the Civil Code, excepting, of course, article 1312 of the Code as it stands concerning restitution following rescission of a contract for the defect of incapacity. And one must add at once that the formulation of this latter provision postdates 1804 as it is derived from the Law of 18 February 1938.

Even so, the issue of restitution was not unknown to the codifiers since special rules are found in the Code which organise the way in which it should operate in the rules surrounding several other legal doctrines. This is the case, in particular, as

to the provisions of the Civil Code concerning recovery of undue payments to which it is customary to refer in this respect (articles 1376 *et seq.* of the Civil Code); of the rules which determine the effects of the guarantee against eviction (article 1630 *et seq.* of the Civil Code) which are said to set out a regime which qualifies the normal position governing restitution; of those provisions which apply to a buyer's actions in respect of latent defects (article 1644 *et seq.* of the Civil Code) since these actions are considered as naturally aimed at providing for restitution; or even of the set of rules governing a seller's option to repurchase (article 1659 *et seq.* of the Civil Code) or even more significant for this purpose, rescission of a contract of sale for gross undervalue (article 1674 *et seq.* of the Civil Code).

In drafting the proposed legislative provisions which are set out here, these sparse provisions in the Civil Code, which for the most part remain unchanged since 1804, can serve as a source of inspiration and of wording of the new provisions. However, it does not seem that they can be directly transposed to the context of restitution on annulment or termination of a contract. For their way of thinking is either too specialised, as in the case of rules governing certain special kinds of termination of contracts of sale, or too different as in the case of the rules governing restitution in respect of undue payments.

Important recent work by scholars (cf. C. Guelfucci-Thibierge, *Nullité, restitutions et responsabilités*, doctoral thesis, University of Paris I, preface by J. Ghestin, (L.G.D.J., Paris 1992); M. Malaurie, *Les restitutions en droit civil*, doctoral thesis, University of Paris II, preface by G. Cornu, (Cujas, Paris 1991)) has shown that the area of restitution understood in a broad sense attracts the attention of several branches of law outside the law of obligations (*viz.* the law of property) or, within the law of obligations, of regulation other than by the law of contracts (*viz.* the law of civil liability, quasi-contract with its theories of recovery of undue payments and unjustified enrichment). Now, the aims of the law of property in governing the theoretical basis of rights to fruits, expenses incurred in maintaining another's property or property acquired through accession, in common with the aims of civil liability, whether contractual or delictual, in defining the conditions of reparation for loss, are not the same as those of the rules governing restitution following annulment or retroactive termination of a contract. Moreover, it must be said that a *summa divisio* would be between normal restitution, which takes place in the context of usufruct, loan, and even where there is an option to repurchase or in the context of an 'express resolutive condition', and abnormal restitution, which occurs in the context of claims for one's own property, nullity or termination of a contract, recovery of undue payments and recovery of property by a person presumed absent who reappears. To this first division, another then follows on, as it leads to a distinction between restitution which takes place in a contractual context, which is affected in certain respects by the influence of the contract which has been annulled or terminated and which requires reciprocity in returning the parties to the *status quo ante* if both sides to the contract have meanwhile performed, and restitution which takes place outside the contractual context which is usually one-sided.

For all these reasons, it now seems appropriate, if not absolutely necessary, to set out a coherent legal regime solely to govern restitution following the annulment or termination, that is, on the retroactive destruction of a contract.

Furthermore, we shall seek in these proposals to put forward general rules which, by creating a synthesis of the most advanced proposals put forward by legal scholars together with the solutions most frequently reached by the case-law which are compatible with the sparse provisions of the Civil Code, answer the common and objective aim of returning the parties to the *status quo ante* as faithfully as possible.

In this way, the untidy undergrowth of the present law should be pruned and cleared, retrained according to the classical lines of a French garden.

Following this way of thinking, it is proposed that Section 6 which is to govern this area (articles 1161 to 1164-7) should be introduced by article 1161 which would at the outset determine the domain of application of the newly promulgated rules. This introductory provision could make clear the extent to which this new set of rules would govern the numerous cases of restitution which are already regulated by the Civil Code.

Following on from this, the legal regime applying to restitution following the destruction of a contract would be divided into three parts fixing respectively the principles which govern the category of restitution on destruction of a contract, the different forms which restitution may take and supplementary rules which are often designated by the evocative expression 'restitutionary accounting'.

So, it is intended that the **first part** should contain several provisions which would announce the principles which are common to this type of restitution.

First, in article 1162 the general mechanism for restitution on destruction of a contract is defined.

As to its area of application, it seems logical that the existence, the significance and the extent of any retroactive effect should be fixed in the sections dealing with nullity and termination respectively. In this way, the fiction of retroactivity will come into play systematically on annulment, but only in a reduced way on termination as it is limited there to contracts of instantaneous performance. This solution appears appropriate as it is both practical and accurately reflects the different natures of the two sanctions. And this explains the fact that the provision sets out the consequences of annulment without any restrictions as it is always retroactive, but restricts its application to termination to those situations in which it has this effect.

From the point of view of its significance, article 1162 declares a principle of 'full restitution,' a principle which is already accepted and by which each person must receive neither more nor less than he earlier provided. Restitution must be 'reciprocal' where the contract is synallagmatic. However, the attractive metaphor of a 'reversed synallagmatic contract' suggested by *le doyen* Carbonnier should not be taken too literally, as restitution depends above all on what one or both parties have performed during the intervening period. In this way, the quantum of restitutionary recovery is to be assessed analytically rather than at large and its theoretical basis is a calculation of the sum of all direct or indirect advantages received in respect of each obligation which has been performed, and this sum will form the basis of recovery. Reciprocal restitution arises only in the putting together of these various partial elements and subject to the guarantees which

these imply. Be this as it may, restitution is imposed equally as regards contracts which are not bilateral, which explains the phrase 'where applicable' found in the first part of article 1162. Finally, it is made clear that restitution takes effect 'by operation of law' on annulment or retroactive termination of a contract. This emphasises the automatic character of restitution and indicates that there is no room for a distinction between two types of actions or claims of which it might be the object, one for destruction of the contract on the one hand and for restitution on the other: this has an effect on which rules of civil procedure are relevant.

In a really very general way, the wording of the second paragraph of article 1162 reserves to a claimant the possibility of obtaining damages subject to the ordinary conditions of civil liability. In this way it tends to show that restitution does not follow precisely the same logic and does not obey the same conditions as it remains a mechanism strictly detached from fault.

After this come two rules which are technical but of a considerable practical importance and which are drawn from solutions adopted by the case-law (article 1162-1).

First, it is provided that an obligation of restitution benefits by extension from any security stipulated for performance of the original obligation. This marks the formal acceptance of the solution worked out in the absence of any legislative provision as regards contracts of guarantee concluded to cover the reimbursement of repayments of a loan. It has long been accepted that the security covers restitution of the sums borrowed if the contract is annulled.

Secondly, the issue of prescription of an obligation to make restitution is dealt with following the lead of a recent judgment of the Cour de cassation which refused to apply in the circumstances the rules applicable to recovery of undue payments (Civ. (1) 24 September 2002, Bull. civ. I, no. 218, p. 168). It appears natural in fact in this respect that restitution following the destruction of a contract should draw on the same regime for its rules as regards nullity and retroactive termination as these both ensue by operation of law.

Following on from this come a group of proposals put together in one legal provision, which sets out the role of the court in a number of respects in awarding restitution after the destruction of a contract (article 1162-2).

From the first it seems legitimate to give to courts the possibility of deciding issues of restitution on their own initiative since these issues are to all intents and purposes included within any claim for annulment or for termination of a contract as they form one of the consequences of these sanctions (See, in this sense, Civ. Sect. 29 January 2003, *pourvoi* 01-03185, JCP 2003.II.10116). All the same, it could be asked whether, in a written submission, a claim for nullity has the primary significance in the mind of the claimant of a claim for restitution. Be that as it may, the provision proposed (article 1162-2) does not go as far as to impose on courts an obligation here, even though this could appear to be logical. It is therefore for the parties to set out formally their claims in this respect, though a court may decide to make up for their failure to do so by ordering restitution on its own initiative. This also leaves the parties the possibility of returning to the court later if the question of restitution was not previously determined. This also explains the

provision, which is a natural one, in the third paragraph which provides that a judgment of annulment or termination interrupts any existing prescription period and converts it into the thirty-year prescription period of the general law. In the absence of such a provision, a risk—if only a theoretical one—would exist that a claim for restitution would run out of time very quickly after the pronouncement of the contract's destruction.

The second paragraph poses the principle of a judicial process of restitutionary accounting where restitution and counter-restitution are set-off against each other subject to the condition, of course, that this set-off is technically possible since one can only add or subtract things of the same nature.

Traditionally, giving practical effect to the principle of full restitution has two limitations, justified by subjective considerations of morality and of fairness. They deserve to be preserved as safety-valves which can temper the strictness of the principle.

In this respect, the terms of article 1162-3 give effect to the long-desired putting into law of the maxim *nemo auditur suam propriam turpitudinem allegans* ('A person who relies on his own wrong-doing shall not be given audience'). This reflects an enlargement of the ambit of denial of restitution which will apply to any knowing failure to conform to public policy or public morality in circumstances where usually at present only immoral behaviour is sanctioned by the courts.

The protection put in place for a person suffering from incapacity (article 1312 of the present Civil Code), remains, but elsewhere, being allocated a place in the new section of the Civil Code concerning the capacity of the contracting parties and the power to act in the name of another (article 1117-5). The long-standing wording of article 1312 is repeated except for a very slight simplification in the drafting as the general expression 'a person lacking capacity' in future will replace 'minor and adult subject to guardianship'. While maintaining this protection is justified as a matter of fairness, its particular characteristics explain why it should be treated with other rules governing incapacity.

The **second part** tackles the different **modalities of restitutionary recovery**.

The first provision (article 1163) declares the principle on the basis of which a court is to decide between the two possible forms of restitution.

The actual performance of the subject-matter of a contractual obligation gives rise to a right to restitution in kind, either to recover exactly the same thing or an equivalent substitute. Where restitution in kind is impossible, it is replaced with an obligation to make restitution of its value. There are therefore two kinds of restitution. In this way, the impossibility of making restitution in kind should never in future be considered as an obstacle to restitution, even though the case-law has actually taken this position for a long time. In other respects, it must be noted that restitution in kind can itself take place in one of two forms depending on the nature of the thing which is the object of restitution. As regards ascertained physical property, it takes effect by way of restitution of the very same property. As regards generic property, the maxim *genera non pereunt* ('generic property cannot perish') expresses the idea that restitution in kind can take effect by an equivalent

of the same nature (for example, a ton of sand for another ton of sand previously delivered).

Thus it appears that the form of restitution depends primarily on the nature of subject-matter of the contractual obligations which have been performed, as the articles following article 1163 illustrate. Secondly, it can also be affected by events which take place during the period between performance of the obligation in question and the annulment or retroactive termination of the contract.

Articles 1163-1 to 1163-6 draw out in more detail the significance of the general proposition which has already been stated in article 1163.

So, where the obligation in question was to do or not to do (article 1163-1), logically restitution is effected by transfer of its value as this is the only form of restitution which is possible. Its assessment must be made without taking account of the terms of the contract. Nevertheless, in order to avoid double recovery in respect of the same contractual performance, account may be taken of third-party benefits already received by the person who has performed (for example, in the case of tied petrol stations, where a petrol retailer acts as agent and has already received a commission on resale of the products) and of indirect advantages which have been drawn from it (for example, in a contract of apprenticeship, where training is received over and above the contractual agreed sum).

Where the obligation in question was to give generic property, restitution is effected by transferring equivalent property. This regime of restitution applies to monetary obligations by their nature (article 1163-2). The wording of this provision emphasises that money is fungible by its very essence and that the principle of the nominal value of money (found in article 1895 of the present Civil Code and maintained by the case-law), applies. But article 1163-4 refers to it explicitly as regards other generic property, though it nevertheless adds an option. However, there is no reason why in this type of case restitution in kind should take place by way of transfer of equivalent property, but given that this can turn out to be totally useless for the person who is claiming restitution, it seems natural to offer the latter a choice. It is to be noted that article 587 of the present Code provides an identical choice in the context of quasi-usufruct, but for the benefit of the person who restores the thing after use, that is to say, the usufructuary. The logic of nullity and of retroactive termination of a contract leads to a reversal of the rule since a person who has benefited from performances of a fungible obligation will always be able to obtain an equivalent thing so as to fulfil his own restitutionary obligation.

Where the obligation in question was to give ascertained property (article 1163-3), restitution takes effect in kind if the thing still exists in the hands of its recipient. However, the impossibility of such a restitution *in natura* does not prevent all forms of restitution: there can be restitution of its value if the thing is no longer identifiable as a result of its destruction, its transformation or its incorporation into other property. In the first situation, restitution in full must be ordered whether the destruction of the thing was accidental or results from a voluntary act of the person who received it, this reflecting the case-law which no longer distinguishes between them two situations, treating them identically. Moreover, this solution fits with the idea that a person who holds a thing between

performance of the primary contractual obligation and accrual of an obligation to make restitution is better placed to insure it. Finally, the last provision of article 1163-3 deals with the situation where any damage to ascertained property received is only partial. Here, an option is available to take account of the fact that partial restitution could be pointless for the person to whom restitution is destined. In this situation, therefore, a claimant may opt to receive full restitution of its value instead, in keeping with a number of special legislative provisions to the same effect.

Following this series of provisions, article 1163-5 recommends the adoption of two complementary provisions which are aimed at simplifying the process of return of the parties to the *status quo ante* while at the same time avoiding recourse to restitution of value. A case in point would be where the thing which was lost through accident was insured or where its loss was attributable to a third party's action. A further case would be where the thing subject to restitution has been resold. In both situations, restitution of its value appears to be technically necessary, but it seems both more effective and fairer to see this as a case for the application of the doctrine of real subrogation, reflecting the provision contained in article 1380 of the present Code as regards recovery of undue payments. Furthermore, any compensation or price received (or to be received) in respect of a thing subject to an obligation of restitution will also be subject to restitution by operation of law.

Finally, article 1163-6 defines the method of assessment of awards of restitution of value. By stating that the court must assess the value of the thing as at the date of its decision according to its condition as at the date of discharge of the obligation by the claimant, it forms an application of the general doctrine of debts of value. This approach is consistent with the way in which depreciation or appreciation of the thing is to be compensated and also conforms to the method of evaluation of the benefit which results from performance of an obligation to do or not to do (article 1163-1).

**The third part** sets out the rules for supplementary payments which in an appropriate case are to be added to the principal restitutionary recovery and which together make up a process of restitutionary accounting. It is here that the rules governing expenses incurred in relation to the thing to be restored, its accessories and its appreciation or depreciation in value are set out.

In the case of accessories, it is provided that a person who must make restitution is accountable not merely in respect of the principal subject-matter of any obligation performed for his benefit but also in respect of its accessories as at the date of discharge (article 1164). In contrast to the regime set up by the Code for the law of property (article 549 C. civ. concerning fruits) or dealing with recovery of undue payments (article 1378 C. civ.), the strict nature of restitution after destruction of a contract requires that account should be taken of all accessories of the thing in question, regardless of the good or bad faith of the parties (Cf. Guelfucci-Thibierge, *Nullité, restitutions et responsabilités, supra*, no. 802), which is relevant only to the possibility of supplementary compensation. Also it is right to set the point of the calculation of their value as at the date of performance of the contract (the 'discharge' of each obligation) in order to determine any additional benefit which is

derived from it. The maxim *lautius vixit non est lucupletior* ('a person who lives luxuriously does not become richer') is not to be applied in this context as in any event any debt relating to income from the thing (whether its fruits or any accumulated interest) will in synallagmatic contracts be set off at the level of the higher of the two sums.

Of course, accessories vary according to the nature of the subject-matter of the contractual obligation which has been performed. Where a sum of money must be restored (article 1164-1), they consist of interest at the rate set by law (which is the standard solution) but also of any taxes paid in respect of the price. Logically one must include these only where they have been actually paid by the person who returns the price. In essence, the main concern here is VAT which has been paid on the price. Furthermore, it will be necessary for the person who has to make restitution in respect of such a payment to claim it back from the tax authorities. Where restitution concerns a thing other than a sum of money (article 1164-2), its accessories consist of its fruits or the enjoyment to which it has given rise. Here, it is proposed that the solution recently adopted by the *Cour de cassation* (Ch. mixte 9 July 2004, D 2004.2175 note C. Tuailon, JCP 2004.I.173) after considerable earlier hesitation (Civ. (1) 11 March 2003, Bull. civ. I no. 74 and Civ. (3) 12 March 2003, Bull. civ. III no. 63, D 2004.2522) should not be followed. In contrast to what was most recently held, it could be thought that in the interest of simplifying the calculation of any supplementary restitution a more logical and balanced approach would require recovery in respect of enjoyment of the thing transferred whatever the nature of the contract. In practice this would consist of a financial equivalent of the fruits which it could have produced (R. Wintgen, *L'indemnité de jouissance en cas d'anéantissement rétroactif d'un contrat translatif*, *Défrenois* 2004, article 3794-2, p. 692 *et seq.*). Moreover, where the thing in question does not produce fruits, the *Cour de cassation* formerly used to impose a set-off at a fixed rate between interest payable on money sums to be returned and such an enjoyment. Indeed, interest corresponds both to remuneration for enjoyment of and the fruit to be garnered from money. Furthermore, the solution which is at present adopted by the *Cour de cassation* does not accord with the principle of the retroactive effects of annulment and termination and the idea that they destroy all the direct or indirect effects of performance of a contract.

As regards expenses, the provisions which are proposed pick up a suggested distinction found in scholarly writing (see Malaurie, *supra*, p. 205) between expenses incurred in relation to the contract itself (for example, the cost of any preliminary investigations, the cost of drawing up any legal document, of the necessary registration of rights, of publicity in relation to immovable property, of notarial costs or of the formal deposit of payment with a third party etc.) and expenses incurred specifically in relation to the thing itself (for example, the cost of insuring the thing and any charges arising from it). Their treatment is very clearly differentiated as the regime governing the first category is clearly found in the rules of delictual liability (article 1163-3) whereas the second category where fault is irrelevant is brought under the aegis of the law governing restitution (article 1163-4).

There remains only the question of the increase or decrease in value of the thing. Here, it is proposed that provisions should be adopted which would synthesise the

accepted principles in the area, even though the case-law is not always either clear or settled (see Guelfucci-Thibierge, *Nullité, restitutions et responsabilité*, *supra*, no. 808 *et seq.*; Malaurie, *supra*, p. 215 *et seq.*).

The same rule for assessment as at the date of making restitution is adopted for both situations (article 1164-6), a rule which is consistent with the method of calculation for cases of full restitution of value as previously noted. Any increase in value of the thing inures to the benefit of the person to whom it must be returned, though the relative position of the parties can be adjusted by means of an award of compensation where the increase in value results from an act of the person returning the thing (article 1164-4). In the case of decreases in value of the thing, the position is made quite complex by the need to marry two different ideas: on the one hand, the need for harmony of regimes applicable to cases of total accidental loss and to cases of accidental deterioration or partial loss, since the difference between the two is merely one of degree; on the other hand, the desire for a correlation between different types of increases or decreases in value, at least where it is possible to establish a reciprocal relationship between the two. Increases or decreases in value of the thing have a variety of causes (whether physical, legal, economic or monetary), often stemming from an act of the person who must return the thing, but in other cases arising from external circumstances (see M. Malaurie, *supra*, p. 219 *et seq.* & p. 237 *et seq.*). Taking these factors into account, a new article 1164-5 provides that a person who must make restitution of a thing is responsible for its being damaged or its deterioration where these have reduced its value or caused its loss, whatever their cause. In this way, cases of accidental deterioration would be treated in the same way as cases of total loss of the thing, where restitution of value is required (article 1163-3). Even so, normal wear and tear of the thing resulting from use are to be compensated even where no fault is attributable to the person who must return the thing. Both these solutions conform in every way to the positions taken by the case-law on the question (Com. 21 July 1975, D 1976.582 note E. Agostini and P. Diener; Civ. (1) 2 June 1987, Bull. civ. no. 183, *Défrenois* 1988, art. 34202, no. 13, p. 373, obs. J.-L. Aubert). On the other hand, obsolescence of the thing subject to restitution which results from lapse of time does not give rise to any distinct restitutionary recovery, as properly speaking this does not involve either damage to or deterioration of the thing itself, as these both are understood to apply only to an alteration of its physical state. A proper correlation between increases and decreases in value is assured as in both cases those which have a economic or monetary origin are not the subject of restitution. The sole difference relates to the bearing of the cost by the person liable to make restitution of any partial loss of the thing or its accidental damage which find no counterpart as regards increases in value. This allows the rules governing total loss and accidental decreases in value to be harmonised.

## *The Effects of Contracts as regards Third Parties* (articles 1165 to 1172-3)

*Jean-Luc Aubert  
Pierre Leclercq*

Inspired by a concern to clarify and to modernise, this section brings together in five parts the different elements which constitute the traditional subject-matter relating to the question of the *obligational effects of contracts*, traditionally governed by the principle of their ‘*relative effect*’.

The aim of these provisions is therefore to define better the position of third parties in relation to a contract concluded by two or more other persons and to take account of the clear needs of modern contractual practice. To do so, we first recommend that the different aspects of the position of contractual third parties should be rearranged, the Civil Code at present treating them in a rather scattered way. Secondly, the work of both the courts and legal writers leads us to recommend more numerous and more explicit provisions to govern an area which lies at the very heart of contracts. Finally, we put forward various changes to fill various gaps or inadequate treatments in the present Code.

Under the heading ‘General provisions,’ the **first part** sets out the two principles which govern this area, making very clear the difference in significance of a contract as regards the contracting parties on the one hand and as regards third parties on the other.

Article 1165 affirms that ‘contracts bind only the contracting parties’, thereby restricting the obligational effect of contracts to only those who have made them, subject to the exceptions and qualifications which are set out in detail in the subsequent provisions.

Article 1165-1 adds that ‘contracts may be invoked by and against third parties’, thereby formally adopting the principle of the ‘opposability’ of contracts as against the whole world, a principle which has been worked out bit by bit by legal writers and the courts. The wording of this provision underlines the double significance of this notion of ‘opposability’ which applies as much against third parties as for their benefit, with the essential qualification as to the latter that they cannot require performance of the contract, thereby allowing the fundamental distinction between the obligational effect of contracts and their opposability.

The **second part** sets out in an innovative way the possibility of transfer of the obligational effects of a contract from one of the contracting parties to a third party, and so gives formal recognition to the possibility of *substitution of parties* to a contract.

The classic example of this may be found in the effect of transmissibility of contracts on death (art. 1165-2).

Assignment *inter vivos* of the status of being a party to a contract is a further example of this and it is proposed that this possibility should be expressly recognised, though it may take place only where the other party to the contract consents (art. 1165-3).

However, there are *exceptions* to this requirement, which is not to apply where legislation provides to the contrary nor where the contract in question forms part of an operation which sets up an indivisible collection of transactions (as in the case of mergers of companies, or assets contributions, etc.). At all events, a party to a contract who has not agreed to the transfer of the contract by the other party retains the right to withdraw from the contract on transfer, subject to contrary agreement.

The **third part** regulates the different actions which legislation grants to third parties to a contract who are creditors of one of its parties. Here we find once again *actions obliques* and *actions pauliennes*, but also ‘direct actions’, a notion which it is therefore proposed should be expressly recognised and at the same time delineated.

As to the content of the two first of these, the articles which are proposed take up the different solutions worked out in the case-law with two important qualifications. On the one hand, article 1167-1 paragraph 1 is intended to remedy the relative ineffectiveness of *actions obliques* and therefore allows creditors who have brought proceedings of this kind to be paid out of the sums which have become part of the assets of the debtor in default as a result of their claim. On the other hand, in order to limit their disruptive effect on contractual certainty, *actions pauliennes* are to be brought within two years of the date of knowledge by the creditors of the fraud committed by the debtor.

Finally, the concept of a ‘direct action’ is formally recognised, but it is expressly provided that direct actions arise only where legislation so provides (art. 1168 paragraph 1). Nevertheless, it is proposed that such an action should be allowed even in the absence of any express legislative provision where there is a link uniting the contracts in question and ‘where it is the sole means of avoiding the unjust impoverishment of a creditor’ (art. 1168 paragraph 2).

The **fourth part** deals with promises to stand as surety for another and stipulations for the benefit of third parties.

Essentially, here it is a matter of putting into proper shape and order the accepted regimes which the case-law has established for these two doctrines on the basis of articles 1120 and 1121.

For promises to stand surety for another (art. 1170), this involves clarifying all the effects of this doctrine, setting out the risks which the surety runs (paragraph 1 which picks up and adds detail to the proposition found at present in article 1120 of the Civil Code), and the prospect of his complete release if what he has promised occurs (paragraph 2). The provision proposes that formal recognition should be made of the obligation for a surety’s heir to perform the undertaking which the surety took on (paragraph 3).

As to stipulations for the benefit of third parties, this involves the formal recognition of all the elaborate structure worked out by the case-law. In particular, article 1171-1 casts light on the core elements of the doctrine: the freedom to revoke the promise until it has been accepted by the third party (paragraph 1); the irrevocability of the promise as soon as it has been accepted before revocation (paragraph 2); and the direct right of the third party to obtain performance from the promisor of the undertaking which he has made (paragraph 3). Views have also been taken of a number of issues so as to organise the regulation of certain situations which is at present unsatisfactory. So, having stated that the heirs of a promisee may revoke the promise after the latter's death, article 1171-2 provides that such heirs can exercise this right of revocation only at the end of three months following their putting the third party on notice to accept the benefit of the promise to no effect. So too, the final part of article 1171-3 makes clear that (subject to contrary agreement) acceptance may be made by the heirs of the third party beneficiary of the contract after the latter's death and that it 'can take place even after the death of the promisee or the promisor.'

Finally, the **fifth part** is innovative in that it gives formal recognition to the potential significance of the interdependence of two or more contracts making up a contractual grouping (articles 1172 to 1172-3).

This interdependence rests on membership of the contracts in question of a group devoted to the same overall operation and on a requirement that their performance contributes to its achievement (articles 1172).

It is proposed that the existence of such an interdependence would give certain contract terms contained in one or other of the interdependent contracts a wide effect, even if they are not expressly accepted by the other contracting parties, as long as the latter were aware of them at the time of their own undertaking and as long as they had not expressed any reservation in this respect. However, the presumption of acceptance which is established in this way applies only to certain contract terms which are set out in an exhaustive list: terms governing liability, arbitration clauses and choice of jurisdiction clauses (article 1172-1).

The Reform Proposals add two important clarifications:

First, outside the situations specifically provided for in this way, the extension of the effect of a contract term contained in one of the contracts to other contracts in the grouping assumes that such a term was reproduced in the latter contracts and accepted by their parties (article 1172-2).

Secondly, the nullity of one of the interdependent contracts authorises the parties to the other contracts in the group to treat them as lapsing (article 1172-3).

# *Conditional, Time-Delayed, Alternative and Discretionary Obligations*

(articles 1173 to 1196)

*Jean-Jacques Taisne*

## §1 Conditional obligations

Disputes which arise all too often relating to conditions highlight the imperfections of the present codification. The multiplicity of certain definitions, and contradictory elements which sometimes creep in, do damage to the clarity of fundamental notions. Although certain developments are characterised by their wordiness, the legislative provisions are short on other points, leaving them to the imagination of the courts. For these reasons, two fundamental concerns have to guide the work of redrafting the legislative provisions. First, a concern to simplify them; and secondly, a concern to allow the parties to have a clear picture of the consequences of the use of a condition.

At first sight these two aims call for different methods: the first would require a serious pruning, the second the opposite—a complete and detailed set of provisions. However, it is possible to achieve a balance. On numerous points, reference to the common intention of the parties allows us to resolve any difficulty and to give the regime of conditional obligations a desirable flexibility. But it is also necessary, for the very reason of the role which is attributed to the will of the parties, to assist the latter to obtain a full understanding of the points which could give rise to difficulty between them.

The present Proposals recommend first that superfluous provisions should be deleted—that is, in accordance with the idea already championed in 1946/1947 by the Commission for the Reform of the Civil Code:

- the provisions concerning the classification of conditions which depend on chance, or are potestative, or mixed (articles 1169 to 1171); all that remains is the provision prohibiting a condition which is potestative on the part of the debtor, drafted in harmony with article 944 which is not, of course, altered;
- the provisions concerning the methods of satisfaction of positive or negative conditions (articles 1176-1177) which set out matters which are self-evident as a result of the present article 1175 (itself deduced from article 1156).

It also removes from the field of conditions article 1184, which has long been entirely alien to it.

On the other hand, the Reform Proposals recommend the introduction into the general doctrine of conditional obligations of provisions which are presently missing. The Commission for the Reform of the Civil Code had contemplated in this respect provisions which, after the event has occurred, concern the fate of administrative measures or the taking of fruits. It is helpful to take inspiration

from these. Moreover, it is useful to add, following the lead taken by the courts, provisions relating to the renunciation of a condition.

Finally, the Reform Proposals suggest making additions to the existing provisions, either to identify the remedial regime (nullity of an obligation which is dependent on a potestative condition on the part of the debtor); or to extend to all conditions the obligation of loyalty which has hitherto been expressly set out only for suspensive conditions; or, finally, to create a new form of condition, distinct from resolutive conditions—simply extinctive conditions. This implicitly settles the disputed question of risk allocation in the case of a transfer made under a resolutive condition.

On one particular point the Reform Proposals reject the model bequeathed by the Commission for the Reform of the Civil Code. The Commission's giving up of the principle of retroactivity of satisfied suspensive conditions, which was settled on following a change of opinion, has not been convincing; retroactivity is justified on both theoretical and practical grounds, and removing it inevitably requires a provision that during the period of uncertainty the debtor must behave in accordance with good faith and without doing anything which harms the interest of the other party—tests which may be uncertain and difficult to apply. It should be noted that the Quebec Code retains retroactivity (article 1506) and that all the present 'European' legislation or proposals for reform which remove it, still allow it to be restored if the parties expressly so provide. Our Reform Proposals take the opposite path; faithful to the present law, they retain retroactivity, but qualify its *effects*, or allow the parties to reject it altogether, if they think it preferable.

## §2 Time-delayed obligations

The present Code gives rise to few difficulties, but seems rather skeletal by comparison with more recent codes: Quebec and, in particular, Libya. It is therefore proposed to make express provision for the notions of fixed and uncertain delay-points, and suspensive and extinctive delay-points.

## §3 Obligations with more than one subject-matter

Here again the Code gives rise to few difficulties. In essence, it is proposed to draft it in a more contemporary style, and to make provision for discretionary obligations.

## *Joint and Several Obligations, and Indivisible Obligations* (articles 1197 to 1217)

*Pierre Catala*

The subject of plural obligations is the one which the Reform Proposals challenge the least: most of the articles of the Civil Code are preserved to the letter, or are included again in substance with only some rearrangement and drafting amendments.

In the case of joint and several obligations, no changes are made to active solidarity (joint and several *creditors*). In relation to passive solidarity (joint and several *debtors*), just one new proposal appears in article 1211, which will form a basis for interpretation to refine the analysis of this modality.

Another long-awaited reform is the abolition of obligations *in solidum* in the case of civil liability. Their place is not in the section dealing with contractual obligations, and so it is article 1378, in the sub-section on civil liability, which deals with its abolition.

The only significant debate regarding joint and several obligations has been about the conditions for their incidence. One forcefully-put argument was that, unless the parties contracted out of it, joint and several obligations should become the principle in the civil law between co-debtors liable for a common obligation (and similarly for joint and several creditors).

This would have had the result that the civil law legislation would be aligned with the rule in commercial law. This argument did not convince the majority of the working group; they thought that the risks and the rewards of this radical reversal were not well calculated, and were difficult to calculate. It appeared to be quite out of harmony with the spirit of consumer protection which the Civil Code is not required to espouse but of which it should take account. One could imagine some unpleasant surprises for co-debtors under the civil law where one of them became subject to the laws protecting against excessive debts.

Such a reform, moreover, would have created an imbalance as regards joint and several liability between co-debtors and sureties, given the position in which the latter are placed by article 2294 of the proposals to reform the law on sureties. In short, the majority opinion was that to maintain the present presumption would give rise to fewer problems than its reversal.

As regards indivisible obligations, it appeared that the regime for indivisible obligations did not call for any change. On the other hand, a divisible obligation is not a modality of obligation but is part of its very nature when indivisibility is not imposed by virtue of the subject-matter, legislation or contract. We have therefore deleted the paragraph of the Civil Code relating to divisible obligations; the rule

which is at present contained in article 1220 is transferred to article 1224-1 in the chapter on satisfaction.

## *Extinction of Obligations* (articles [1218] to 1250)

*Jérôme François,  
Rémy Libchaber*

Chapter V of Title III of Book III of the Civil Code, which is devoted to the extinction of obligations, appears on the whole suitable for the present requirements. As a general rule, it will be sufficient to tidy it up, rather than re-draft it.

Subrogation and novation have been removed from this chapter—the former because its effect is simply to effect a transfer, the latter because its close parallel with the idea of transactions relating to rights under obligations. These are both regulated by the provisions of the following chapter.

Article 1218, which is the headline provision of Chapter V, also excludes other legal institutions which cannot be likened to the other grounds of extinction of obligations—nullity, retroactive termination, loss of the thing, the effect of resolutive conditions—which appear at present in article 1234 of the Civil Code. The other grounds of extinction remain valid, although with some amendment relating to their substance or their form.

### SECTION 1: SATISFACTION

The provisions concerning satisfaction called for some attention throughout. The removal of satisfaction with subrogation necessitated a re-drafting of the whole structure, which now comprises four sections. After the general provisions (§ 1), three other sections are given over to allocation (§ 2), proof (§ 3), and deposit with a public depositary together with offer of satisfaction, and notice to perform (§ 4).

After discussing the notion of satisfaction, the general provisions (§ 1) raise questions concerning persons, the subject-matter of satisfaction and its regime.

As regards the notion, the Reform Proposals are limited to giving at article 1219 a generic definition, and then repeating at article 1220 the present article 1235 concerning the restitution of satisfaction that was rendered without being due.

The innovations in relation to persons are no more significant either—except for article 1222. Its first paragraph synthesises the present case-law in requiring the good faith of the debtor. The second makes a special provision for satisfaction by electronic means, in requiring the creditor to guarantee the security of the proposed method of satisfaction.

As regards the subject-matter of satisfaction, the Reform Proposals retain in articles 1223, 1224 and 1224-1 the provisions of articles 1243, 1244 and 1220 of the present Civil Code, apart from the fact that delivery by way of satisfaction—

which has hitherto had no textual authority—is now defined in article 1223, paragraph 2.

Moreover, specific rules relating to monetary obligations have been added. Article 1225 formally recognises the principle of payment of the numerical sum specified in the contract. This concerns all obligations worded in currency, whereas hitherto it has been dealt with only in particular provisions (see especially article 1895 in relation to the contract of loan). But the principle of payment of the numerical sum does not prevent the use of indexation (there is a reminder of the principle at article 1225-1); nor of a debt whose value is to be assessed (article 1225-2); nor, of course, of the charging of interest and its capitalisation (article 1225-3 and 1225-4). In addition, a new article (1226) has been drafted concerning the currency of payment, which takes up the contributions of the courts to this topic.

Finally, as regards the regime for satisfaction (place, time, grace periods, the quality of the thing and the costs of satisfaction), the provisions of the present Civil Code have largely been repeated.

Section 2 is dedicated to the allocation of payments, which has been rationalised without significant amendment. There is now a distinction between the allocation of the partial payment of a single debt (art. 1228) and the allocation of payment (in full or in part) in respect of more than one debt (articles 1228-1 to 1230).

Section 3, dealing with proof of satisfaction is new both in form and in substance. Article 1231 formally recognises the principle of proof by all forms of evidence, which is used because it is the most sensible rule in practice, especially with regard to monetary obligations. Moreover, alongside this rule of proof have been set the presumptions of release (articles 1232 and 1232-1) which are dealt with in the present Civil Code under the heading of release of an obligation—which is also reformed by our Proposals (see below).

## SECTION 2: RELEASE OF AN OBLIGATION

The presumptions of the release of the debtor have been dealt with alongside proof (cf. above), and so the overall arrangement of the section has been reviewed. After an article (1237) defining the release of a debt and highlighting its contractual character, rules are set out for its effects. This is just a tidying-up of the present provisions of the Civil Code, incorporating in article 1239-1, paragraph 2, the rule devised by the courts relating to the release which is granted to a joint and several co-surety.

## SECTION 3: SET-OFF

This section has been completely re-thought, with an internal sub-division between set-off in general (§ 1), and set-off of connected debts (§ 2).

In relation to set-off in general (§ 1), the various forms developed by the courts on the basis of the inadequate provisions of the Code Civil have been introduced within their own legal regime. Distinctions are now made between set-off by operation of law, by order of the court, and by contract.

In the case of set-off by operation of law, the rules of the Civil Code have been taken up in their entirety. However, the declaration which appears in article 1290 of the present Civil Code, to the effect that set-off operates by operation of law, has been removed, on the basis that it results from a drafting error which has long been criticised. Therefore, article 1243 of the Reform Proposals adopts a new form of wording, suited to the needs of the legal industry.

Set-off by order of the court, which has only an indirect basis in the New Code of Civil Procedure (articles 70, paragraph 2, and 564), makes its appearance in the Civil Code. In this respect, articles 1246 and 1246-1 of the Reform Proposals define its notion and its regime, on the basis of the rules which are today established in the case-law.

Finally, the possibility of set-off by contract, outside the circumstances prescribed by legislation, is provided for at article 1247.

To this classification, which distinguishes between these three forms of set-off, is added a particular and separate form of set-off: set-off of connected debts (§ 2). In this case, set-off, of whatever nature (by operation of law, by order of the court, or by contract) may have effects beyond the circumstances set out in section I. This exceptional regime, very important in practice, is now set out in articles 1248 and 1248-1, which codify the modern judicial developments.

#### SECTION 4: MERGER

Articles 1249 and [1250] take up the provisions of articles 1300 and 1301 of the present Code, almost to the word. Dealing with the effects of merger, article 1249 takes the position of affirming the absolute character of the extinction effected by merger, whereas the courts sometimes deliver judgments in favour of its simple paralysis. The proposed form takes up again the intention of the draftsman of the 1804 code, who placed merger amongst the grounds of extinction of an obligation.

### *Deposit With a Public Depositary Together With an Offer of Satisfaction* (articles 1233 to 1236)

*Philippe Théry*

Although a creditor will rarely refuse to accept satisfaction which is owed to him, the Code must permit enforced satisfaction on the initiative of the debtor who intends to discharge himself. This procedure is constructed around the following ideas:

- Since the procedure may lead to the discharge of the debtor, it is important to ensure that the tender of satisfaction is serious, by requiring the debtor to deposit what is due, so that the creditor may take it without any particular formality.

- Discharge of the debtor is effected if the creditor, having known about the offer, does not challenge it. If it is not certain whether the offer was known about by the creditor, the discharge of the debtor must go before the court for assessment.
- The provisions draw a distinction according to the nature of the thing that is deposited. Property, other than a sum of money, if it is not taken within a reasonable period, may be sold on the initiative of the debtor and the price paid deposited to the account of the creditor.
- Finally, it seemed fair to abandon the rule under which acknowledgment of a debt interrupts the running of time for the purpose of prescription. The main consequence is that the debtor may require restitution of what he has deposited if the creditor has allowed the full prescription period to elapse.

## *Transactions Relating to Rights Under Obligations* (articles 1251 to 1282)

*Hervé Symet*

Chapter VI of the Reform Proposals is fundamentally new.

In its arrangement, it brings together for the first time transactions which have hitherto been scattered: assignment is treated in the present Civil Code as a kind of sale (articles 1689 *et seq.*); personal subrogation is joined with satisfaction (articles 1249 *et seq.*); novation is seen as a method by which obligations are extinguished (articles 1271 *et seq.*); delegation is simply mentioned in the course of the provisions dealing with novation (articles 1275 and 1276). Viewed from an economic perspective, however, these transactions are very closely related: in each, the right under an obligation is seen as an asset, given circulation or constituting the basis for the creation of new obligations. In a renewed Civil Code it is therefore appropriate to organise, in a more consistent way, the dealings recognised by the law in relation to rights under obligations.

In essence, the regime of the four transactions which have been mentioned is today marked by obsolescence, or is weak because of a lack of clarity. Dealing in rights under obligations constitutes a not insignificant part of the modern economy. It forms the daily activity of financiers and credit houses. These have a pressing need for effectiveness, security and speed. We have to recognise that the provisions of the Civil Code today are worryingly inadequate in this regard. As a response to this, particular regimes have been put in place, in special legislation and in other codes. If we want to avoid the Civil Code becoming the repository of outdated lists of rules, rather than forming the legal basis of the dealings recognised by the law in relation to rights under obligations, we have to propose a fundamental renewal of the solutions. This is what has been done in these Proposals.

**Assignment** is seen no longer as a kind of sale but, in a more abstract and general form, as ‘a contract by which the creditor (the assignor) transfers the whole or part of his rights under an obligation to a third party (the assignee)’ (article 1251). Any transaction by an individual may be used to achieve this. This definition, wide as it is, allows the inclusion, without any difficulty, of an assignment by way of guarantee (article 1257-1). This is a significant reform, which would allow French law to reverse its backwardness which has unfortunately developed in comparison with several of its European counterparts.

A second element of modernisation is the formal acceptance of the possibility of assigning future rights (those ‘yet to come into existence’, says article 1252; it therefore does not matter, for example, that the contract which will give rise to the right has not yet been concluded, and is not even in draft, at the moment of the assignment). And the effectiveness of the transaction is encouraged by saying that it is sufficient that the instrument of assignment contains the details enabling the assigned right to be identified **when the time comes** (article 1252). And so the transfer of ‘debt flow’ may now be effected with clear legal certainty under the Civil Code.

The third novelty is the abandonment of the infamous article 1690. The requirement of notification by an extrajudicial instrument (or its substitute, the acceptance by the debtor in a publicly authenticated instrument) constituted a burdensome—and often discouraging—formality. The proposed scheme is fundamentally different. It rests on a rule of formality (‘On pain of nullity, an assignment must be effected in writing’: article 1253) and a distinction. As between the parties, as much as in relation to third parties, the transfer of a right under an obligation is effected at the moment that the instrument is executed (article 1254). The formalities with a view to enforceability against different persons are removed. One rule of proof, relating to the date of the instrument (article 1254, paragraph 2) allows the risk of antedating to be avoided. On the other hand, relying on the transaction against the debtor requires written notification (but without any requirement for a public official to become involved): the debtor must know, without any ambiguity, into whose hands he must discharge his obligation.

If one adds to this that article 1257 deals in precise terms with the often disputed question of the raising of defences, we may think that the new regime for assignment responds to the needs of users, and brings back into the fold of the general principles of the law some transactions which had abandoned it.

**In the provisions dealing with personal subrogation**, the Reform Proposals constitute, on the whole, a work of consolidation. Consolidation in relation to the function of subrogation: it has become a mechanism for the transfer of rights under obligations, alongside assignment, which justifies the transposition of the subject-matter from the section dealing with satisfaction to this new chapter which embraces all transactions in the benefit relating to rights under obligations. The definition maintains, however, the link with tradition, by underlining that subrogation operates to the benefit of a person who discharges a liability (article 1258). Consolidation, too, in relation to the regime: the various kinds of subrogation by operation of law are retained without any change, although their order is modified to take account of their respective practical importance (article

1259); the requirement of co-existence of subrogation and satisfaction is relaxed, along the lines already drawn by the courts (article 1260, paragraph 3); the effect by way of transfer is emphasised, both in its extent (the right under an obligation and its ancillary rights) and with regard to it being relied upon as against third parties (removal of the requirement of formality, including in the situation where the issue is the enforceability of the transfer of securities which are attached to the right under the obligation).

What is new is subrogation on the initiative of the debtor. First, article 1261, paragraph 1, of the Reform Proposals reverses the classical approach taken by the courts under which subrogation is only effected if the satisfaction is rendered by the substitute creditor himself, and not if the debtor borrows in order to satisfy his debt to a creditor who is willing to issue a receipt specifying the source of the funds. Secondly, the second paragraph of the same article settles the much debated question about the conditions under which the debtor may require subrogation in favour of a new lender, called upon to ‘refinance’ the transaction (at an interest rate which is, of course, more favourable). Respect for the binding force of contracts has provided the principle: for the debtor to be able to effect the subrogation on his own, it is still necessary for the debt to have fallen due or the period for payment to have been set for his benefit.

**Novation** is given a definition which hitherto it has lacked. It is ‘*a contract which has as its subject-matter the substitution of one obligation (which it extinguishes) with a different obligation (which it creates)*’ (article 1265). This therefore emphasises the substitution effected by such a transaction, by contrast with the transfer effected by assignment and personal subrogation. It also underlines the need for a difference between the two successive obligations—although, in the case of novation by change of subject-matter, article 1266, paragraph 3, says that ‘*there is a novation, regardless of any particular difference between the old and the new obligations*’ (it is to be hoped that this clarification will put a stop to doubts in the case-law about there being limits to what can constitute novation).

The novelty of the regime which is put in place does not concern the proposed classification of the different ways in which novation is effected (we see the familiar trichotomy: novation by change of debtor, novation by change of creditor, novation by change of subject-matter); nor the requirement of the unequivocal will to novate. It relates to the freedom given to the parties to arrange the novation in advance, in order to make it an effective instrument to manage rights under obligations, capable of being a useful alternative to assignment. Two provisions are key in this respect. Article 1270, paragraph 1, in the first place, under which ‘*novation by substitution of a new creditor may take place if the debtor has agreed in advance that the new creditor will be appointed by the old*’. Article 1271, secondly, in the exception which it introduces to the extinctive effect of novation as regards securities: ‘*as long as these have not been, and are not, expressly preserved by the agreement of all those interested*’. As a result of the flexibility which is thus introduced, French law would allow businesses and professionals, like their counterparts with whom they are in competition, to use novation as a legal framework for refinancing transactions.

**Delegation** could no doubt have continued to blossom away from the rigidity which is inevitably induced by legislative intervention. After all, the essential thing

here is contractual freedom, which is particularly expected to be called into play in relation to the determination of the subject-matter of the delegate's obligation. However, it was thought useful to lay down in the Civil Code the outlines of delegation, in order both to avoid the uncertainty flowing from certain academic debates, and to combat initiatives taken by the courts which are hardly going to assist in the development of delegation. In this spirit, article 1276 sets out that *'delegation is valid even if the delegator is not a debtor of the beneficiary, and if the delegate is not a debtor of the delegator'*: in the future, one will not be able to deny that the delegate has the power to undertake the obligation 'without cover'. The question of what defences may not be raised is regulated carefully, with at the same time the introduction of the notion of an *'undertaking which is expressly stipulated as independent'*, and the exception of contracting out of the proposed solutions. The result is key: the parties will be able, by suitable contract terms, to deprive the delegate of the possibility of taking advantage of defences linked to legal relations which are outside those which link him to the beneficiary, which is one of the advantages of delegation. Article 1281, paragraph 1, the terms of which provide *'The delegate's undertaking in favour of the beneficiary renders the right under the delegator's obligations in favour of the beneficiary unavailable; it may not be assigned nor subject to distraint'* draws the conclusions from the peculiar strictness which may apply to the obligation of the delegate. He must not be exposed to the requirement to render satisfaction twice—first to an assignee or to a judgment creditor enforcing the rights of the delegator, and then to the beneficiary, against whom he would not have the right to raise defences arising from his relationship with the delegator. And so a coherent system is proposed, which will make delegation a secure mechanism.

## *Proof of Obligations* (articles 1283 to 1326-2)

*Philippe Stoffel-Munck*

The Reform Proposals make no major upheavals in the chapter on proof. The principles and distinctions which have guided this subject since 1804 have demonstrated their value and are grounded in practice without giving rise to any significant difficulties.

There being no need to touch the substance, wisdom counsels us to abstain from gratuitously bold gestures in a matter of such everyday common practice. And so it seemed preferable to decline to set out a general definition of proof or to take a position on the question—still controversial—of the requirement of loyalty in its establishment. This wise course was all the more possible because the Law of 13 March 2000 had already introduced reform, adapting the Code to new technologies and containing several significant clarifications, especially as regards the notions of writing and signature.

In substance the Reform Proposals are therefore limited to bringing in the existing case-law to supplement the present body of legislative principles, or to introducing

certain new minor details, such as the disapplication of the rule of double originals in the case of electronic writing (article 1296).

In relation to form, on the other hand, clarification has often seemed beneficial, with regard to both the structure of the chapter and the detail of its provisions.

As to substance, first, the Proposals retain the following traditional principles:

- the mechanism for attributing the burden of proof remains the same (article 1283);
- the distinction between proof of facts and of juridical acts is maintained (article 1284);
- the definition of writing and of a signature, necessary for written proof, is taken up from the Law of 13 March 2000 (articles 1285 to 1286);
- the principle of liberty in the forms of evidence is written into the legislative texts (article 1287), and the requirement of written evidence of juridical acts is preserved (article 1306);
- the lawfulness of agreements about proof is affirmed, in accordance with the case-law and within certain limits (article 1289)
- the judge-made law to the effect that ‘no-one may establish evidence in his own favour’ is given legislative force (article 1299)

In relation to form, then, the Proposals re-model the structure of the chapter dedicated to proof in such a way as to show more clearly the major theoretical divisions of the subject. It is composed of four sections.

The first section is dedicated to ‘general provisions’ (articles 1283-1290). A genuinely ‘introductory section’, it focuses on the principles governing the whole area of proof of obligations. The other sections make provisions for each method of proof one by one.

The second section defines the requirements of form of proof by writing, equally referred to as written proof, and establishes its significance (articles 1291 to 1305). It draws the classical distinction between a publicly authenticated instrument and a signed document, and makes provision for the consequences of copies and formal acknowledgments. This section does not contain any particular innovation by comparison with the existing law, apart from removing electronic writing from the ambit of the rule of double originals (article 1296). On the other hand, it adopts several judicial solutions. And so it is expressly provided that the requirement of a statement by the party undertaking an obligation, constitutes just one condition for proof of the document (article 1297).

The third section establishes the domain for the requirement of proof by writing. In its essentials, it carries over articles 1341 to 1348 of the present Civil Code, simply adding (in accordance with case-law) that the beginning of proof by writing must be supplemented (article 1312).

The fourth section sets out in detail the rules peculiar to presumptions, admission, and then oaths. It does not contain any significant innovation with respect to the current law, simply integrating into the provisions several judge-made solutions. And so one finds the case-law taken up which accepts that presumptions of fact relating to human action may result from evidence which is weighty and definite *or* corroborative (article 1318), this article adding that such presumptions may always

be rebutted. The mechanism of legal presumptions is also made clear (article 1317).

In relation to form, too, the Reform Proposals seek to clarify certain rules without changing their meaning. The clearest example of this is the reformulation of the ancient rule which appears in article 1341 of the present Civil Code. Where this provides that ‘A juridical act must be entered into before a notary, or under the parties’ signatures, for any things which exceed a sum of money or a value fixed by decree’, the new text provides more simply that ‘Proof in writing is required for juridical acts which exceed a sum of money or a value fixed by decree’ (article 1306); the notion of proof in writing being defined precisely in the section preceding that which opens with the new article.

With regard to proof, the hope of the draftsmen of the Reform Proposals is therefore to have clarified the vocabulary, the concepts and the formulation of the rules, to have ordered the presentation in a more logical manner, and to have brought the substance up to date by integrating the courts’ contributions. This should give a better understanding of the current law, without any significant change in its content, given that the needs of practitioners seem to be well satisfied with the existing state of the subject.

## *Quasi-Contracts*

*Gérard Cornu*

Quasi-contracts remain a source of obligations in the Proposals, as they do in the existing Civil Code. This position is of course controversial in terms of legislative scope, but it flows naturally from the approach to law-making which forms the Proposals’ intellectual foundations and which sets its boundaries. It would have been necessary to adopt a maximalist ambition which the Proposals do not espouse to overturn the doctrine of the sources of obligations to the point of getting rid of quasi-contracts, coming as they do between contract and delict. Today, everyone is aware that, far from being obsolete, this classification fits well with the major distinction between juridical acts and juridically significant facts which are listed as sources of obligations at the very beginning of the Proposals (article 1101 *et seq.*): so, on the one hand, there are juridical consensual acts, either unilateral or collective; on the other, there are juridically significant facts, either ones which cause harm or ones which confer benefits.

Deservedly, it is the concept of quasi-contract itself as so lucidly analysed by Jean Carbonnier, which justifies, indeed, demands its inclusion. It is not a mere rag-bag collection, but possesses a conceptual integrity. In the same way that the civil court’s jurisdiction to hear non-contentious applications no longer consists merely of all matters which are not for its contentious jurisdiction, but possesses its own distinct, parallel function, so too quasi-contracts are not an amalgam of shapeless, left-over situations. Whereas civil liability is concerned with harm caused without right, quasi-contracts are concerned with advantages received without right; this is the point which unites all quasi-contracts and from which the general definition

given first in the Proposals stems (article 1327). From this central element of this broad category flow naturally the two particular and specific applications which are traditionally recognised—management of another’s affairs and undue payments—as does the customary general principle that no-one must enrich themselves at the expense of another without justification. The whole is entirely coherent.

The other reason against radical reform is the valuable contribution which tradition and interpretation can bring to the subject. The sets of rules relating to management of another’s affairs and undue payments are made up of a number of solutions to problems which are both logical and sensible. The provisions which introduce them are to a large extent, simple, clear and confident. Many of the articles retain their original import. And the general doctrine of *unjustified* enrichment—which is the more modest, more reasonable and much narrower version of the very open-ended doctrine of *unjust* enrichment—is kept in check technically by the requirement of subsidiarity (article 1338), all this coming from lessons drawn from scholarly writing and the case-law. The Proposals here mark the formal recognition of established principle, rather than an unwise leap forward.

Nevertheless, our revision of the legislation does make a certain impact on the area. On a number of points it relies on the prevailing interpretation of solutions on which everyone agrees to make real progress. It is certainly a happy extension of the ambit of management of another’s affairs and one attracting a wide consensus, that it can consist of physical action and not merely juridical acts (article 1328) and that it can be undertaken not merely in the exclusive interest of another person but also in the common interest of another person and of the person intervening (article 1329). Other opportune and agreed changes may be found in the assimilation of payment under duress to payment by mistake (article 1332) and of release of security to cancellation of a creditor’s instrument of title (*ibid.*). Other retouching of details puts in relief some crucial points. The key notion of the utility of the management undertaken had to be set out as the first and foremost of the conditions of the obligation of the person benefiting from it (article 1328-3). Use of the term ‘ascertained property’ had to replace the inappropriate reference to corporeal movable property found in article 1334 of the existing Code and the position where bad faith is present had to be raised and regulated by article 1334-1.

However, the Proposals do contain some real innovations:<sup>1</sup> the idea of calculating the compensation due to a person managing another’s affairs taking into account the losses which he thereby suffers but not including any amount for his remuneration (article 1328-3) and above all the truly inspired recourse to recovery on the ground of unjustified enrichment where the actions of a person managing another’s affairs do not exactly fulfil the conditions for the application of the doctrine of management of another’s affairs (article 1329-1). This supplementary relief shows clearly the relationship (found as regards all the quasi-contracts) between the specific example of management of another’s affairs and the general doctrine of unjustified enrichment which is endowed with a subsidiary role. Finally, special provision is made so as to extend the rules governing restitution so

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<sup>1</sup> These were retained at the suggestion of M A. Bénabent.

as to apply to the case of payment which was due at the time it was made but which becomes unjustified by reason of annulment or retroactive termination of a contract. Strictly speaking, this situation falls outside the doctrine: the payment was not undue, but it becomes unjustified. It therefore rests on reasoning from an absence of justification and this is a good reason for making an analogous extension to the rules of restitution.

This observation leads us back to the fundamental unity of this area. The traditional features of management of another's affairs seem very faithful to its origins, the law still revealing its etymological origins in quasi-mandate. But in the final analysis it is the doctrine of legal justification (*'la cause'*) which unites the trio of management of another's affairs, undue payment and unjustified enrichment. A payment is undue if it does not flow either from an intention to confer a gratuitous benefit, from performance of a natural obligation, or from any other justification (article 1330 paragraph 2). Similarly, an enrichment is unjustified only where (and because) loss to the person at whose expense the enrichment is made does not stem from his intention to confer a gratuitous benefit on the person enriched, nor the fulfilment of an obligation which he owes him in law, as a result of a court order, under a contract or from the pursuit of his own personal interest (article 1337). In its turn, the management of another's affairs is unsupported by any authority to do so. This common fundamental basis could lead it to be thought that, although the legitimacy of the notion of 'justification' (*'la cause'*) is doubtful in the contractual context, it could find some support in the law of quasi-contracts, and that this would reveal an element of consistency at the heart of the general theory of the law of obligations. The requirement of a justification for a contract corresponds to the absence of justification in quasi-contract.

# Preliminary Chapter

## *The Source of Obligations*

(Articles 1101 to 1101-2)

### **Art. 1101\***

Obligations arise either from juridical acts or from juridically significant facts. Certain obligations also arise simply by legislation, such as duties between neighbours, and public duties,\*\* which are set out in their proper sections.

*Notes: \*This re-uses and expands article 1370 of the present Civil Code.*

*\*\* For example guardianship (see art. 427 C.civ)*

### **Art. 1101-1**

Juridical acts are exercises of will which are intended to produce legal effects.

A contractual juridical act—or contract—is an agreement formed between two or more persons with the aim of producing such effects.

A unilateral juridical act is an act done by one person, or a number of persons acting together, with the aim of producing legal effects in circumstances accepted by legislation or by custom.

A collective juridical act is a decision taken collectively by the members of an association.

Unilateral acts and collective acts are governed, as far as may be, as regards their validity and their effects, by the same rules as apply to contracts.

### **Art. 1101-2**

Juridically significant facts consist of conduct or events to which the law attaches legal consequences.

An action which confers on another a benefit to which he has no right constitutes a *quasi-contract*. The obligations which flow from it are governed by the Sub-title *Quasi-contracts*.

An action which, without legal justification, causes harm to another gives rise to an obligation to make reparation in the person who does it. This obligation is governed by the Sub-title *Civil liability*.

*Supplementary notes on the preliminary chapter:*

- 1) *The word source should be emphasised; it is not insignificant.*
- 2) *It gives a perspective on the principal division between juridical acts and juridically significant facts.*
- 3) *Just as the article dealing with juridical acts distinguishes between three types, so the article dedicated to juridically significant facts distinguishes between actions causing harm,*

*and quasi-contracts and, in each category, the modern terminology is linked to the traditional notions.*

*4) Both delictual liability and contractual liability are, at this point, brought together under the umbrella of 'liability', as a key element of the Reform Proposals makes clear.*

*5) Inspired by a suggestion of Carbonnier, and by a doctrinally correct contrast between 'harm caused' without justification, and 'benefit conferred' without justification, the essential elements of the definition of quasi-contracts are here outlined. The more detailed definition is found in article 1327 of the Proposals.*

*6) Quasi-contracts have their proper place after contracts (Sub-title II), which allows a certain distance between contracts and the whole group of sources of civil liability: harmful actions, and contractual failures to perform.*

## Sub-Title I

# Contracts and Obligations Created by Agreement in General (Articles 1102 to 1326-2)

# Chapter I

## *General Provisions*

### *Section 1*

#### *Definitions*

(Articles 1102 to 1103)

**Art. 1102**

A contract is an agreement by which one or more persons undertake the accomplishment of its subject-matter in favour of one or more others.

**Art. 1102-1**

A contract is synallagmatic or bilateral where the parties undertake reciprocal obligations in favour of each other.

It is unilateral where one or more persons undertake obligations in favour of one or more others without there being any reciprocal undertaking on the part of the latter.

**Art. 1102-2**

A contract is onerous where each of the parties expects to receive a benefit from the other in return for what he provides.

A contract is gratuitous where one of the parties expects to provide a benefit to the other without receiving anything in return.

**Art. 1102-3**

A contract is commutative where each of the parties undertakes to provide a benefit to the other which is regarded as the equivalent of that which he receives.

It is aleatory where the parties, without seeking equivalence in what they agree to exchange, accept a chance of gain or of loss for each or some of them, depending upon an uncertain event.

*Comment: Here account is taken of article 1964 of the present Civil Code.*

**Art. 1102-4**

A contract is consensual where it is formed by the mere outward signs of the parties' consents in whatever form they may be expressed.

A contract is formal where its formation is subject to formalities prescribed by law on pain of nullity.

**Art. 1102-5**

A standard-form contract is one whose terms are not discussed but are accepted by one of the parties in the form that the other party unilaterally determined in advance.

Such a contract can, however, add particular terms which have been negotiated.

**Art. 1102-6**

A framework contract is a basic agreement by which the parties agree to negotiate, to form or to maintain a contractual relationship whose essential characteristics they will determine.

Implementation contracts determine the modalities of performance under a framework contract, in particular the date and quantity of what is required by the obligations and, if necessary, its price.

**Art. 1103**

Contracts are subject to the general rules contained in this title, whether or not they have their own denomination.

Rules particular to certain contracts are laid down, either in the titles of this Code dealing with each of them, or by other codes and laws, and particularly in areas dealing with the human body, intellectual property rights, commercial transactions, labour relations and consumer protection.

Innominate contracts are subject by analogy to the rules applicable to comparable contracts, as long as there is no obstacle to it in their own special features.

## *Section 2*

### *Formation of Contracts*

(Articles 1104 to 1107)

#### **§ 1 Negotiations**

**Art. 1104**

The parties are free to begin, continue and break off negotiations, but these must satisfy the requirements of good faith.

A break-down in negotiations can give rise to liability only if it is attributable to the bad faith or fault of one of the parties.

**Art. 1104-1**

The parties may, by an agreement in principle, undertake to negotiate at a later date a contract whose elements are still to be settled, and to work in good faith towards settling them.

**Art. 1104-2**

The rules governing agreements which are intended to provide for the conduct or breaking-off of negotiations are subject to the provisions of this sub-title.

## **§ 2 Offer and acceptance**

### **Art. 1105**

The formation of a contract requires the meeting of the definite and certain will to be bound on the part of more than one person.

### **Art. 1105-1**

An offer is a unilateral act defining the essential elements of the contract which the person making it proposes to a particular person or to persons generally, and by which he expresses his will to be bound if it is accepted.

### **Art. 1105-2**

An offer may be revoked freely as long as it has not come to the knowledge of the person to whom it was addressed, or if it has not been validly accepted within a reasonable period.

### **Art. 1105-3**

An offer lapses if it is not accepted within the period fixed by the person who makes it or in the case of his incapacity or death before its acceptance. It is also extinguished if the offeree rejects it.

### **Art. 1105-4**

However, where an offer addressed to a particular person includes an undertaking to maintain it for a fixed period, neither its premature revocation nor the incapacity or death of the offeror can prevent the formation of the contract.

### **Art. 1105-5**

Acceptance is a unilateral act by which a person expresses his will to be bound on the terms of the offer.

An acceptance which does not conform to the offer has no effect, apart from constituting a new offer.

### **Art. 1105-6**

In the absence of legislative provision, agreement between the parties, business or professional usage or other particular circumstances, silence does not count as acceptance.

## **§ 3 Unilateral promises to contract and pre-emption agreements**

### **Art. 1106**

A unilateral promise to contract is a contract by which one party promises another (and the latter accepts in principle) to give him the exclusive right to conclude a contract of which the essential elements are settled, but for the formation of which only the consent of the beneficiary is required.

Revocation by the promisor during the period allowed to the beneficiary to express his agreement cannot prevent the contract which was promised from being formed.

A contract concluded with a third party does not prejudice the beneficiary of the unilateral promise, apart from the effect of any rules designed to protect third parties in good faith.

**Art. 1106-1**

A pre-emption agreement is a contract by which a party remains free to decide whether to enter into a contract, but undertakes that, if he does so decide, he will first offer to the beneficiary of the agreement the right to deal with him.

The promisor is bound to bring to the notice of the beneficiary any offer relating to the contract which is the subject of the pre-emption right.

A contract concluded with a third party does not prejudice the beneficiary of the pre-emption agreement, apart from the effect of any rules designed to protect third parties in good faith.

**§ 4 The date and place of formation**

**Art. 1107**

In the absence of agreement to the contrary, a contract is completed by receipt of the acceptance. It is deemed formed at the place where the acceptance is received.

## Chapter II

# *The Essential Conditions for the Validity of Contracts*

### **Art. 1108**

Four conditions are essential for the validity of a contract:

- the consent of the contracting parties;
- their capacity to contract;
- a subject-matter of the undertaking;
- a cause which justifies the undertaking.

In addition, for a juridical act effected by the representative of one party, there must be the power to act in the party's name.

The form of contracts is set out in articles 1127 *et seq.*

*Note: the term 'power' has many meanings, but it is within the law of representation that it appears in its most pure, particular meaning (Carbonnier and Gaillard) amongst the conditions of validity for acts done by representatives. It therefore deserves to be set out in this title in article 1108. It is a condition which applies only sometimes (in the case of representation) but, in that situation, it is essential.*

*The notion of power also appears in the case of a person with legal capacity who acts on his own account. But that is a different notion and, as a condition of validity, it is arranged in each area of law by the rules which govern it. For example, the 'powers' of spouses by virtue of the matrimonial property regimes; the 'powers' of an owner, usufructuary, holder by permission, etc. It is not a general condition of validity in relation to agreements in general. We shall leave it aside.*

## *Section 1*

### *Consent*

(Articles 1109 to 1115-1)

#### Sub-section 1: Existence of consent

### **Art. 1109**

In order to make a valid contract, one must be of sound mind.

A party who brings an action for nullity must prove the existence of a mental problem at the time of the juridical act.

**Art. 1109-1**

There is no consent where the parties' wills have not met on the essential elements of the contract.

**Art. 1109-2**

An absence of consent taints the agreement with relative nullity.

## Sub-section 2: Quality of consent

### § 1 Integrity of consent

**Art. 1110**

If one of the parties knows or ought to have known information which he knows is of decisive importance for the other, he has an obligation to inform him of it.

However, this obligation to inform exists only in favour of a person who was not in a position to inform himself, or who could legitimately have relied on the other contracting party, by reason (in particular) of the nature of the contract or the relative positions of the parties.

A party who claims the benefit of an obligation to inform has the burden of proving that the other party knew or ought to have known the information in question, but it is then for that other party to show that he has fulfilled his obligation in order to escape liability.

Information is relevant if it has a direct and necessary link with the subject-matter or the cause of the contract.

**Art. 1110-1**

In the absence of an intention to deceive, a failure to fulfil an obligation to inform gives rise to liability in the party subject to it.

**Art. 1110-2**

In certain agreements as fixed by legislation, consent is final and irrevocable only at the end of a period of reflection or a period allowed for a change of mind.

A *period for reflection* is one until the expiry of which the offeree cannot give his effective consent to the contract.

A *period allowed for a change of mind* is one until the expiry of which the offeree may freely revoke his consent to the contract.

### § 2 Defects in consent

**Art. 1111**

There is no valid consent if the consent has been given only by mistake, or if it has been ensnared by fraud, or extracted by duress.

*(art. 1109 of the present Code)*

**Art. 1111-1**

Mistake, fraud and duress vitiate the consent where they are of such a nature that, without them, one of the parties or his representative would not have contracted, or would have contracted on different terms.

Their decisive character is assessed in the light of the person and of the circumstances.

**Art. 1112**

Mistake is a ground of nullity of the contract only where it is about the substance of the thing which is its subject-matter or about the person of the other contracting party.

**Art. 1112-2**

Mistake about the substance of the thing means that which bears its essential qualities which the two parties had in mind on contracting or, alternatively, which one of the parties had in mind to the knowledge of the other.

It is a ground of nullity whether it bears on the subject-matter of the obligation of one party or of the other.

Acceptance of a risk about a quality of the thing rules out mistake in relation to this quality.

**Art. 1112-2**

A mistake about the person means one which bears on the essential qualities of the other contracting party.

It is a ground of nullity only as regards contracts entered into on account of personal considerations.

**Art. 1112-3**

Mistake about the substance or the person is a ground of nullity, whether it is a mistake of fact or of law, as long as it is not inexcusable.

**Art. 1112-4**

In the absence of a mistake about the essential qualities of the thing, where a party makes only an inaccurate valuation of it, this mistake of value is not, of itself, a ground of nullity.

**Art. 1112-5**

Mistake about mere motive, extraneous to the essential qualities of the thing or of the person, is a ground of nullity only if the parties have expressly made it a decisive element of their consent.

**Art. 1113**

Fraud is an act of a party in ensnaring the other's consent by scheming or lies.

*Comment: Repetition of the verb in article 1111 (1109 of the present Code).*

**Art. 1113-1**

It is also fraud where one party intentionally conceals a fact which, if it had been known by the other party, would have deterred him from contracting, at least on the terms which they agreed.

**Art. 1113-2**

Fraud is equally established where it originates from the other party's representative, a person who manages his affairs, his employee, or one standing surety for him, or even from a third party acting at the instigation of, or with the complicity of, the other party.

**Art. 1113-3**

A mistake induced by fraud is always excusable. It is a ground of nullity even where it bears on the value of the thing which is the subject-matter of the contract, or on a person's mere motive.

**Art. 1114**

There is duress where one party contracts under the influence of pressure which makes him fear that his person or his wealth, or those of his near relatives, might be exposed to significant harm.

**Art. 1114-1**

A threat of legal action constitutes duress only when it is abused. It is abused where the legal process is deflected from its proper aims or is exercised in order to obtain a manifestly excessive advantage.

**Art. 1114-2**

Duress vitiates the consent of the contracting party, regardless of whether it has been applied by the other party or by a third party, and not only where it has been committed against the contracting party but also where it has been applied against his spouse or one of his near relatives.

Dutiful respect for one's father, mother or other older relative is not of itself sufficient for annulment of the contract without any duress being committed.

*Comment: This re-uses three current articles: 1111, 1113, 1114.*

**Art. 1114-3**

There is also duress where one party contracts under the influence of a state of necessity or of dependence, if the other party exploits this situation of weakness by obtaining from the contract a manifestly excessive advantage.

A situation of weakness is assessed by reference to all the circumstances, taking particular account of the vulnerability of the party who submits, the pre-existing relations between the parties, and their economic inequality.

**Art. 1115**

A contract entered into by mistake, fraud or duress gives rise to an action for relative nullity.

Independently of any annulment of the contract, duress, fraud or a mistake which causes harm to one of the parties gives rise to an obligation on the party by whose fault it was caused to make reparation for it.

Actions based on a defect in consent arise from the same, unique cause of action and this makes them interchangeable.

**Art. 1115-1**

In the case of duress, the period for bringing an action for nullity runs only from the day when it ceased; in the case of mistake or fraud, it runs only from the day when they were discovered.

## *Section 2*

### *The Capacity of the Contracting Parties and the Power to Act in the Name of Another* (Articles 1116 to 1120-2)

#### **§ 1 Capacity for enjoyment of legal rights**

*Note: There is good reason to emphasise the capacity of the contracting parties by indicating the distinction between the capacity to enjoy legal rights and the capacity to exercise one's rights (§ 2) and, following on from the latter, the power to act in the name of another (§ 3).*

**Art. 1116**

To be valid an undertaking requires, in the person of the contracting party, the capacity for enjoyment, the ability to hold legal rights.

*Note: To give a lighter touch, the decision to include a running definition is inspired by the existing example of the definition of guardianship (art. 427 C. civ.). Its purpose is to give an idea of the capacity for enjoyment as a participant in activities for which the law provides.*

**Art. 1116-1**

As a legal actor, every natural person possesses a general capacity for enjoyment. This is limited only by special incapacities and prohibitions established by law in relation to certain types of juridical acts.

**Art. 1116-2**

Thus, anyone who holds an office or employment in an establishment in which dependent persons reside, or which provides psychiatric treatment, is prohibited, without judicial authorisation, from procuring the acquisition of property or the assignment of a right belonging to a person admitted to the establishment, and from taking a lease of the residence occupied by such a person before his admission to the establishment.

For the purposes of this article the spouse and relatives (both ascendant and descendant) of the persons to whom the above prohibition applies are also deemed to be included.

*(art. 1125-1 of the present Code)*

### 1116-3

Legal persons are endowed with a special capacity for enjoyment of legal rights. This covers juridical acts which are effective to accomplish their objects as defined by their constituent instruments, in accordance with the rules applicable to the legal person in question, as well as transactions which are ancillary to those referred to above.

*Note: By contrast with 'possess' (for natural persons: art. 1116-1 above), it may be interesting to emphasise the term 'endowed with' for legal persons.*

### Art. 1116-4

The capacity of future persons for enjoyment is governed by the titles *Succession* and *Acts of Generosity* in this Code.

### Art. 1116-5

A lack of capacity for enjoyment, or a declaration of legal incapacity, affecting one of the parties to a contract in the course of performance causes the contract to lapse, unless it can be fully completed by its other parties.

## § 2 Capacity for exercise of legal rights

### Art. 1117

Every natural person who is not declared by law to lack capacity may contract, by himself, without support or a representative.

A natural person may enter into any juridical act appropriate to the arrangement of the protection and management of his interests in the situation where he becomes incapable of exercising his legal rights, in accordance with the principles set out in the first Book of this Code.

*Note: For natural persons it seems necessary to state the capacity to exercise legal rights. This is the position in principle.*

### Art. 1117-1

The following lack capacity to contract, to the extent defined by law:

- minors who have not been emancipated;
- adults who are protected within the meaning of article 490 of this Code.

*(art. 1124 of the present Code)*

### Art. 1117-2

A person who is protected by a lack of capacity to exercise his rights may nevertheless, acting independently, enter into juridical acts which are necessary to preserve his legal rights, acts which are specified by law, and day to day transactions which it is customary to do.

*Note: This is an exception to the exception—hence the order of the articles.*

If he has sufficient understanding, he may also enter into contracts relating to his person and the person of his children, in accordance with the provisions set out in the first Book of this Code or in particular legislative provisions.

However, the consequences of such contracts on the estate of a protected person are governed by the applicable rules of the relevant protective regime

A natural person may enter into any juridical act necessary to protect or manage his interests for the situation where he may become incapable of exercising his rights, in accordance with the principles set out in the first Book of this Code.

**Art. 1117-3**

A minor may not escape from undertakings which he has entered into in the exercise of his business or profession, nor obligations which flow from his delictual conduct, whether deliberate or not.

The fact that the minor has declared that he is an adult does not constitute an obstacle to restitution.

*Cf. arts 1306 to 1310 of the present Code.*

**Art. 1117-4**

Where after attaining his majority a minor ratifies an undertaking entered into during his minority, he may no longer contest its validity, whether it was a nullity, or merely gave rise to restitution.

**Art. 1117-5**

Restitution which is due to a person lacking capacity is reduced to the extent of any benefit which he has obtained from the juridical act which is annulled.

*(art. 1312 C. civ., amended)*

**Art. 1118**

A substantive inequality of bargain, where it does not result from a fortuitous and unforeseen event, of itself gives rise to rescission in various different types of contract, in favour of a minor who has not been emancipated, and an adult protected in the situations provided for by articles 491-2 and 510-3 of this Code.

Repurchase to undo the inequality can always be proposed by the party who has benefited from the contract.

*Comment: Compare art. 1305 of the present Code.*

**Art. 1118-1**

Persons with capacity to contract may not raise the lack of capacity of those with whom they have contracted, where their lack of capacity is designed to protect them.

*(art. 1125 C. civ., amended)*

Such persons may defend an action taken against them for relative nullity or rescission by showing that the juridical act benefited the protected person, and did not embody a substantive inequality or that he has made a profit from it.

They may also set up against the action for nullity or rescission the fact that the contracting party ratified the transaction after gaining or regaining his capacity.

**Art. 1118-2**

Where a lack of capacity to exercise rights is general, the law ensures that the protected person has a representative or supporter.

**Art. 1118-3**

Persons with capacity to contract may confer on a third party a power to represent them.

**Art. 1118-4**

Legal persons enter into contracts through their representatives.

**§ 3 The power to act in the name of another**

**Art. 1119**

Where a person is given the task of representing one of the contracting parties by law, by court order, or by contract, the resulting contract must comply with the following further condition.

*Note: This links back to the proposed form of art. 1108.*

A legal, judicially-appointed or contractual representative is not entitled to enter into transactions except within the scope of those juridical acts which are within the capacity for enjoyment of the person whom he represents, and within the powers which have been conferred upon him.

**Art. 1119-1**

A person who is represented is bound only by transactions entered into by his representative within the limits of his powers.

But the representative is liable for any fault which he was able to commit in the exercise of these powers, in particular if it causes a ground of nullity of the juridical act entered into in the name of the representative.

**Art. 1119-2**

Where the task of the representative is defined in general terms, it is limited to necessary managerial acts.

Where it is defined expressly, the representative may only enter into those transactions for which he is authorised, and those which are incidental to them.

**Art. 1119-3**

A juridical act entered into by a representative outside his powers is a nullity. However, a person who is represented may ratify it, if he has the capacity to do so. The same rules apply to a juridical act by which the representative makes himself liable for a misuse of his power to the detriment of the person he represents, unless a third party entered into the contract in good faith.

**Art. 1120**

As long as it lasts, legal or judicial representation takes away from the person represented the powers which have been transferred to the representative.

Contractual representation leaves the person represented the power to exercise his rights, subject to his duty of loyalty towards his representative.

*Note: The addition of this reservation is sensible.*

**Art. 1120-1**

It is forbidden for a representative to act in the name and on behalf of both parties to a contract, or himself to contract with the person whom he represents, unless legislation so permits, or allows a court so to permit.

This prohibition can be waived, by express agreement of the person represented or, in the case of a group, by a lawful decision of its members.

**Art. 1120-2**

A representative may not undertake or continue to exercise the task which has been entrusted to him if he suffers from a lack of capacity or is legally prohibited from doing so.

He may not continue if his task is cancelled by contract or by the court.

## *Section 3*

### *The Subject-Matter of Contracts*

#### (Articles 1121 to 1122-3)

**Art. 1121**

A contract has as its subject-matter a thing the property in which one party undertakes to transfer, or to grant the right to use it; or something which the party undertakes to do or not to do. The right to hold the thing can also be transferred without there being a grant of the right to use it, for example by way of deposit or guarantee.

*Note: This paragraph is an extended version of the present article 1127: 'The mere use or possession of a thing can, like the thing itself, be the subject-matter of a contract'. But it is more accurate. For if a right to use something can in this way be the subject-matter of a contract (the permission), possession in fact, and not merely in law, can be too. The text actually refers to the right to hold a thing ('detention', and that word carries such a greater meaning, because it implies an obligation to restore the thing). In the proposed version, a right to hold the thing is a common factor in contracts which grant it together with the right to use (leases, loans for use; see, later, arts. 1146, 1155 et seq.: obligations to give for use) and contracts which grant a right to hold without a right to use (pledge, deposit).*

The contents of the obligations so agreed characterise contracts as declaring, creating, transferring or extinguishing legal rights and obligations.

Any clause which is inconsistent with these essential elements is struck out.

*General observation: It is worth keeping the traditional notions and terms (thing, give, do, not to do, subject-matter of the undertaking, commerce [capable of being owned or alienated]), but linking them with terms in current use (contents of the obligations, essential elements: these terms and expressions reappear, moreover, in many other provisions). The whole network is coherent.*

**Art. 1121-1**

Only things which are capable of being owned or alienated can be the subject-matter of a contract.

**Art. 1121-2**

A thing which forms the subject-matter of the undertaking must be lawful.

It must be possible and must be in existence at the moment when the contract is formed.

However, future things can be the subject-matter of an obligation.

**Art. 1121-3**

An obligation must have as its subject-matter a thing which is ascertained or ascertainable, as long as, in the latter case, the extent of the undertaking is not left to the decision of one of the parties alone.

**Art. 1121-4**

In contracts which provide for performance successively or in instalments, it may nevertheless be agreed that the prices to be paid by the person entitled to the benefit of performance are to be fixed by him at the time of each supply, such as by reference to his own tariffs; and in case of dispute he has the burden of justifying the amount on the first request, made in writing by recorded delivery, of the person providing such a benefit.

**Art. 1121-5**

If the extent of an obligation to do is not ascertained at the time of the contract, nor ascertainable at a later stage in accordance with criteria which do not depend upon the will of the parties, its price may be fixed by the person entitled to the benefit of performance once the obligation has been performed; and in case of dispute he has the burden of justifying the amount on the first request, made in writing by recorded delivery, of the person providing such a benefit.

**Art. 1121-6**

In the situations set out in the preceding two articles, a person who is entitled to receive, but who has not received, a justification within a reasonable period may free himself from liability by depositing the customary price with a public depositary.

**Art. 1122**

Unlawfulness of the subject-matter taints the contract with absolute nullity.  
Absence of any subject-matter is sanctioned by relative nullity.

**Art. 1122-1**

A lack of equivalence in the agreed contents of the obligations in a commutative contract is not a ground of annulment except where the law allows rescission of the contract by reason of substantive inequality of bargain.

**Art. 1122-2**

However, a contract term which creates a significant imbalance in the contract to the detriment of one of the parties may be revised or struck out at the request of that party, in situations where the law protects him by means of a particular provision—notably because he is a consumer, or where the clause has not been negotiated.

*Comment: The last part of the sentence is inspired by the Lando principles.*

**Art. 1123**

A lack of equivalence in the contents of the obligations agreed in a commutative contract arising during its performance falls to be governed by the provisions contained in Chapter III of this Title, dealing with the effects of contracts.

## *Section 4*

### *Cause*

#### (Articles 1124 to 1126-1)

##### **Art. 1124**

A contract is valid where the undertaking has a cause which is real and lawful which justifies it.

##### **Art. 1124-1**

Absence of cause is sanctioned by relative nullity of the contract. Unlawfulness of cause taints the contract with absolute nullity.

##### **Art. 1124-2**

A contract is no less valid for the cause not being expressed.

A person who disputes the cause which has not been expressed has the burden of proving its absence or unlawfulness.

##### **Art. 1125**

Where from the beginning what is agreed to be given in return is illusory or derisory, the undertaking is not justified for lack of real cause.

*Note: The term 'agreed' refers to the content of the contract (the bargain).*

Any term of the contract which is incompatible with the real character of its cause is struck out.

##### **Art. 1125-1**

An undertaking to return a thing or to repay a sum of money has as its cause the delivery of the thing or the money to the party subject to the obligation.

Where the value handed over is lower than that required by the undertaking, the scope of the obligation must be reduced to match the cause, as long as the difference is not justified from the contract.

##### **Art. 1125-2**

An undertaking entered into in exchange for a benefit agreed for a third party has this benefit as its cause, regardless of any moral or material interest that the party entering into the undertaking may find for himself.

##### **Art. 1125-3**

Aleatory contracts have no real cause where, from the beginning, the absence of any risk makes the agreed exchange illusory or derisory for one of the parties.

##### **Art. 1125-4**

There can be no gift or testament in the absence of an intention to confer a gratuitous benefit.

The conferral of gratuitous benefits does not have any real cause in the absence of a motive without which the party conferring the benefit would not have done so.

**Art. 1126**

An undertaking is not justified for lack of lawful cause where it is entered into, at least by one of the parties, with a purpose contrary to public policy, public morality, or, more widely, a mandatory rule of law.

*(cf. art. 1162-3 of the present Code)*

**Art. 1126-1**

A party who enters into a contract with a purpose which is unlawful\* without the knowledge of the other must compensate all the loss caused by the annulment of the contract.

There can be no claim where both parties knew of the unlawfulness.

*Note\*: Unlawfulness includes immorality in the provision just mentioned.*

## *Section 5*

### *Form*

(Articles 1127 to 1128-2)

#### **§ 1 General provisions**

**Art. 1127**

As a general rule, contracts are completely formed by the mere consent of the parties regardless of the form in which this may be expressed.

**Art. 1127-1**

Exceptionally, solemn juridical acts are required to comply with those formalities which are prescribed by law, and failure to comply results in the act being annulled unless the defect can be cured.

**Art. 1127-2**

Where writing is required for the validity of a juridical act, it may be created and stored in electronic form on the basis set out in chapter seven of this Title.

In circumstances where a person undertaking an obligation is required to add something in his own hand, he may do so in electronic form if the circumstances of this are such as to guarantee that it could have been done only by him.

**Art. 1127-3**

The provisions of the preceding article do not apply to signed juridical acts relating to family law and the law of succession, nor to signed juridical acts relating to personal or real guarantees, whether made under civil law or commercial law, unless they are entered into by a person for the purposes of his business or profession.

**Art. 1127-4**

Where they are not determined by law, the rules applicable to the action for nullity for absence of, or defect in, formality depend on the nature of the interests which the requirement of form is intended to protect.

**Art. 1127-5**

Formalities required for the purpose of evidence of a juridical act or its effect on third parties do not prejudice the validity of the contract in question.

**Art. 1127-6**

Contracts whose purpose is to modify or terminate an earlier contract must comply with the same rules of formality as the earlier contract, unless there is a legal provision or agreement to the contrary.

**§ 2 The form of electronic contracts**

**Art. 1128**

A person who, in a business or professional capacity, makes a proposal in electronic form for the supply of goods or services, must provide the applicable contractual terms in a form which will permit their retention and reproduction. Without prejudice to the conditions of validity mentioned in the offer, the offeror remains bound by it as long as the offer is available to him in electronic form.

An offer must set out in addition:

1. The different steps that must be completed to conclude the contract in electronic form;
2. The technical mechanisms by which the user, before the conclusion of the contract, may identify errors in the data entry, and correct them;
3. The languages proposed for the conclusion of the contract;
4. Where the contract is to be archived, the circumstances in which the offer is to store it and the conditions for access to the stored contract;
5. If the offeror intends to be bound by any business, professional or commercial rules, the means by which these may be consulted in electronic form.

*(art. 1369-1 of the present Code)*

**Art. 1128-1**

In order that a contract may be validly concluded, the offeree must have had the possibility of verifying the detail of his order and the total price, and to correct any errors, before confirming this to give his acceptance.

The offeror must without unnecessary delay acknowledge receipt of such an order which has been addressed to him in electronic form.

The order, the confirmation of acceptance of the offer, and the acknowledgement of receipt are deemed to have been received when the parties to whom they are addressed can obtain access to them.

*(art. 1369-2 of the present Code)*

#### **Art. 1128-2**

There is an exception to the obligations referred to in paragraphs 1 to 5 of article 1128 and to the first two paragraphs of article 1128-1 for contracts for the supply of goods or services which are concluded exclusively by exchange of electronic communications.

In addition, the provisions of article 1128-1 and paragraphs 1 to 5 of article 1128 may be excluded in contracts concluded between business or professionals.

*(art. 1369-3 C.civ, amended)*

## *Section 6*

### *Sanctions*

#### (Articles 1129 to 1133)

#### **§ 1 Nullity**

##### **Art. 1129**

A contract which does not satisfy the conditions required for its validity is a nullity.

##### **Art. 1129-1**

Nullity is said to be absolute or a matter of public policy where the rule that has been violated is prescribed for the safeguard of the public interest.

It is said to be relative or protective where the rule that has been violated is prescribed for the safeguard of a private interest. However, where the private interest originates in a fundamental value, such as the protection of the human body, the nullity takes on the character of being absolute.

*Note: The terms 'absolute' and 'relative' are of such different meanings that it is better to make them clear by an example of how they are used, and by introducing them by the words 'said to be'.*

##### **Art. 1129-2**

Absolute nullity may be invoked by any person who can demonstrate an interest, as well as by the magistrate representing the public interest; it may also be raised by the court on its own initiative.

Absolute nullity cannot be remedied by affirmation of the juridical act, which must be entered into afresh.

*Note: In article 1129-2: harmonisation with the Code of Civil Procedure: the parties 'rely on', the court 'raises'.*

##### **Art. 1129-3**

Relative nullity can be invoked only by a person whom the law is designed to protect. The party who has the right to the action for nullity may renounce it and affirm the contract.

**Art. 1129-4**

An act of affirmation or ratification of an obligation for which the law allows an action for nullity is valid only where it identifies the substance of the obligation, the ground of action for nullity, and the intention to rectify the defect on which the action is based.

In the absence of an act of affirmation or ratification, it is sufficient that the obligation is performed voluntarily after the time when the obligation may be validly affirmed or ratified.

Affirmation, ratification or voluntary performance in the forms and at the time fixed by legislation imply waiver of the grounds of claim and defences that a person might otherwise raise to the juridical act, without, however, prejudice to the rights of third parties.

*(art. 1338 C. civ., amended)*

If a number of persons have the right to the action for nullity, waiver by one does not bar the action of the others.

**Art. 1129-5**

The party on whom affirmation or ratification rests may be given notice by the other party either to affirm or ratify, or to proceed with an action for nullity within a period of six months, on pain of losing the right.

**Art. 1129-6**

A donor cannot by a confirmatory instrument remedy the defects in an *inter vivos* donation which is a nullity by virtue of defects in formality. The donation must be made again in the form required by law.

*(art. [1339] of the present Code)*

Affirmation or ratification, or voluntary performance of a donation by the heirs or successors in title of the donor after his death implies their waiver of any right to object to it based either on a defect of form or on any other basis.

*(art. [1340] of the present Code)*

**Art. 1130**

An action for absolute nullity becomes prescribed after a period of ten years, and the action for relative nullity after a period of three years, unless the law otherwise provides.

A defence based on nullity does not become prescribed if it relates to a contract which has not yet been in any way performed.

**Art. 1130-1**

Nullity is declared by the court, unless the parties to the juridical act establish it by common consent.

#### **Art. 1130-2**

Where the ground of nullity affects only one term of the contract, it does not give rise to nullity of the whole juridical act unless this term formed a decisive element of the parties' undertaking, or of one of them.

The contract continues in force if the purpose of the rule which has been violated requires its continuation, or if the law strikes out a clause which will not thereafter bind the debtor.

The same rules apply to a case where nullity affects only one part of the juridical act.

#### **Art. 1130-3**

A contract which has been annulled is deemed never to have existed.

Performance which has been rendered gives rise to restitution, either in kind or according to its value, in the different situations set out in articles 1161 to 1164-7.

### **§ 2 Lapse**

#### **Art. 1131**

A contract which has been validly formed lapses on the disappearance of one of its constituent elements, or on the failure of an external element to which its effectiveness was made subject.

The effect of such a lapse is retroactive or only for the future, depending on the circumstances.

*Comment: This applies to unilateral acts: see the end of art. 1101.*

### **§ 3 Invalidity and third parties**

#### **Art. 1132**

A contract which does not fulfil all the conditions for its full effect with regard to third parties cannot be set up against them.

#### **Art. 1132-1**

This effect is relative. It does not annul the contract itself, but merely neutralises its effects as against persons who have a right not to be prejudiced by it—and such persons have the burden of establishing the circumstances which justify this lack of effect, such as for example the commission of a fraud or the failure to publicise the juridical act.

### **§ 4 Regularisation**

#### **Art. 1133**

Where the law so authorises, regularisation restores its full effect to a juridical act by the removal of the defect which affects it, or by the completion of any formality required.

## Chapter III

# *The Effects of Contracts*

### *Section 1*

### *General Provisions*

### (Articles 1134 and 1135)

#### **Art. 1134**

Contracts which are lawfully concluded take the place of legislation for those who have made them.

They can be modified or revoked only by the parties' mutual consent or on grounds which legislation authorises.

They must be performed in good faith.

#### **Art. 1134-1**

The parties may reserve to themselves or to one of themselves\*\* a right of withdrawal from the contract, this right being exercised under the conditions set by the contract itself, by custom or by legislation.\*

#### *Notes:*

\* *A right of withdrawal is here assumed to result from an express contract term, but its exercise is subjected to conditions which are set by legislation, custom or the contract depending on the circumstances.*

\*\* *A right of withdrawal is, in general, one-sided, but nothing prevents one from being established reciprocally on occasion.*

#### **Art. 1135**

Contracts create obligations not merely in relation to what they expressly provide, but also to all the consequences which equity, custom or legislation give to them according to their nature.

*(art. 1135 of the present Code)*

Notably, contracts should be supplemented by customary terms, even if they are not expressed.

*Comment: This is the present text of article 1160, which appears better following on from article 1135.*

#### **Art. 1135-1**

In contracts whose performance takes place successively or in instalments, the parties may undertake to negotiate a modification of their contract where as a result of supervening circumstances the original balance of what the parties must do for each other is so disturbed that the contract loses its point for one of them.

#### **Article 1135-2**

In the absence of such an express term, a party for whom a contract loses its point may apply to the President of the *tribunal de grande instance* to order a new negotiation.

#### **Article 1135-3**

Where applicable, these negotiations should be governed by the rules provided by Chapter I of the present Title.

In the absence of bad faith, the failure of the negotiations gives rise to a right in either party to terminate the contract for the future at no cost or loss.

*Comment: These legislative provisions avoid recourse to the idea of unforeseeability and are limited to referring to a change of circumstances (cf. article 900-2 of the Civil Code). They are based on the loss of any point to the contract and as they are included within the category of non-gratuitous contracts, their formulation appears more apt than does article 900-2. They are consistent with the introductory provisions of Chapter I governing negotiations.*

## *Section 2*

### *Interpretation and Classification*

(Articles 1136 to 1143)

#### **§ 1 Interpretation**

##### **Art. 1136**

In interpreting contracts one should look for the common intention of the contracting parties at the time rather than staying at the literal meaning of the words.

*Note: It is essential to maintain as the leading paragraph the provision contained in article 1156 of the present Code, an important pillar of the law and a memorable rule which has the customary force of an adage. It proclaims the principle for the interpretation of contracts, an exegetical principle which places the spirit of the contract over its letter. This fundamental choice is especially valuable given that (apart from particular differences) the proper approach to reading contracts, which provide the law for their parties, has always been and is still considered as the model of how at least to approach the reading of legislation, which constitutes the law for the State.*

Similarly, in the case of a unilateral juridical act, effect must be given to the genuine intention of the person who makes it.

*Note: This is implied underneath the literal meaning of the words, but this is implicit from use of the word 'similarly'.*

In the case of interpretation of a collegial decision, effect must be given to the meaning which most conforms to the common interest of the members of the group.

#### **Article 1137**

All contract terms are to be interpreted by reference to each other, giving to each the meaning which makes sense of the contract as a whole.

Within the contractual groupings which they form, interdependent contracts are to be interpreted in relation to the overall operation to which they contribute.

#### **Article 1138**

Contract terms which are clear and unambiguous are not to be the object of interpretation so as to avoid distorting the nature of the transaction.

#### **Article 1138-1**

However general the terms in which an agreement is cast, it covers only those matters which the parties appear to have had in mind on contracting.

*(art. 1163 of the present Code)*

#### **Article 1138-2**

Where a contract explains an obligation by setting one example of its application, the parties are not deemed on this ground to have intended to restrict the ambit of their undertaking to this case alone where it would extend to other examples which are not expressed.

*(art. 1164 of the present Code)*

*Note: It is essential to maintain the historic parallel between these two complementary provisions, which concern two instances of clumsy drafting, one where a statement is too general, one where it is too particular.*

#### **Art. 1139**

Contracts are to be interpreted rationally and equitably.

#### **Article 1139-1**

Where a term of a contract may bear two meanings, it should be understood in the way which gives it some effect rather than in the way according to which it would produce no effect.

*(art. 1157 of the present Code)*

#### **Art. 1139-2**

Contract terms which may bear two meanings must be understood in the sense which best accords with the subject-matter of the contract.

*(art. 1158 of the present Code)*

#### **Article 1139-3**

An ambiguous term is to be interpreted by reference to what is customary in the place where the contract was made and to any previous dealings of the parties.

*(art. 1159 C. civ., amended)*

#### **Article 1140**

In case of doubt, a contract is to be interpreted against a person who has stipulated an obligation and in favour of a person who has undertaken it.

*(art. 1162 of the present Code)*

#### **Article 1140-1**

Nevertheless, where the contractual bond has been created as a result of the dominating influence of one of the parties, the contract should be interpreted in favour of the other party.

#### **Article 1141**

A contract is to be interpreted on the basis of all its elements taken together. Any misconstruction of its essential elements constitutes a distortion of its nature.

*Note: This reflects the classic position, drawing on settled case-law but put in the form of a legislative declaration. On the other hand, no legislative expression can be given to the case-law which places the interpretation of contracts in the sovereign power of assessment of the lower courts (juges du fond), and sees a distortion by them of the nature of the contract as a mistake of law and therefore proper for the censure of the Cour de cassation. This sort of development forms part of the division of judicial competences between the lower courts, which decide issues of fact, and the highest court, which decides issues of law. The proposed provision says the same thing, but by way of giving a fundamental explanation of this division of function, that is, in sum, why interpretation is a matter for factual assessment and why the distortion of the nature of the contract by a lower court counts as a mistake of law; or, put another way, what involves the merits of a case and what involves questions of pure civil law.*

*The particular interest of article 1141 is that the rule which it sets out is in harmony with the definition of the 'subject-matter' of contract (where there is the same reference to the essential elements of contracts, to their very nature: a coherent network. Cf. article [1121]).*

## **§ 2 Classification**

*Note: Classification can take place at three levels. Where the parties themselves give a particular denomination to their agreement, then it is right to take this agreed classification as the proper starting-point. In the special case dealt with by article 12 paragraph 3 of the New Code of Civil Procedure, such an agreed classification actually binds the court: this is the case where 'by virtue of an express agreement and as regards rights over which they have an unrestricted power of disposition', the parties can bind the court by the denomination which they have chosen. Here, therefore, the parties' own initial classification is the only one of which account should be taken.*

*Outside this situation, it is the role—indeed, the duty—of a court to classify any contract which is the subject-matter of litigation either where the parties have failed to do so or, where on the contrary they have done so, to restore to the contract in dispute its true legal classification, 'without stopping at the denomination which the parties had proposed for it' if it is inaccurate (article 12 paragraph 2 of the New Code of Civil Procedure).*

*Classification or reclassification of a contract is a matter for the lower courts, but this judicial classification takes place under the control of the Cour de cassation, which may censure it for mistake of law.*

*Putting aside rules arising from the law of civil procedure, the important legal point which is properly included within the Civil Code is to set out clearly the substantive grounds of the Cour de cassation's review of classification by the lower courts, and, therefore, also of classification itself. This is based on a contract's essential elements, more precisely, on those essential elements which were genuinely put forward as the foundation of their agreement by the parties.*

**Art. 1142**

In general, a denomination given to an agreement by its parties shall be followed. However, a court shall rectify this classification where it is inaccurate, except in the situation where it is binding on it. Where a court reclassifies a contract, it shall do so on the basis of those elements which the parties have genuinely given as the foundation of their agreement.

*Note: cf. article 12 paragraph 3 of the New Code of Civil Procedure: 'Nevertheless, a court cannot change the denomination or the legal basis of a claim where the parties have restricted its decision-making by their choice of a particular legal classification or particular legal issues to which they intend to limit their dispute by virtue of an express agreement and as regards rights over which they have an unrestricted power of disposition.'*

**Art. 1142-1**

If one of the essential elements of a contract is later varied a court shall give the contract any new classification which this entails.

**Art. 1143**

Where a juridical act would otherwise be a nullity for failing to satisfy the conditions of validity governing the legal classification which the parties have chosen to give it, nevertheless it may continue to exist in a reduced form as long as it complies with the conditions of validity of another juridical act whose result conforms to the intentions of the parties.

*Note: This is an application of the maxim res magis valeat quam pereat, here given effect by a process of reclassification.*

## *Section 3*

### *Different Types of Obligations*

(Articles 1144 to 1151)

**Art. 1144**

The subject-matter of an obligation to do is an action, such as the effecting of works or the supply of services, as in the building context or contracts for services; the subject-matter of an obligation not to do is an abstention, as in the case of duties not to compete, not to re-establish one's business, not to breach a confidence or not to build on a parcel of land.

**Art. 1145**

The subject-matter of an obligation to give is the alienation of ownership or of some other right, as in the case of sale, gift, assignment or the creation of a usufruct.

**Art. 1146**

The subject-matter of an obligation to give for use is a grant of permission to use a thing on condition of its return, as in the case of hire or loan for use; it does not arise in the case of agreements which grant permission to hold a thing without any right to use it, as in the case of pledge or deposit.

*Note: Obligations to give for use are not capable of being reduced either to obligations to give or to obligations to do. They constitute an independent concept and create a distinct category which is characterised by the specific and limited nature of the right which is conferred (a right to use) and by the obligation to return the thing. In other words and in a nutshell, it makes a person a permitted holder of a thing; not its owner, nor either a debtor of a sum of money, but a user bound to restore it. The grand dichotomy between obligations 'to give' and 'to do' must therefore give place to a trichotomy, distinguishing between obligations 'to give', 'to give for use' and 'to do' (or 'not to do').*

*Linguistically, the expression 'to give for use', which is concise enough to fit into the first paragraph of article 1101-1 between 'to give' and 'to do', is a nice one as it evokes both 'to give by way of hire' and 'to loan for use'. This is just right, as hire and loan for use are the two contexts in which this overarching category of 'giving for use' is best exemplified.*

**Art. 1147**

An obligation is monetary where it concerns a sum of money. All other obligations are termed obligations in kind.

Monetary obligations in any currency are fungible, except where the law or a contract otherwise provide.

**Art. 1148**

An obligation of value requires the supply to its creditor, either in money or in kind, of an economic advantage variable according to the circumstances which in time secures for him an appropriate satisfaction by giving him an amount calculated as at the date of its performance.

An obligation of value is monetary where its subject-matter is to supply a sum of money ascertainable at the time when payment is due; an obligation of value is in kind where its subject-matter is to provide for the needs of a person or care of a thing, unless in these cases it is converted into a revisable monetary obligation either by agreement or by a judicial decision.

**Art. 1149**

An obligation is termed an 'obligation of result' where the debtor is bound to procure for the creditor a promised satisfaction except for cases of *force majeure*, so that, with this exception, his liability arises from the mere fact that he has not succeeded in accomplishing this set purpose.

An obligation is termed an 'obligation to take necessary steps' where the debtor is bound merely to take the care and precautions normally necessary to accomplish a certain purpose, so that his liability arises only on proof of a failure to take care or precaution.

*Note: Very frequently parties to a contract do not specify expressly the kind of engagement which they are taking on (whether to accomplish a result or to take care). It is certainly better to avoid use of the verb 'to undertake'. It would seem that a more neutral expression is preferable, for example, 'to be bound by,' which works equally well where the parties are silent as to the content of their obligation. From a practical point of view, the particular difference lies in the rules governing proof. It is certainly preferable to draw attention to this, by attempting to put together the basis of the distinction between the two types of obligation both in terms of substance and in terms of proof.*

**Art. 1150**

A safety obligation, which is inherent in certain contractual undertakings, requires its debtor to look after the integrity of the creditor's person or property.

**Art. 1151**

A natural obligation involves a moral duty towards another person. It may be performed voluntarily and, where it is, the debtor may not claim restitution of what he has given or in respect of what he has done; it may also be the object of an executory promise of discharge.

*Note: There is no need to qualify the moral duty as legitimate: it is actually enough by itself.*

## *Section 4*

### *The Performance of Obligations*

(Articles 1152 to 1156-2)

#### **§ 1 Obligations to give**

**Art. 1152**

In principle an obligation to give is performed by the mere exchange of consent. Nevertheless, its performance may be deferred by agreement of the parties, by a legislative provision or by the nature of the things to which it relates. Obligations of this type are performed in kind, whatever their subject-matter, whether corporeal or incorporeal.

Their performance gives the creditor an entitlement to the right conveyed and puts the thing which is the object of this right at his risk, even if it has not yet been physically handed over.

*(cf. art. 1138 para. 2 and 1302 para. 1 C. civ.)*

**Art. 1152-1**

An obligation to give comprises an obligation to deliver the thing and to look after it until delivery, taking all the care of a good head of household.

*(cf. art. 1136 C. civ.)*

Loss of the thing discharges a debtor of his obligations, as long as he shows that this occurred without his fault. However, he must cede to the creditor any rights or actions for compensation in respect of the thing.

*(cf. art. 1303 C. civ.)*

**Art. 1152-2**

Where a debtor is put on notice to deliver the thing, risk remains with or passes to him.

*(cf. art. 1138 para. 2 C. civ.)*

If the thing is lost, a debtor who has been put on notice to deliver must return the price, unless the thing would have perished in the keeping of the creditor if it had been delivered in any event.

*(cf. art. 1302 para. 2 C. civ.)*

**Art. 1152-3**

A debtor is put on notice to perform by formal demand, by an equivalent act which gives sufficient warning, or, where this is provided for by the contract, by mere expiry of the time for performance.

*(cf. art. 1139 para. 2 C. civ.)*

**Art. 1153**

If a person undertakes obligations one after another to give the same purely movable property to two persons, as between the latter it is the person who has effective possession who is to be preferred and he becomes its owner even if his title is later in date, provided that his possession was in good faith.

**Art. 1153-1**

The effects of obligations to give immovable property are governed by rules provided in the Title 'Sales', and in the Title 'Charges and Mortgages'.

**§ 2 Obligations to do and not to do**

**Art. 1154**

If possible an obligation to do is to be performed in kind.

Its performance may be ordered by a court either on pain of a monetary penalty or of some other means of constraint, unless the subject-matter of the obligation has a clearly personal character.

In no case may performance be obtained by recourse to any coercion which compromises a debtor's personal liberty or dignity.

In the absence of performance in kind, an obligation to do gives rise to damages.

*Note: This reversal of the statement of principle is welcome. It is certainly better to declare it in an impersonal form rather than by means of the formula that the creditor 'has the right to...'*

*Should it have been added that performance in kind is available 'where it is possible'? There are pros and cons (should one be cautious or is it too obvious?). If the arguments in favour were found convincing, one could envisage a provision such as 'An obligation to do or not to do is to be performed in kind if possible.'*

*The reversal of the statement of principle is even more welcome in that it does not get rid of the irreducible minimum which is found in the ruling out of personal coercion. In this way the proposition found in the third paragraph follows very closely the maxim 'Nemo praecise cogi ad factum' ('No-one can be compelled to perform in kind an obligation to do').*

*The phrase 'subject-matter of the obligation' refers equally to the personal action of a debtor which puts him beyond range of the imposition of a monetary penalty and of a direct order to perform.*

**Art. 1154-1**

A failure to observe an obligation not to do gives rise to damages by operation of law from the mere fact of the breach, without prejudice to the creditor's right to claim performance in kind for the future.

**Art. 1154-2**

A creditor may be authorised to arrange for performance of a obligation himself or to destroy anything done in contravention of a negative obligation. The cost of these arrangements is to be borne entirely by the debtor who may in an appropriate case be ordered to pay any necessary sum of money in advance.

**§ 3 Obligations to give for use**

**Art. 1155**

An obligation to grant permission to use a thing requires its delivery and its maintenance in a fit state for its use during a certain period of time at the end of which its holder is bound to return it. These rules are subject to agreement or legislative provision to the contrary.

These obligations may relate either to corporeal or incorporeal property.

They are to be performed in kind.

**Art. 1155-1**

Where there is a conflict between several persons claiming use of a thing, the person whose title is first in time is to be preferred.

**Art. 1155-2**

Where the parties have not made provision as to the period at the end of which the thing is to be returned, it must be returned after a reasonable period and, except in urgent cases, after giving notice to the debtor.

**Art. 1156**

However, a holder of a thing given to him for use is entitled to keep it until any sums due to him arising from a debt attached to it have been fully paid.

## *Section 5*

# *Non-Performance of Obligations and Termination of Contracts*

(Articles 1157 to 1160-1)

### **Art. 1157**

In synallagmatic contracts, either party may refuse to perform his obligation to the extent to which the other does not perform his own obligation.

Where non-performance results from *force majeure* or some other ground recognised by law, the contract may be similarly suspended if the non-performance is not incapable of being remedied.

In reply to a defence of non-performance, the other party may establish before a court that suspension of the contract was not justified.

#### *Comments:*

(1) *The reference to synallagmatic contracts appears necessary as this is the context in which the defence of non-performance may arise (and especially by way of contrast to article 1158).*

(2) *Giving prominence to unavoidable or lawfully justified non-performance (national service, pregnancy, strikes, and more particular situations) is useful (and this is the occasion to note the non-irremediable nature of non-performance on which suspension of the contract depends).*

(3) *Making proof to the contrary before a court a common factor in a general way seems appropriate.*

### **Art. 1158**

In all contracts, a person for whose benefit an undertaking has not been performed or has been performed only imperfectly, has the choice either to pursue performance of the undertaking, to instigate termination of the contract or to claim damages, and the latter may in some cases be recovered in addition to performance or termination of the contract.

Where a creditor opts for termination of the contract, he can either claim it from the court or by his own act put the defaulting debtor on notice to fulfil his undertaking within a reasonable time, failure to do so in the debtor leading to the creditor's right himself to terminate the contract.

Where a debtor continues to fail to perform, the creditor can give him notice that the contract is terminated and on what grounds. In these circumstances, termination takes effect at the time of receipt of the notice by the other party to the contract.

#### *Comments:*

(1) *In the crucial first paragraph, it is useful to set out the full range of possibilities.*

*(2) Termination therefore possesses two tracks. Why close off judicial termination on opening the way for unilateral termination? It is to be noted, however, that a creditor who chooses the latter does so at his own risk.*

*(3) Unilateral termination of a contract could be rather a shock. It is useful to give it formal recognition, but with some care as to its form (thinking of the psychological side of the change). The form of words 'he declares that the contract is terminated' would be too downright. For the same result, one can make one-sided termination more tolerable by using a less 'unilateralist' turn of phrase by saying 'the contract shall be deemed to be terminated.'*

**Art. 1158-1**

The debtor may contest the creditor's decision before the court by claiming that any failure to perform which is alleged against him does not justify termination of the contract.

Depending on the circumstances, the court may confirm the termination effected by the creditor or instead order performance of the contract, with the possibility of giving the debtor time to perform.

**Art. 1159**

Termination clauses must expressly identify the contractual undertakings whose non-performance will lead to termination of the contract.

Termination of the contract may take place only after the service of a notice to perform, which has not been complied with, unless it was agreed that termination may arise from the mere act of non-performance. A notice to perform counts for this purpose only if it reminds the debtor of the termination clause in clear terms.

In all cases, termination takes effect only on actual notification to the debtor and on the date of its receipt.

**Art. 1160**

Where its performance is divisible, a contract may be terminated merely in part.

**Art. 1160-1**

Termination of the contract frees the parties from their obligations.

As regards contracts with performance successively or in instalments, termination takes effect for the future; the parties' undertakings cease from the time of service of proceedings for termination or from the time of notice of any unilateral termination.

If the contract has been performed in part, anything so exchanged by the parties gives rise neither to restitution nor to any compensation as long as they conformed to the respective obligations of the parties.

As regards contracts whose performance is instantaneous, termination of the contract is retroactive; each party must make restitution to the other in respect of what he has received, in accordance with the rules set out in section 6 of this chapter (below).

*Section 6*  
*Restitution Following Destruction of a Contract*  
(Articles 1161 to 1164-7)

**Art. 1161**

Restitution following the destruction of a contract, whether by way of annulment or retroactive termination, is governed by the following rules.

Except where legislation or a special agreement so provides, these rules apply to other cases of restitution, notably lapse where it has a retroactive effect.

*Note: the multiplicity of situations in which restitution may arise makes it necessary to determine at the outset the domain of application of the rules set out for restitution following the destruction of a contract.*

**§ 1 Principles**

**Art. 1162**

The annulment or the retroactive termination of a contract involves the full and, where applicable, reciprocal restitution by operation of law of any benefit received in performance of the contract.

Where annulment or termination is attributable to one of the parties, the latter must also compensate the other for all his losses.

**Art. 1162-1**

An obligation to make restitution brings with it the benefit of any guarantees stipulated in respect of discharge of the original obligation.

An obligation to make restitution is subject to prescription on expiry of the same period as the nullity or retroactive termination to which it relates.

**Art. 1162-2**

A court seized of an action for annulment or for termination of a contract may on its own initiative decide on issues of restitution even where it has not been required to do so by the parties' claims.

In its decision, a court may set off any fungible restitutionary debts.

A court order which declares the annulment or the retroactive termination of a contract interrupts the original prescription period applicable to the obligation to make restitution and converts it into the prescription period provided by the general law.

**Art. 1162-3**

Restitution may be refused to a person who has knowingly violated public policy, public morality or, more generally, any mandatory rule.

## § 2 The modalities of restitution

### Art. 1163

The modalities of restitution depend on the nature of the subject-matter of the obligations effected in performance of the contract.

### Art. 1163-1

After performance of an obligation to do or not to do, restitution takes place of its value.

The amount of restitution is calculated taking into account the direct and indirect benefits which the parties were able to derive from performance of the contract, assessed as at the date of restitution.

### Art. 1163-2

Restitution of a sum of money is effected by way of an equivalent. It consists of simply the numerical sum specified in the contract.

### Art. 1163-3

Where ascertained physical property remains in the hands of the person who has received it, restitution must be made in kind.

Restitution is to be made of its value where the thing is no longer identifiable by reason of its voluntary or accidental destruction, its transformation or its incorporation into other property.

Where only part of the thing has been destroyed, transformed or incorporated into other property, the person to whom restitution is due may elect either full restitution of its value or partial restitution in kind with the value of the balance.

### Art. 1163-4

Restitution of generic property other than a sum of money is to be made by rendering equivalent property unless the person to whom it is due prefers to receive its value.

### Art. 1163-5

Where the thing which is subject to restitution has perished accidentally or by the act of a third party, restitution relates by operation of law to any compensation resulting from insurance or civil liability, or to any right to indemnity arising by way of subrogation.

Where a thing which is subject to restitution has been sold, restitution relates by operation of law to the price received or to the right to recover the price by way of subrogation.

### Art. 1163-6

In all situations where restitution is not made in kind or by way of subrogation, the court shall assess the value of the thing as at the date of its decision on the basis of its condition as at the date of discharge of the obligation.

### § 3 Supplementary regulations

#### **Art. 1164**

Restitution relates to the principal subject-matter of the obligation which is discharged and its accessories as at the date of discharge.

#### **Art. 1164-1**

The accessories of a sum of money which is subject to restitution consist of interest at the legal rate and any taxes on the price paid to the person who received the price.

#### **Art. 1164-2**

Where restitution concerns a thing other than a sum of money, its accessories consist of its fruits and the enjoyment to which it has given rise.

Restitution of natural, industrial or civil fruits which do not still exist in kind is made according to their value assessed as at the date of reimbursement, and on the basis of the condition of the thing as at the date of discharge of the obligation. Where any income generated results in part from improvement of the thing by the person making restitution, then it is to be made in proportion to the income which would have been produced by the thing in its original condition.

Restitution in respect of enjoyment is to be assessed by the court as at the date of its decision.

#### **Art. 1164-3**

Expenses occasioned by the contract can be put to the account of the party who is responsible for the annulment or retroactive termination.

#### **Art. 1164-4**

Expenses relating to the thing itself can be the object of restitution.

The person to whom restitution is made must give credit to the person making restitution for all necessary expenses incurred in the maintenance of the thing.

He must also give credit in respect of any expenses incurred in improving the condition of the thing to the extent to which this has led to an increase in its value.

#### **Art. 1164-5**

By way of corollary, a person who makes restitution of a thing is responsible for any degradations or deteriorations which have reduced its value or caused its loss.

#### **Art. 1164-6**

Increases and decreases in value which affect the thing subject to restitution are assessed as at the date of its restitution.

*Section 7*  
*The Effects of Contracts as regards Third Parties*  
(Articles 1165 to 1172-3)

**§ 1 General provisions**

**Art. 1165**

Contracts bind only the contracting parties: they have no effect on third parties except in the situations and subject to the limitations explained below.

*Note: This global statement appears preferable to an analytical contrast between 'benefiting' and 'harming' third parties.*

**Art. 1165-1**

A secret agreement hidden by the contracting parties behind another ostensible agreement can be effective only as between those parties; it has no effect on third parties.

**Art. 1165-2**

Contracts may be invoked by and against third parties; the latter must respect them and can take advantage of them, though they do not have a right to require their performance.

**§ 2 The substitution of contracting parties and the transfer of contracts**

**Art. 1165-3**

Where the rights and obligations of a deceased person are not extinguished by the fact of his decease, they are transmitted to his heirs in accordance with the rules set out in the Title 'Succession' and the Title 'Gifts *inter vivos* and Testaments'.

Similarly, the heirs or legatees of a deceased person, or certain of them, are able to take the latter's place in the contracts to which he was party and whose performance is sought after his death, as long as this substitution is established by legislation, provided for by contract or stipulated by the deceased in his testament.

**Art. 1165-4**

A contracting party cannot assign *inter vivos* his status as party to the contract without the express or implied consent of the other contracting party.

#### **Art. 1165-5**

Exceptions are made to this principle in situations provided for by legislation.

Outside these situations, the substitution of one party to a contract by another person can occur where the contract forms an integral part of an operation giving rise to an indivisible group of transactions, as in the case of the merger or division of companies and of assets contributions.

In the absence of contrary agreement, where such a transfer takes place without his consent, the other party to the contract may withdraw from the contract at the end of a period of reasonable notice.

### **§ 3 Actions available to creditors**

*Note: Creditors are, of course, third parties but there is more than one subtle distinction between 'third party creditors' and 'third parties who are entirely foreign to the contract'.*

#### **Art. 1166**

A creditor may exercise all the rights and actions of his debtor in the latter's name, with the exception of those which are exclusively personal to him.

*Note: This formulation brings out better the difference between the action oblique and the action paulienne.*

A creditor does not justify his interest in bringing proceedings unless he establishes a failure in his debtor to perform which causes him loss.

#### **Art. 1167**

In addition, a creditor can challenge in his own name any juridical act made by his debtor in fraud of his rights, although in the case of a non-gratuitous act he can do so only if he establishes that the other party contracting with his debtor knew of this fraud.

A juridical act which has been declared fraudulent may not be invoked against creditors, so that the latter must not be prejudiced by any of its consequences. Where applicable, a third party who has acquired property under such an act is bound to make restitution in respect of what he has received through fraud.

A creditor may bring such an action only within a period of three years from the time when he became aware of the fraud.

#### **Art. 1167-1**

A creditor who exercises the action provided by article 1166 may be paid by deduction from the sums which, as a result of his claim, have become part of the assets of the debtor in default.

Claims brought under article 1167 benefit only those creditors who initiated the proceedings and those who joined proceedings once they were already in motion.

#### **Art. 1167-2**

In the case of the rights set out in the Title 'Succession' and the Title 'Contracts of marriage and matrimonial property regimes', creditors must obey the rules which are detailed in those titles.

#### **Art. 1168**

Legislation grants to certain creditors the right to sue directly to obtain satisfaction from the debtor of their own debtor, up to an amount not exceeding the lesser of the sums owed by their own debtor or his debtor.

A direct action may also arise where it is the sole means of avoiding the unjust impoverishment of a creditor taking into account the link which unites the contracts in question.

### **§ 4 Standing surety and stipulations for the benefit of third parties**

#### **Art. 1169**

In general, a person is not able to undertake engagements nor to make stipulations in his own name except for himself.

*Note: The advantage of preserving this article at the beginning as a reminder, is, on the one hand, to preserve the expression 'to stipulate' in its specific sense (requiring a person to promise something) which has here all its force, even though today this usage is much less frequent compared to its general meaning according to which it is a synonym for 'to conclude' (to agree).*

#### **Art. 1170**

Nevertheless, a person may stand surety for a third party by promising that the latter will do something; if the third party refuses to do what the surety has promised that he will do or refuses to ratify the agreement, then the surety must pay compensation.

If the third party performs the act which has been promised or ratifies the surety's undertaking, the latter is released from any obligation, and the undertaking is retroactively validated as from the date on which it was originally made by him.

*Note: It is preferable to maintain in the first paragraph the present tenor of article 1120 of the Civil Code since it puts forward first and very prominently the risk which standing surety entails and its own particular consequence (which it has in and by itself): viz. the burden of paying compensation. It therefore acts as a warning declaration. Where it takes place, ratification is a distinct juridical act which occurs after a person has stood surety and which possesses its own consequences.*

A third party who inherits from a person who has stood surety must fulfil the undertaking which the latter took on.

#### **Art. 1171**

One of the parties to a contract (termed the 'promisee' ('stipulator')) may require an undertaking from the other (the 'promisor') to do something for the benefit of a third party beneficiary, on condition that where the latter is a future person he must be precisely identified or capable of being determined at the time of performance of the promise and that he has at this date the legal capacity to receive this benefit.

*Note: The point of this leading provision is to make available the possibility of a stipulation for the benefit of a third party as a matter of principle. Equally, it is to set the terminology used to describe the protagonists of this triangular transaction, notably, the promisee ('stipulator'), and in this way echoes the verb 'to stipulate' which is retained by article 1169, which allows it to be given this special definition.*

#### **Art. 1171-1**

The promisee may freely revoke a stipulation which he has made for the benefit of a third party unless and until the latter accepts it.

Where the third party accepts the benefit of such a stipulation before its revocation, this renders the stipulation irrevocable once its maker or the promisor becomes aware of it.

Although enjoying from the time of acceptance a right to sue the promisor directly for performance of the undertaking, the beneficiary is deemed to have had this right as from the time of its creation by the contracting parties.

*Note: This provision is stripped of unnecessary detail and reduced to its essentials. It appears to be of capital importance to set out clearly all the crucial elements of the legal doctrine of stipulations for the benefit of third parties as they were carved out by the reforming case-law at the end of the nineteenth century. The splendid nub of this case-law is to be found in the judgments of the Cour de cassation in 1888, which established that a stipulation for the benefit of a third party is revocable until it is accepted. Both the irrevocability of a stipulation on acceptance within an appropriate time, and the retroactive effect of acceptance, revolve around the central axis of the beneficiary's direct right.*

#### **Art. 1171-2**

Revocation may be effected only by the promisee, or, after his death, by his heirs. The latter may do so only after a period of three months has elapsed from the date when they put the third party on notice to accept the benefit of the promise.

Revocation is effective as soon as the third party or the promisor become aware of it. Where it is made by testament, it takes effect from the moment of the testator's death. If it is not accompanied by a new designation of a beneficiary, revocation benefits the promisee or his heirs, as the case may be. A third party who was initially designated is deemed never to have benefited from the stipulation made for his advantage.

#### **Art. 1171-3**

Acceptance can be made by the beneficiary or, after his death, by his heirs, subject to any contrary agreement. It may be express or implied. It can take place even after the death of the promisee or the promisor.

#### **Art. 1171-4**

The promisee is himself entitled to demand performance from the promisor of the undertaking made for the benefit of a third party.

### **§ 5 The effects of interdependent contracts**

#### **Art. 1172**

Contemporaneous or successive contracts whose performance is necessary for the putting into effect of a group operation of which they form part are seen as interdependent to the extent specified below.

**Art. 1172-1**

Contract terms which organise the relationship between the parties to one of the contracts within such a grouping do not apply to the other agreements except where they are reproduced in those agreements and accepted by the other contracting parties.

**Art. 1172-2**

Nonetheless, the effect of certain types of contract term contained in one of the group contracts extends to the parties to the other contracts within the group, provided that those parties were aware of them at the time of their own contractual undertakings and that they made no reservation in this respect.

This is the case as regards contract terms which limit or exclude liability, arbitration clauses and choice of jurisdiction clauses.

**Art. 1172-3**

Where one of the interdependent contracts is affected by nullity, the parties to other contracts in the same grouping can treat them as lapsed.

## Chapter IV

# *Modalities of Obligations*

### *Section 1*

### *Conditional Obligations*

(Articles 1173 to 1184-1)

#### § 1 Conditions in general

##### **Art. 1173**

An obligation is conditional where it is made to depend on a future, uncertain event.

An event until which the creation of the obligation is suspended is a *suspensive condition*; an event on which the obligation is terminated is either a *resolutive condition* or an *extinctive condition*.

*Note: The contrast between suspensive conditions and resolutive (retroactive) conditions is enriched (see Carbonnier) if one adds a third kind, extinctive conditions (which are not retroactive).*

##### **Art. 1174**

Any condition which rests on a thing that is impossible or unlawful is a nullity and nullifies the contract which depends upon it.

*Note: 'unlawful': a general term, preferable to the present detailed list of article 1172 of the Code.*

However, the contract can be maintained and the condition struck out where in reality the condition was not a decisive reason for the parties' having entered into the contract.

*Note: The exception gives rise, a posteriori, to a judicial evaluation (which corresponds to existing practice).*

Likewise, a condition which rests on not doing something which is impossible does not nullify the obligation undertaken subject to the condition.

*Note: This puts together in the same article the principle (paragraph 1) and its two exceptions (paragraphs 2 and 3).*

##### **Art. 1175**

Any obligation undertaken subject to a condition whose satisfaction depends upon the will of the debtor alone is a nullity. But nullity on this ground cannot be claimed where the obligation has been performed in full awareness of the position.

*Note: A shorter form, in a single article, about what has hitherto been known as a potestative condition.*

**Art. 1176**

The parties have an obligation of loyalty with regard to the satisfaction of the condition.

*Note: In the proposed article [1176] the verb 'co-operate' is not well suited to a condition whose satisfaction depends on chance (this still exists, although no longer specifically identified by name). The obligation of loyalty seems to fit equally well the failure of a condition and its satisfaction: hence the general term 'event' applies to both.*

**Art. 1177**

A condition is deemed to have been satisfied if the party who is interested in its failure has obstructed its satisfaction.

It is deemed to have failed if its satisfaction has been caused by the party who had an interest in this occurring.

*Note: To avoid possible dispute, the words 'to the detriment of the other party' are better not included.*

**Art. 1178**

The party for whose exclusive benefit a condition has been stipulated is free to renounce it unilaterally, as long as the condition has not been satisfied. Until that moment the parties may also, by agreement, renounce a condition stipulated for the benefit of each.

Any renunciation renders the obligation unconditional.

*Note: This puts together in a single article everything concerning renunciation, which allows the final proposition to be a given as a common factor (last paragraph).*

*In this article a reversion of order seems more logical. Unilateral renunciation, which is available only in a particular situation, deserves to be given prominence. Renunciation by agreement between the parties, which is generally available, is obvious.*

**Art. 1179**

Before the condition is satisfied, the creditor may take all measures necessary to preserve his rights, and take action against any transactions effected by the debtor in fraud of his rights.

*Note: This provision seems to go better after article 1178, and before that which governs succession to, and assignment of, obligations.*

**Art. 1180**

Conditional obligations are transmissible on death, unless the parties have otherwise provided, or the nature of the obligation prevents it. With this same restriction, the benefit of conditional obligations is assignable inter vivos.

*Note: The wording of article 1179 is not felicitous and is incomplete. Although conditional, such obligations are no less active and passive elements of a person's estate. But although transmissibility relates to both the duties and rights arising under obligations, assignment is limited to rights. The exception is common to both.*

## § 2 Suspensive conditions

### Art. 1181

An obligation contracted under a suspensive condition is one which depends on either a future, uncertain event, or an event which has already happened but is not yet known to the parties.

*(art. 1181 para. 1 of the present Code)*

The obligation cannot be performed before the event or the parties' knowledge of it.

*(cf. art. 1181 paras 2 and 3, C. civ.)*

### Art. 1182

If the condition fails, the obligation lapses; it is deemed never to have existed.

If the condition is satisfied, the obligation is deemed to have been in existence from the date when the contract was entered into.

However, this retroactivity does not cast any doubt on the validity, either of administrative acts or of acts by which the parties exercised their rights, in the intervening period.

*Note: The parallel between the failure and satisfaction of the condition in the same article seems quite illuminating, and they have in common the limiting of the effect of retroactivity (this is perhaps not very helpful, but it is not too awkward).*

### Art. 1182-1

Where an obligation has been contracted under a suspensive condition, the thing which is the subject-matter of the contract remains at the risk of the debtor, who has the obligation to deliver it only when the condition is satisfied.

*(art. 1182 para.1 of the present Code)*

If the thing perishes in its entirety, the obligation is extinguished.

If the thing deteriorates, the creditor has a choice between retroactively terminating the contract, and requiring the thing as it is, without reduction of price.

This is all without prejudice to any award of damages which may be due to the creditor under the rules of civil liability where the loss or deterioration of the thing are attributable to the fault of the debtor.

## § 3 Resolutive conditions

### Art. 1183

A resolutive condition does not suspend the performance of the obligation until the anticipated event occurs; it effects its revocation when this event occurs.

*Note: Would it not be better to begin with what distinguishes a resolutive condition from a suspensive condition? The remainder of Section 3 is dedicated to retroactive termination.*

**Art. 1184**

In this latter situation termination has retroactive effect; it restores things to the same state as if the obligation had never existed, and requires the creditor to make restitution of what he has received, under the rules set out in articles 1161 to 1164-7.

*Note: It does not seem to be necessary to qualify this by reference to contrary contractual provision: an extinctive condition, as explained below, is simply a resolatory condition that is not retroactive according to the parties' own provisions.*

However, the creditor is not required to make restitution in respect of the fruits which he took before the event, and administrative acts which he has undertaken in the same period are maintained.

**§ 4 Extinctive conditions**

*Note: This has a parallel in extinctive time delays.*

**Art. 1184-1**

An extinctive condition is one which subjects the extinction of the obligation to a future, uncertain event. An extinctive condition has effect only for the future.

*Section 2*  
*Time-Delayed Obligations*  
(Articles 1185 to 1188)

**§ 1 Delay-points in general**

**Art. 1185**

A 'delay-point' is a future, certain event which affects an obligation which has already come into being, either by delaying its performance, or by putting an end to it.

It may be express or tacit, such as where it results implicitly from the content of the undertaking.

The delay-point may be a fixed date, or its occurrence may be unknown as long as it is certain that it will happen.

**Art. 1186**

Where the parties indicate only a period of time by reference to a number of days, months, or years, the period is calculated from the date of the contract, in the absence of contrary provision fixed by legislation or by the agreement of the parties. However, the day from which the calculation begins is not itself included in the period.

**Art. 1186-1**

If the parties agreed to postpone fixing the delay-point, or to leave it to one of them, and if the delay-point has not been fixed after a reasonable period, the court may fix it according to the circumstances.

## § 2 Suspensive delay-points

### Art. 1187

Whatever is due only on arrival of the delay-point may not be demanded before the expiry of the period which it sets; but whatever has been paid in advance may not be claimed back.

The creditor whose rights will arise on arrival of the delay-point may take all measures necessary to preserve his rights, and take action against any transactions effected by the debtor in fraud of his rights.

*(cf. arts 1180 C.civ and 1179 above)*

### Art. 1187-1

A suspensive delay-point is presumed to have been agreed for the benefit of the debtor, as long as the contract or the surrounding circumstances do not show that it was fixed in favour of the creditor or for the common benefit of both parties.

The party for whose exclusive benefit the delay-point has been stipulated may renounce it unilaterally.

### Art. 1187-2

A debtor may not claim the benefit of the delay-point if he does not provide the securities he promised to the creditor or by his own action reduces the value of those which he has provided.

He is also deprived of the benefit if he becomes insolvent or is declared to be in liquidation by the court.

## § 3 Extinctive delay-points

### Art. 1188

An extinctive delay-point puts an end to an undertaking for the future. Until the arrival of the delay-point, the obligation has the same effect as if it were unconditional.

## *Section 3*

## *Alternative and Discretionary Obligations*

(Articles 1189 to 1196)

### § 1 Alternative obligations

#### Art. 1189

An obligation is alternative where it gives a choice between one of two possible subject-matters which it embodies, in such a way that the satisfaction of one of them is sufficient to discharge the debtor.

If one of the subject-matters of the obligation is impossible or unlawful from the moment of the contract, the obligation applies to the other.

**Art. 1190**

The debtor has the choice, if it has not been otherwise agreed.

Where a party does not make the choice as he is entitled to do within the period which has been fixed or within a reasonable period, the choice passes to the other party after he has given notice to make his choice.

A choice, once made, is final.

*(cf. art. 1190 C. civ.)*

**Art. 1191**

The debtor may neither choose, nor be required, to perform part of one of the alternative subject-matters of the obligation and part of the other.

*Comment: Extension of art. 1191 C. civ.*

**Art. 1192**

If one of the alternative subject-matters becomes impossible, whether or not through his own fault, the debtor must perform the other.

If, in the same situation, performance of both subject-matters becomes impossible, and this is, as to one of them, through the fault of the debtor, he owes to the creditor the value of the performance which remained longest in being.

*Comment: New version of art. 1193 C. civ.*

**Art. 1193**

A creditor who has the choice between alternative subject-matters of an obligation must, if one becomes impossible to perform, accept the other, as long as the impossibility is not the fault of the debtor; in that case the creditor has the choice between requiring performance of the subject-matter which remains, or the value of the subject-matter which has become impossible.

If in the same situation performance of both subject-matters becomes impossible and if the debtor is at fault with regard to one or both of them, the creditor may require the value of one or other subject-matter.

*Comment: New version of art. 1194 C. civ.*

**Art. 1194**

Where without the fault of the debtor performance of all the subject-matters becomes impossible the obligation is extinguished.

*Comment: Extension of art. 1195 C. civ.*

**Art. 1195**

The same principles apply to the situation where there are more than two subject-matters comprised within the alternative obligation.

*Comment: Art. 1196 C. civ., amended.*

## § 2 Discretionary obligations

### Art. 1196

An obligation is discretionary where, although it has a particular subject-matter as its object, the debtor nevertheless has the right to discharge himself by providing another.

A discretionary obligation is extinguished if, without the fault of the debtor, the performance of the principal subject-matter of the obligation becomes impossible.

## *Section 4*

## *Joint and Several Obligations*

(Articles 1197 to 1212)

### § 1 Joint and several creditors

#### Art. 1197

An obligation is joint and several amongst a number of creditors where each has the right to require contractual satisfaction in full, and satisfaction in favour of one of them discharges the debtor, even if the benefit of the obligation is divisible and may be shared between several creditors.

*(art. 1197 C. civ., amended)*

#### Art. 1197-1

The joint and several nature of an obligation is not presumed: it must be expressly provided for.

#### Art. 1198

The debtor has a choice between performing in favour of one or another of the creditors who have the joint and several benefit of the obligation, as long as he has not been sued by one of them.

However, any release of the debt which is given by only one of two or more joint and several creditors discharges the debtor only with regard to that creditor.

Similarly, merger or set-off between the debtor and one of the creditors extinguishes the obligation only with regard to that creditor.

*(art. 1198 C. civ., amended)*

#### Art. 1199

Any act which interrupts or suspends prescription with regard to one of two or more joint and several creditors operates for the benefit of the other creditors.

*(art. 1199 C. civ., amended)*

## § 2 Joint and several debtors

### Art. 1200

There is joint and several liability amongst debtors where they are under obligations to do the same thing such that the totality of it may be enforced against each of them, and satisfaction by only one discharges the others with regard to the creditor.

*(art. 1200 of the present Code)*

### Art. 1201

An obligation may be joint and several even though one of the debtors may have a different obligation from the other as regards the accomplishment of the same thing; for example, if one has only a conditional obligation, whilst the obligation of the other is unconditional; or if one has a delay-point on his obligation which is not given to the other.

*(art. 1201 of the present Code)*

### Art. 1202

Joint and several liability is not presumed; it may result from legislation, contract or commercial custom.

*(cf. art. 1378 below: Sub-title III, Civil liability)*

### Art. 1203

The creditor of a joint and several obligation may require performance by any of the debtors he may choose—and the latter may not raise against him any claim to limit his share of liability.

*(art. 1203 C. civ., amended)*

An action brought against one of the debtors does not prevent the creditor from bringing a similar action against the others.

*Comment: The new article 1203 brings together the provisions of articles 1203 and 1204 of the present Code.*

### Art. 1204

If the thing is lost through the fault of one or more of the debtors, the others remain under an obligation with regard to its value; but they are not liable in damages unless they had been put on notice to perform at the time of the loss.

*(art. 1205 C. civ., amended)*

### Art. 1205

An action brought against a single joint and several debtor interrupts or suspends the running of prescription with regard to all.

The same effects follow from service of a notice to perform.

*(art. 1206 C. civ., amended)*

**Art. 1206**

A claim for interest made against a single joint and several debtor causes interest to run against all.

*(art. 1207 of the present Code)*

**Art. 1207**

A joint and several debtor sued by the creditor may raise all the defences which arise by virtue of the nature of the obligation, and all those which are available to him personally, as well as those which are common to all the debtors.

He may not raise defences which are purely personal to the other debtors, or to any one of them.

*(art. 1208 of the present Code)*

**Art. 1208**

Where one of the debtors becomes successor in title to the rights of the creditor, or where the creditor becomes subject to the duties of one of the debtors, merger extinguishes the obligation only on the part of the debtor whose rights and obligations have become merged.

*(art. 1209 C. civ., amended)*

**Art. 1209**

A creditor who consents to the division of the share of the debt of one of the debtors retains his action against the others jointly and severally, but after deduction of the share of the debtor whose joint and several liability he has discharged.

*(art. 1210 of the present Code)*

**Art. 1210**

A joint and several obligation is divisible by operation of law as between the debtors, each of whom is liable only for his own share.

A debtor who has discharged a joint debt may claim from the others only their own respective shares.

*(arts 1213 and 1214 para. 2 C. civ. merged and amended.)*

**Art. 1211**

The debtors stand as mutual guarantors as regards their solvency.

The share of an insolvent party is divided amongst the others, including one who has discharged the debt or who has already been discharged from the joint and several liability by the creditor.

*(arts. 1214 para. 2 and 1215 C. civ., amended.)*

**Art. 1212**

If the matter for which the debt has been entered into jointly and severally concerns only one of the debtors, he alone is liable for the debt as regards the others, with the result that he has no recourse against them if he has discharged it himself; and the others, if they have discharged it, may recover against him.

*(art. 1216 C. civ., amended.)*

## *Section 5*

### *Indivisible Obligations*

(Articles 1213 to 1217)

*In a chapter such as this dedicated to the modalities of obligations, only indivisible obligations (and not divisible obligations) constitute modes of obligation. This is the case whether as between co-debtors or as regards heirs, where it has a particular function (this leads to their effects being grouped in a single article).*

*The divisibility of obligations after death is not a mode of obligation. The rule is division of the deceased's duties and rights under an obligation by operation of law between heirs.*

*The rule set out (in a rather surprising form, it should be noted) in paragraph 1 of article 1220 of the Civil Code forms both the general law and reflects common sense. The debtor may not require the creditor to accept partial satisfaction. The rule concerns satisfaction (cf. below, art. 1224-1).*

**Art. 1213**

An obligation is indivisible where it has as its object a subject-matter whose performance is not capable of division, either physically or conceptually.

*(art. 1217 C. civ., amended)*

**Art. 1214**

An obligation is indivisible, even if the thing or the act which forms its subject-matter is of its nature divisible, if the basis on which it is set out in the obligation renders it incapable of partial performance.

*(art. 1218 of the present Code)*

**Art. 1215**

Each debtor of an indivisible obligation is bound to the whole.

It is the same for each heir of a person who is bound by such an obligation.

*(art. 1222 and 1223 C. civ., amended.)*

**Art. 1216**

An heir of the debtor, if sued with respect to the totality of the obligation, may ask for time to join the other successors to the proceedings, as long as the debt is of such a nature that it cannot be discharged by him alone—in which case judgment may be given against him alone, subject to recourse by way of indemnity against his other co-heirs.

*(art. 1225 of the present Code)*

**Art. 1217**

Each heir of the creditor may require total performance of an indivisible obligation.

He may not alone grant a release relating to the totality of the debt; he may not alone receive the value of a thing in place of the thing itself. If one of the heirs has alone released the debt or received the value of the thing, his co-heir may not require the indivisible thing without giving credit for the share of the heir who has granted the release or who has received the value.

*(art. 1224 of the present Code)*

## Chapter V

# *Extinction of Obligations*

### **Art. 1218**

An obligation is extinguished:

- by satisfaction,
- by release of the debt,
- by set-off,
- by merger,
- by novation and prescription, which are covered by their own separate provisions.

## *Section 1*

### *Satisfaction*

(Articles 1219 to 1236)

#### **§ 1 General provisions**

##### **Art. 1219**

Satisfaction is the performance of the subject-matter of the obligation.

##### **Art. 1220**

Satisfaction presupposes a debt: where satisfaction has been given without being due, it is subject to a claim for restitution.

A claim for restitution is not allowed as regards natural obligations which have been discharged voluntarily.

*(art. 1235 of the present Code)*

##### **Art. 1221**

An obligation may be discharged by any person who has an interest in doing so, such as a co-debtor or a surety, and by those who act in the name of the debtor.

An obligation may even be discharged by a third party who has no personal interest in doing so, subject to the creditor's right to refuse the tender of performance if he has a legitimate interest in so doing. Outside this situation the third party may require reimbursement on the basis of contractual subrogation or by virtue of a personal recourse.

*(art. 1236 C. civ., amended)*

**Art. 1221-1**

Valid satisfaction may be given only by a person who has capacity, or is properly represented.

However, satisfaction by means of payment of a sum of money may not be claimed back from a creditor who has used it in good faith.

*(art. 1239 C. civ., amended)*

**Art. 1221-2**

Satisfaction must be made to the creditor or his representative.

Satisfaction which does not conform to the obligation is still valid if the creditor ratifies it or has benefited from it.

**Art. 1222**

Satisfaction made in good faith into the hands of the apparent creditor is valid.

In the case of satisfaction by electronic means, the creditor guarantees to the debtor the security of the proposed method of satisfaction.

**Art. 1223**

The creditor cannot be required to accept a thing different from that which is owed to him, whether the value of the thing offered is equal to it or even higher.

However, the parties may agree that satisfaction will be made by the delivery of a different performance.

**Art. 1224**

The debtor cannot require the creditor to accept partial satisfaction of a debt.

*(art. 1244 of the present Code)*

Even if it is capable of division, a debt must always be discharged as between the creditor and the debtor as if it were indivisible.

*Note: This makes use of the present article 1220 C. civ. (1st phrase) which reinforces the idea.*

**Art. 1224-1**

Unless it is indivisible, a debt is divided by operation of law between the heirs of the creditor and the debtor. They may claim performance of the debt or are bound to pay it only as regards the share which belongs to them, or in relation to which they are bound, as representing either the creditor or the debtor.

*Note: The first phrase sets out the principle of divisibility. The second, drawn from the present art. 1220 C. civ., develops it.*

**Art. 1225**

A debtor of a monetary obligation is liable only for the sum of money set out in the contract, unless it is a debt whose value is to be assessed.

**Art. 1225-1**

The amount of the sum due may also vary in accordance with an indexation clause. Such a clause must satisfy the requirements of the Monetary and Financial Code.

**Art. 1225-2**

The amount of an obligation to pay a sum of money may even be fixed other than in present units of currency, as long as the sum to be paid is calculated at the date of payment; and this must all satisfy the special rules provided by legislation.

**Art. 1225-3**

If the obligation attracts the payment of interest, whether under legislation or under a contract, the interest may be compounded if either an application is made to court or the parties make particular provision by agreement, provided that the application or the agreement relate to interest that has been outstanding for at least a complete year.

*(art. 1154 C. civ., amended)*

**Art. 1125-4**

However, overdue payments of income such as farm rents, other rents and arrears of perpetual or life annuities bear interest from the date of the claim or the agreement.

The same rule applies to claims for restitution in respect of fruits or interest paid by a third party to the creditor in discharge of the debtor.

*(art. 1155 of the present Code)*

**Art. 1226**

Payment in France of a sum of money due must be made in the money current there at the time. However, if an obligation arises under an international contract, or under a judgment, it is possible to provide that payment will be made in France in foreign currency.

**Art. 1226-1**

Satisfaction must be rendered in the place fixed by the contract. If the place was not so fixed, satisfaction which relates to specific and ascertained property must be rendered in the place where the thing which was its subject-matter was at the time when the obligation was undertaken.

Unless the court orders otherwise, maintenance payable under a court order must be paid at the place of domicile or residence of the person entitled to receive it.

Outside these situations, satisfaction must be rendered at the place of domicile or residence of the debtor.

*(art. 1247 of the present Code)*

**Art. 1226-2**

Satisfaction must be rendered as soon as the obligation becomes enforceable.

However, depending on the situation of the debtor and the needs of the creditor, a court may defer payment, or allow it to be made in instalments, for a period no greater than two years.

By a special, reasoned decision, a court may order that sums corresponding to deferred instalments will bear interest at a reduced rate (not lower than the legal rate of interest) or that any payments made will first be allocated to repayment of capital.

In addition, the court may make its decision on these matters subject to the debtor entering into whatever juridical acts may be necessary to facilitate or secure payment of the debt.

The provisions of this article do not apply to debts in relation to maintenance payments.

**Art. 1226-3**

A court order made under article 1226-1 suspends any enforcement procedures which have been initiated by the creditor. The interest payable or penalties incurred by reason of the delay cease to be payable during the period fixed by the court.

**Art. 1226-4**

Any contractual provision contrary to the provisions of articles 1226-1 and 1226-2 is struck out.

**Art. 1227**

A person who has a duty to provide specific and ascertained property is discharged by the delivery of the thing in its present state at the time of delivery, provided that any deterioration in it is not a consequence of his action or his fault, nor of those persons for whom he is responsible, and as long as he was not already on notice to perform before the deterioration.

*(art. 1245 of the present Code)*

**Art. 1227-1**

If a debt relates to a thing which is determined only by its kind, the debtor shall not be bound to provide the best thing of that kind in order to be discharged; but he may not offer the worst.

*(art. 1246 of the present Code)*

**Art. 1227-2**

The costs of satisfaction are borne by the debtor.

*(art. 1248 of the present Code)*

## § 2 Allocation of payments

### Art. 1228

The debtor of a debt which carries interest or is in arrears may not, without the consent of the creditor, allocate a payment he makes to the capital in preference to the arrears or interest. Payment is attributed to both capital and interest but if payment is incomplete it is first allocated to interest.

*(art. 1254 of the present Code)*

### Art. 1228-1

A debtor who owes more than one debt has the right at the time of payment to declare which debt he intends to discharge.

*(art. 1253 of the present Code)*

### Art. 1228-2

Failing allocation by the debtor, the parties may by agreement make provision for the allocation of payments in respect of a debt. If the allocation is made on a receipt delivered by the creditor, its reception by the debtor does not raise a presumption that he accepts it.

### Art. 1229

Failing allocation in the ways set out above, a payment must be allocated according to the following provisions:

1. Where the debtor is liable in respect of both overdue and not overdue debts, payment is allocated first to the former.
2. If more than one debt is overdue, payment is allocated first to the debt which the debtor has the greatest interest in discharging.
3. If the debts are of a similar kind, payment is allocated to the oldest; if they are of the same age, the allocation is pro rata.
4. If the allocation is made only to debts which are not outstanding, rules 2 and 3 must be followed.

### Art. 1230

In the case of multiple debts, allocation to any of them follows the rule in article 1228, if necessary.

## § 3 Proof of satisfaction

### Art. 1231

Satisfaction may be proved by all forms of evidence.

### Art. 1232

A voluntary delivery by the creditor to the debtor of the original signed instrument, or of the court order, raises a presumption that the debt has been released or satisfied, subject to proof to the contrary.

Delivery to one of two or more joint and several debtors of the original signed instrument, or of the court order, has the same effect in favour of the co-debtors.

**Art. 1232-1**

The re-delivery of a thing that was given as security is not sufficient to raise a presumption that the debt has been released.

*Note: These provisions correspond to the present articles 1282, 1283, 1284 and 1286, which appear in the section dealing with release of a debt. However, they seem to relate more to release of the debtor, where they create a presumption. Therefore, they are put together with satisfaction and its proof.*

**§ 4 Deposit with a public depositary together with an offer of satisfaction, and notice to perform**

*Note: The (long) title emphasises the link between deposit with a public depositary, offer of satisfaction, and notice to perform.*

**Art. 1233**

Where the creditor refuses to accept performance on the due date, the debtor may place what is due in the custody of a person authorised to receive it.

Such a deposit constitutes satisfaction (1) if it fulfils the latter's conditions. (2) The debtor is discharged as set out below.

*Notes:*

*(1) The general rule of the civil law is placed first.*

*(2) This general reference avoids the need to set out conditions 1 to 5 of article 1258 of the present Code.*

**Art. 1234**

The debtor must notify the creditor that he has made the deposit as an offer of satisfaction in accordance with any agreed conditions.

**Art. 1234-1**

Where the thing which is deposited is a sum of money, the debtor is discharged, as to both capital and interest, if, at the end of a period of two months from the notification to the creditor personally, the creditor has not challenged the offer of satisfaction.

**Art. 1234-2**

If the notification was not made to the creditor personally, the debtor may bring proceedings to ask the court entrusted with enforcement to declare that the effect of his offer of satisfaction was to discharge him, subject to the right of the creditor to demand its withdrawal.

**Art. 1235**

Where the thing which is deposited is property other than a sum of money, the offer of satisfaction gives formal notice to the creditor, within a period of two months from the notice, either to receive the thing that has been deposited, or to challenge the offer.

*(Note: Distinctions in the conditions for notification are not repeated, but this has no serious consequences)*

**Art. 1235-1**

If the creditor has not within that period taken one or other course of action, the debtor may obtain permission from the court entrusted with enforcement, at a hearing at which the creditor was heard or of which he was given notice, to arrange for the sale by public auction of the thing which was deposited, and the price paid for the thing is deposited to the account of the creditor, after deduction of the costs of the sale.

Until that moment, the deposited thing is at the creditor's risk.

**Art. 1236**

Notification of the offer does not stop time running for the purpose of prescription.

On expiry of the prescription period, the debtor may require restitution of the thing that he had deposited.

After that date, no application may be made to set aside the order which discharged the debtor.

*Note: The offer of satisfaction constitutes a formal acknowledgment of the debt. However, the debtor is obliged to follow the procedure for forced payments since the creditor is not willing to accept performance. In such a case, it does not seem to be surprising to say that a prescription period, already underway, is not interrupted.*

## *Section 2*

### *Release of Debts*

(Articles 1237 to 1239-1)

**Art. 1237**

Release of a debt is a contract by which the creditor discharges the debtor from his obligation with the latter's express or implied agreement.

**Art. 1238**

The release of one of two or more joint and several debtors discharges all the others, unless the creditor has expressly reserved his rights against them.

In the latter situation, he may sue for satisfaction only after deduction of the share of the party whom he has released.

**Art. 1239**

Release of a debt granted to a principal debtor discharges any sureties; but a release granted to a surety does not discharge the principal debtor.

**Art. 1239-1**

Discharge of one of several sureties does not discharge the others.

If the sureties are joint and several, the others remain liable only to the extent which remains after deduction of the share of the co-surety who has been discharged.

Anything received from a surety in return for the discharge of his suretyship obligation must be set against the debt and pro tanto discharges the principal debtor and the other sureties.

## *Section 3*

### *Set-Off*

(Articles 1240 to 1247)

**Art. 1240**

Where two persons owe each other debts, the two debts are extinguished by set-off, up to the limit of the lower of the two, in accordance with the rules set out below.

#### **§1 Set-off in general**

**Art. 1241**

Set-off can be effected by operation of law, by order of the court, or by contract.

**Art. 1241-1**

Set-off is effected by operation of law only in the case of two mutual fungible debts which are both liquidated and enforceable.

*Note: The four essential conditions are put together. The term fungible is here appropriate; 'fungible or of the same generic kind', the definition in passing is important, and 'generic kind' is better than 'form'.*

Debts are fungible where their subject-matter is a sum of money or a certain quantity of things of the same generic kind.

Debts whose subject-matter is generic and whose price is fixed in a regulated market may be set off against sums which are liquidated and enforceable.

*(art. 1291 C. civ., amended)*

**Art. 1241-2**

A period of grace for payment does not prevent set-off.

**Art. 1242**

All debts may be set off against each other, whatever their legal grounds, save only for maintenance debts and other non-distrainable debts.

*Note: 'may be set off' emphasises that this depends on the nature of the debt.*

**Art. 1243**

A claim for set-off by operation of law must be raised by the debtor in the action brought against him. In such a situation, the debts are extinguished as far as their respective values correspond, at the moment when they are both in existence together with the necessary attributes.

**Art. 1243-1**

A surety may take advantage of set-off as regards the debts owed by the creditor to the principal debtor; but the principal debtor may not take advantage of set-off as regards the debts owed by the creditor to the surety.

A joint and several debtor may not take advantage of set-off between his creditor and one of his co-debtors.

*(art. 1294 of the present Code)*

**Art. 1244**

If a right under an obligation, which is capable of being set off, is assigned to a third party, the debtor of the obligation which has been assigned may take advantage of the set-off against the assignee unless he has expressly renounced in writing the right to do so.

*Comment: In harmony with article 1257.*

**Art. 1244-1**

There can be no set-off between two rights arising under obligations if one becomes unavailable by reason of having been enforced before the reciprocal right becomes liquidated and enforceable.

**Art. 1245**

In the case of more than one debt owed by the same person and liable to set-off, the same rules are used for set-off as for the allocation of payments under article 1228-1.

*(art. 1297 of the present Code)*

**Art. 1245-1**

In enforcing the right to the obligations in respect of which he did not take advantage of set-off, a person who has paid a debt which was liable to set-off may not take advantage of charges or mortgages attached to it to the prejudice of third parties, unless he had good reason for being unaware of the right to the obligation which could have been set off against his debt.

*(art. 1299 of the present Code)*

**Art. 1246**

Set-off may be taken advantage of in court proceedings by a party who has a right under an obligation which is not yet liquidated and enforceable on condition (in the latter case) that the court is able to declare that the delay set for its enforcement has expired. Set-off takes effect at the date when the counter-claim is made.

**Art. 1246-1**

Set-off by order of the court follows in other respects the rules set down for set-off by operation of law.

**Art. 1247**

The parties may agree to extinguish their mutual debts. Such set-off takes effect only on the date of their agreement.

**§ 2 Set-off of connected debts**

**Art. 1248**

In the case of two connected debts, the court may refuse a request for set-off only if one of them does not satisfy the requirements of being liquidated and enforceable.

**Art. 1248-1**

Transmission or attachment of one of two or more connected rights under obligations does not prevent set-off.

## *Section 4*

### *Merger*

#### (Articles 1249 and 1250)

**Art. 1249**

Where the same person becomes both creditor and debtor of the same obligation, there is a merger by operation of law which extinguishes the obligation absolutely.

*(art. 1300 of the present Code)*

**Art. 1250**

A merger which takes place in relation to the principal debtor benefits his sureties.

A merger which takes place in relation to a surety does not cause the principal obligation to be extinguished.

A merger which takes place in relation to one of two or more joint and several debtors enures to the benefit of the others only in relation to his share of the debt.

## Chapter VI

# *Transactions Relating to Rights Under Obligations*

### *Section 1*

### *Assignment of Rights Under Obligations* (Articles 1251 to 1257-1)

#### **Art. 1251**

Assignment is a contract by which the creditor (the assignor) transfers the whole or part of his rights under an obligation to a third party (the assignee) by sale, gift or by some other disposition.

#### **Art. 1252**

Both existing rights and rights yet to come into existence may be assigned. In the case of assignment of a future right, the instrument must include details enabling the assigned right to be identified when the time comes.

#### **Art. 1253**

On pain of nullity, an assignment must be effected in writing, without prejudice to the situations where the execution of a publicly authenticated document is required.

#### **Art. 1254**

Unless they otherwise agree, as between the parties the execution of the instrument is sufficient of itself to effect the transfer of the right.

From that moment, the transfer of the right is deemed to take place as regards third parties, and can be relied on against them without further formality. In the event of a challenge by the latter as to the date of the assignment, the burden of proof of its accuracy lies on the assignee, who may establish it by any form of evidence.

*(cf. art. 1689 C. civ.)*

*Note: The rule is the same, between the parties and against third parties. Drawing these together underlines the similarity, a notable innovation of the provision.*

#### **Art. 1254-1**

However, the transfer of a future benefit takes effect only on the day when it comes into existence, as between the parties as well as as against third parties.

**Art. 1254-2**

An assignment may be relied on against the debtor only once it has been notified to him by the assignor or the assignee in written or electronic form.

**Art. 1254-3**

Priority between successive assignees of the same right under an obligation is accorded to the earliest in time. Proof of the time may be established by any form of evidence.

**Art. 1255**

In the absence of contrary provision, assignment of the right under an obligation includes its accessory rights, such as to a guarantee, charge or mortgage; the assignee may take advantage of these without any further formality.

*(art. 1692 C. civ., amended)*

**Art. 1256**

The assignor of a right under an obligation must guarantee its existence at the time of the transfer, even if it is made without guarantee.

*(art. 1693 of the present Code)*

He is not answerable for the solvency of the debtor unless he has undertaken to be so, and then only up to the value of the sum he was able to obtain for the assignment.

*(art. 1694 of the present Code)*

Where he has promised to guarantee the solvency of the debtor, the promise extends only to his current solvency; it may be extended as to the future, but only if the assignor has expressly so specified.

*(art. 1695 C. civ., amended)*

**Art. 1257**

Where he agrees to an assignment by a written document, the debtor may expressly waive the right to raise against the assignee all or some of the defences that he could have raised against the assignor.

In the absence of such agreement the debtor may raise against the assignee all the defences inherent in the debt, including its non-assignability, as well as any dispute resolution clauses.

He may take advantage, as against the assignee, of the set-off of connected debts which arose in his dealings with the assignor.

As against the assignee he may also rely on the extinction of the debt on any ground which arose before the date on which the assignment became capable of affecting him.

**Art. 1257-1**

A right under an obligation may be assigned by way of guarantee, without charging any price. The assigned right reverts to the assignor where the assignee has had his own rights satisfied or the guaranteed obligation is extinguished on some other ground.

## Section 2

### Personal Subrogation

(Articles 1258 to 1264-2)

#### Art. 1258

Subrogation to the rights of a creditor in favour of a third party who discharges a liability takes effect, either by operation of law or by contract, by placing the substitute creditor in the position of the original creditor.

*(art. 1249 C. civ., amended)*

*Note: The definition proposed in article 1258 of the Reform Proposals may seem too academic and too abstract. It is clear that it is seeking to show that—as is accepted today—subrogation conceals an assignment. But it does not really highlight the fact that, at its root, subrogation remains a particular way of satisfying the obligation (the traditional viewpoint which has been masked by having separated this provision from those on satisfaction). Moreover, it is not self-evident that, whether operating by law or by agreement, subrogation is always a mechanism which works to the benefit of the party who satisfies the obligation. The initial satisfaction of the obligation, triggering a benefit in favour of the party who advances the payment by way of discharge, is a central element in all cases. It is the key to the mechanism of subrogation. It is right that it should appear at the forefront of the headline definition. And it is in its rightful place in the present article 1243 of the Civil Code. It is the natural habitat of subrogation. This basic framework runs through all of its applications: the ‘benefit’ for the one who advances the funds. Incidentally, the transfer of the right under the obligation (which is a common consequence) is given real significance in article 1262 of the Reform Proposals (it would be a needless repetition to keep article 1258 of the Proposals). On the other hand, it is no doubt no bad thing, in the very first article, to show that personal subrogation, a term of deep legal significance, completes the substitution of one creditor for another in the contractual relationship (a common term, immediately understood).*

*N.B. We prefer to speak of the ‘subrogated creditor’ rather than ‘the subrogated person’, by way of contrast with the ‘original creditor’.*

#### Art. 1259

Subrogation takes place by operation of law:

- (1) in favour of a person who, being bound with others or on behalf of others to satisfy a debt, had an interest in discharging it;
- (2) in favour of an heir who has paid from his own funds the debts owed by the estate;
- (3) in favour of a person who, being himself a creditor, pays another creditor whose right is prior to his own;
- (4) in favour of the purchaser of a building who applies the purchase price to the discharge of creditors in whose favour the building was mortgaged.

Subrogation takes place also in certain situations set out in particular legislative enactments.

*(art. 1251 C. civ., amended)*

*Note: Recommendations which give a more logical presentation:*

*a) subrogation by operation of law before subrogation by agreement;*

*b) the general law applicable (art. 1259 C. civ.) before special legislative rules;*

*c) in the list in article 1259, the third item in the present Code is promoted to the top of the list: this is the normal, most straightforward case and in practice the most important.*

#### **Art. 1260**

Subrogation by agreement takes effect on the initiative of the creditor where, on receiving satisfaction from a third party, the creditor substitutes the third party for himself as against the debtor.

This type of subrogation must be express.

It must be agreed upon at the same time as the satisfaction, unless, in an earlier juridical act, the party who subrogates has indicated his intention that the other contracting party should be subrogated to him at the time of satisfaction. The co-existence of the subrogation and the satisfaction may be proved by any form of evidence.

*Note: The form of words proposed here remains very close to article 1250(1) of the present Civil Code. It emphasises the initiative of the creditor whose interest is paid off by a third party.*

#### **Art. 1261**

On the same conditions, subrogation by agreement takes place on the initiative of the debtor where the latter, borrowing a sum of money in order to satisfy his debt, subrogates the lender to the creditor's rights with the latter's consent. In this case, the receipt given by the creditor must indicate the source of the funds.

Subrogation may even be agreed by the debtor without the consent of the creditor, but only where the debt has fallen due or the period for payment was set for the debtor's benefit. On pain of nullity of the subrogation, the loan and the receipt must be established by an instrument with a set date; it must be declared in the instrument of loan that the sum has been borrowed in order to have the debt satisfied, and in the receipt that the satisfaction has been effected from funds provided for this purpose by the new creditor.

*Note: 'even' is significant, since the preceding paragraph is also concerned with subrogation on the initiative of the debtor.*

#### **Art. 1262**

Subrogation transfers to its beneficiary, up to the limit of the satisfaction which he has rendered, the right under the obligation and its ancillary rights, including the benefit of securities guaranteeing it. A subrogated creditor enjoys all the legal rights and rights of action linked to the rights under the obligation which formerly belonged to the initial creditor, apart from rights which belonged to him only personally.

#### **Art. 1263**

However, subrogation cannot prejudice the creditor where he has received satisfaction only in part; in this situation, he may exercise his rights, as regards what still remains outstanding to him, in priority to the person from whom he has received only partial satisfaction, unless the parties agree otherwise.

*(art. 1252 C. civ., amended)*

#### **Art. 1264**

Where subrogation is agreed by the creditor, the transfer of the right under the obligation becomes enforceable against the debtor only from the moment when the debtor is informed of it.

#### **Art. 1264-1**

As against a subrogated creditor, the debtor may raise all the defences inherent in the debt itself, including the prohibition on assignment of the obligation and dispute resolution clauses, and may rely on the right to set off related debts which arise in his dealings with the original creditor.

He may also rely on the extinction of the debt on any ground which arose before subrogation or, in the case of subrogation with the consent of the creditor, before the date on which he was informed of it.

#### **Art. 1264-2**

Subrogation may be relied on as against third parties from the time of the satisfaction which gave rise to it. This effect extends, without the requirement of any further formality, to the transfer of security guaranteeing the obligation.

Where subrogation is effected with the agreement of the creditor or by the debtor with the consent of the creditor, there is no requirement that the instrument have a set date. In case of dispute, the burden of proof of the date lies on the subrogated creditor, who may establish it by any form of evidence.

## *Section 3*

## *Novation*

### **(Articles 1265 to 1274)**

#### **Art. 1265**

Novation is a contract which has as its subject-matter the substitution of one obligation (which it extinguishes) with a different obligation (which it creates).

*Note: Novation is always a contract, although it is not always between the creditor and the debtor of the original obligation. Between that obligation and the new one there is always some difference. It seems better to have these two terms in the opening definition, as well as the verbs 'extinguish' and 'create'.*

**Art. 1266**

Novation takes place in three ways:

- (1) where a new debtor is substituted for the old, who is discharged by the creditor;
- (2) where, in consequence of a new undertaking, a new creditor is substituted for the old, as against whom the debtor is released;
- (3) where the debtor contracts with his creditor for a new debt which takes the place of the old, which is extinguished. In this situation, there is a novation, regardless of any particular difference between the old and the new obligations.

*Note: This is essentially the same as article 1271 of the present Code, 'the rock'.*

**Art. 1267**

Novation is effected only if the old and the new obligations are both valid, unless it has expressly as its subject-matter the substitution of a valid undertaking for an undertaking which was tainted by a defect.

**Art. 1268**

Novation cannot be implied. The intention to effect it must be shown clearly in the instrument.

*(art. 1273 of the present Code)*

**Art. 1269**

Novation by substitution of a new debtor may take place without the consent of the first debtor.

*(art. 1274 of the present Code)*

*Note: One may notice that the first debtor is not a party to the novation, but that the novation is still a contract.*

**Art. 1270**

Novation by substitution of a new creditor may take place if the debtor has agreed in advance that the new creditor will be appointed by the old.

In case of dispute about the date of the novation, the burden of proof lies on the new creditor, who may establish it by any form of evidence.

**Art. 1271**

Extinction of the old obligation extends to all its ancillary rights and obligations, including the securities which guarantee it, as long as these have not been, and are not, expressly preserved by the agreement of all those interested.

*Note: This is new. As a general provision, it is welcome. The principle which it sets out shows that the provisions which follow constitute its application.*

**Art. 1272**

A novation entered into between the creditor and one of two or more joint and several debtors discharges the others.

*(art. 1281 para. 1 of the present Code)*

**Art. 1273**

In this situation, any real security which guarantees the old obligation may be preserved only over the property of the party who undertakes the new obligation, unless such a co-debtor otherwise agrees.

*(art. 1280 of the present Code)*

**Art. 1274**

A novation entered into between the creditor and a surety does not discharge the principal debtor. Nor does it discharge the other sureties, unless the contract otherwise provides.

*Note: This provision reproduces exactly the 'latest case-law'.*

## *Section 4*

### *Delegation*

(Articles 1275 to 1282)

**Art. 1275**

Delegation occurs where, on the order of one person (the delegator) another person (the delegate) undertakes in favour of a third party (the beneficiary of the delegation\*), who accepts him as debtor.

*Note: \*An essential element of delegation, the undertaking of the delegate in favour of the beneficiary, and the acceptance by the latter of the delegation, must appear in the initial definition.*

**Art. 1276**

Delegation is valid even if the delegator is not a debtor of the beneficiary, and if the delegate is not a debtor of the delegator.

**Art. 1277**

In accordance with the determination of the parties, delegation has as its subject-matter one of the following transactions.

**Art. 1278**

Where the delegator is debtor of the beneficiary and the latter releases him expressly, delegation effects a change of debtor.

Such a delegation confers upon the beneficiary a direct, independent right against the delegate, who may not raise against him any defences of which the delegator could have availed himself.

**Art. 1279**

Where the delegator is debtor of the beneficiary and the latter does not release him expressly, this simple delegation provides the beneficiary with another debtor with the status of principal debtor.

Where the delegation is made in order to provide the beneficiary with another debtor, performance by the delegate discharges the delegator.

**Art. 1279-1**

If the obligation of the delegate is a result of an undertaking which is expressly stipulated as independent, he may not raise against the beneficiary the defences of which the delegator could have availed himself, or which he could have raised himself against the delegator, in the absence of agreement to the contrary.

If the delegate, at the delegator's request, has promised to discharge the debt owed by the latter to the beneficiary, he may raise against the beneficiary the delegator's defences, in the absence of agreement to the contrary.

**Art. 1279-2**

Where the delegator is debtor of the beneficiary, he remains bound—even where the latter would have released him—if he has guaranteed the solvency of the delegate, or the delegate is subject to a procedure for cancellation of his debts at the time of the demand for satisfaction.

**Art. 1280**

Where the delegate is debtor of the delegator, it is for the parties to decide whether he should undertake to satisfy the beneficiary as to what he owes the delegator, or whether he should undertake in his favour an undertaking which is expressly stipulated as independent.

The ability to raise defences is governed by the rules set out in the preceding article.

**Art. 1281**

The delegate's undertaking in favour of the beneficiary renders the right under the delegator's obligations in favour of the beneficiary unavailable; it may not be assigned nor subject to distraint.

If there is a dispute about the date of the delegation, the burden of proof lies on the delegate, who may use any form of evidence to establish it.

Satisfaction rendered by the delegate in favour of the beneficiary discharges him in relation to the delegator.

All these provisions are subject to different agreement of the parties.

**Art. 1282**

A simple indication by the debtor of a person who should perform in his place does not constitute either novation or delegation.

The same is true of a simple indication by the creditor of a person who should receive the performance on his behalf.

*(art. 1277 C. civ., amended)*

## Chapter VII

### *Proof of Obligations*

*Note: the general doctrine of proof applies to the whole of private law. Its natural place would be in the Preliminary Title of the Civil Code, a solution which is not now possible. The Title on Obligations can incorporate a large part—first because of the inherent generality of the subject-matter (within which are outlined the general law of juridical acts and juridically significant facts), and also to avoid upsetting the work of practitioners, an essential concern. It should be noted that many specific rules of proof are set out in the Code alongside the subject-matter with which they are concerned (descent, matrimonial property regimes, possession, etc). As things are, the best would be the enemy of the good. A spirit of pragmatism runs throughout.*

#### *Section 1* *General Provisions* (Articles 1283 to 1290)

##### **Art. 1283**

A person who claims the performance of an obligation has the burden of proving it.

In return, a person who claims to have been discharged must establish the satisfaction or the circumstances which have given rise to the extinction of his obligation.

*Note: Art. 1315 of the present Code. It is wise not to make any change to this text. The harmony between the Civil Code and the New Code of Civil Procedure (article 9) does not do any harm.*

##### **Art. 1284**

Proof of acts and facts which give rise to obligations may be established, following the distinctions set out below, by writing, by witnesses, by presumptions, by admission or by oath.

*Note: This introductory provision sets out the range of methods of proof, and introduces the idea that the rules for proof are not identical for juridical acts and for juridically significant facts; and that they may also differ from one form to another.*

*The reference to acts and facts which give rise to obligations is an allusion to the very first article of the Title on Obligations (article 1101).*

*The reference to proof by writing introduces the following article, in which (with a simple inversion) the equivalent formula 'written proof' appears (an opportunity to be taken to include a synonym).*

**Art. 1285**

Proof by writing, or written proof, results from a series of letters, characters, numbers or any other signs or symbols with an intelligible meaning, whatever be their medium or their means of transmission.

*Note: The definition of proof by writing comes immediately after the list of the different forms of proof. This definition is necessary because of the inclusion of writing in an electronic form—and this requires clarification. The definition of the other forms appears in the provisions which concern them, and from which they cannot be separated.*

*The doubling-up proposed by the contributors to the Reform Proposals is interesting, but the advantage of repeating with only a slight qualification (by inversion of the words used) the terms of the existing article 1316 is, on the one hand, as we have already seen, to confirm the identity of proof by writing and written proof; and on the other hand to make a link with the preceding article.*

**Art. 1285-1**

Writing in electronic form is admissible as evidence on the same basis (and has the same probative force) as writing on paper, provided that it is possible properly to identify the person from whom it originates and that it is created and stored in such circumstances as will guarantee its integrity.

*(art. 1316-1 of the present Code)*

**Art. 1286**

The signature which is required in order to complete a juridical act must identify the person who places it on the document. It demonstrates the consent of the parties to the obligations which arise from the act. Where it is placed on the act by a public official, it confers authenticity on it.

Where it is in electronic form, it should use a reliable process of identification, guaranteeing its link with the juridical act to which it is attached. The reliability of the process is presumed, in the absence of proof to the contrary, where the electronic signature is created, the identity of the signatory is ensured, and the integrity of the juridical act is guaranteed, in the circumstances fixed by decree in the *Conseil d'État*.

*(art. 1316-4 of the present Code)*

*Note: This group of four articles belongs here: (1) in order not to separate it from the core definition which it supplements; (2) if it is accepted that the rules concerning writing in electronic form do not apply solely to the proof of juridical acts, but have a general significance including, therefore, sometimes proof of facts giving rise to liability.*

**Art. 1287**

Proof of facts is at large and it may be established by any means.

Outside situations where legislation otherwise so determines, the weight of evidence is assessed by courts as they think right.

In case of doubt, the court takes the one more likely to be true.

*Note: The principle of the freedom of proof concerns traditionally juridically significant facts. Making it a principle common to juridical acts and juridically significant facts is not*

*compatible with the existence (and the necessary maintenance) of special restrictions on the proof of juridical acts.*

*It does not seem necessary to define 'proof', an elementary notion which is perfectly obvious when, on the contrary, every theoretical term is mired in controversy (truth of a fact or of an allegation? and so many other debates are possible).*

*A proposal concerning 'loyalty' in establishing proof also gives rise to many difficulties (something to be thought through further).*

*On the other hand, the reference to the inner conviction (here described in terms of 'thinking right' to prompt discussion), whilst putting aside legislative exceptions, could be useful—just as a provision on doubt and the balance of likelihood. The rule of the 'best legal right' runs through the law of proof in all its spheres (cf. proof of ownership).*

**Art. 1288**

Proof of juridical acts is subject to special rules concerning the form of proof by writing, the requirement of written proof, and the admissibility of oral evidence.

*Note: Laying down, as to their principles, the restrictions affecting the proof of juridical acts (as opposed to juridically significant facts), this provision identifies them and thereby introduces the subjects of Sections 2 and 3.*

**Art. 1288-1**

Presumptions, admissions and oaths are governed by general rules.

*Note: This refers to the rules of proof common to juridical acts and juridically significant facts. The aim is to introduce Section 4.*

**Art. 1289**

Contracts relating to proof are lawful.

However, they must neither remove nor weaken the presumptions set by legislation, nor must they modify the entitlement to rely on admission or oath, as provided by legislation.

Nor may they establish, in favour of one of the parties, an irrebuttable presumption resting on his own writing.

*Note: Since we open up the possibility of contracts relating to proof, it seems necessary to set the limits. This is what the new article [1289] proposes.*

*It will be noticed that the provision relating to tallies (article 1333 of the present Code) does not appear in this version of the Proposals. It is no longer in use.*

*As the contributors to the Reform Proposals suggest, the provisions regarding affirmation should no doubt be moved (articles 1338, 1339, 1340 of the present Code). That would free up the space of three articles in all.*

**Art. 1290**

The application by the courts of the rules of proof, and disputes relating to them, are governed by the New Code of Civil Procedure.

## *Section 2*

### *The Forms of Proof by Writing of Juridical Acts*

(Articles 1291 to 1305)

*Note: The present title, 'Written proof', is too general; certain provisions relating to written proof appear in Section 3. It is too vague: the legislative requirements set out here concern exactly, and only, the forms of proof by writing (and not the requirement of written proof. See Section 3).*

*The section could equally well be entitled 'The forms of written proof of juridical acts' (see below).*

#### **Art. 1291**

Proof by writing of a juridical act may be established by its being created in a publicly authenticated form or by signature.

#### **Art. 1292**

The act, whether publicly authenticated or just signed, constitutes proof as between the parties, even as regards what is set out in it in only declaratory terms, provided that the declaration has a direct relation with the transaction. Declarations which are not related to the transaction can have effect only as a beginning of proof.

*(art. 1320 of the present Code)*

#### **Art. 1293**

Where the law has not laid down other principles, and in the absence of a valid contract between the parties, the court settles conflicts between written evidence by deciding (using any form of evidence) which is the more convincing instrument, whatever its medium.

*(art. 1316-2 of the present Code)*

### **§ 1 Authenticated instruments**

*Note: There is a question of terminology. One can speak indifferently of an authenticated 'instrument' or 'document'. But 'instrument' is a prestigious term which suits public authentication well. The traditional use of the term is not misleading. So we can retain it. The problem is that the 'original instrument' which is referred to in relation to copies can be just a signed document (nothing is perfect). Practitioners are not misled by these similarities, with which they are familiar.*

#### **Art. 1294**

An authenticated instrument is one which has been received by public officials who have the right to draw up instruments in the place where the instrument was drafted, and with the required formalities.

It may be drawn up in an electronic medium if it is created and stored in the circumstances fixed by decree in the *Conseil d'État*.

*(art. 1317 of the present Code)*

**Art. 1294-1**

An instrument which is not authenticated by reason of the lack of authority or incapacity of the official, or a defect in its form, takes effect as a private written document, if it has been signed by the parties.

*(art. 1318 of the present Code)*

**Art. 1294-2**

An authenticated instrument constitutes conclusive proof of the contract which it contains, as between the contracting parties and their heirs or successors.

However, in case of a criminal complaint of forgery, the performance of the instrument alleged to be forged is suspended when the indictment is laid; and, where an allegation of forgery is made in other proceedings, the court may, in an appropriate case, make a provisional order suspending the performance of the instrument.

*(art. 1319 of the present Code)*

**§ 2 Signed documents**

**Art. 1295**

A signed document, acknowledged by the person against whom it is relied upon or deemed by the law to have been so acknowledged, has, as between those who have signed it and their heirs and successors, the same probative force as a publicly authenticated instrument.

*(art. 1322 of the present Code)*

**Art. 1295-1**

A person against whom a signed document is relied upon is required formally either to admit or to deny his writing or his signature.

His heirs or successors may simply declare that they do not recognise the writing or the signature of the person making them.

*(art. 1323 of the present Code)*

**Art. 1295-2**

In a situation where a party denies his writing or his signature, and where his heirs or successors deny that they recognise them, an assessment of its authenticity is ordered by the court.

*(art. 1324 of the present Code)*

**Art. 1296**

A signed document which embodies a synallagmatic contract is valid only if it has been made in as many originals as there are parties with a distinct interest.

One original is sufficient for all persons who have the same interest.

Each original must include a reference to the number of originals which have been made. However, the failure to refer to the fact that there are two, three (etc.) originals may not be relied upon by a party who has performed his part of the contract which is contained in the document.

These provisions do not apply to transactions entered into in electronic form.

*(art. 1325 C. civ., amended)*

**Art. 1297**

Proof of a juridical act by which one party alone undertakes towards another to pay him a sum of money or to deliver to him fungible property, must be given by an instrument which bears the signature of the one who undertook the obligation, as well as a statement, written in his own hand, of the sum or the quantity in both words and numbers. In case of a discrepancy between the two, the signed document is evidence of the sum written in words.

*(art. 1326 of the present Code)*

**Art. 1298**

Signed documents take effect against third parties only from the date when they have been registered, from the date of the death of the person who signed them (or of any one of multiple signatories), or from the date when their substance is established by instruments drawn up by public officials, such as records of sealing or of inventory.

*(art. 1328 of the present Code)*

**Art. 1299**

Written documents originating from a person who claims to be a creditor do not constitute proof of the obligation to which they refer, except in cases provided by legislation, custom or agreement.

In the latter two cases, the written documents have the force only of presumption and inference.

**Art. 1300**

A written document can be used as evidence against the person who wrote it; but one who wishes so to use it must take the whole document, not in part.

**Art. 1300-1**

Private ledgers and papers do not constitute evidence in favour of the person who wrote them. They are evidence against him: first, in any case where they expressly refer to the receipt of a payment; secondly, where they contain express mention that the note has been made in order to remedy the defect of evidence in favour of the person for whose benefit they refer to an obligation.

*(art. 1331 C. civ., amended)*

**Art. 1300-2**

Writing placed by the creditor at the end, in the margin, or on the back of an instrument which has always been in his possession is evidence, even though he has not signed or dated it, where it tends to show the discharge of the debtor.

The same is the case for writing placed by the creditor on the back, in the margin, or at the end of the duplicate of an instrument or a receipt, provided that the duplicate is in the debtor's possession.

*(art. 1332 of the present Code)*

**§ 3 Copies of instruments and formal acknowledgments**

**Art. 1301**

Where the original instrument is in existence, copies constitute evidence only of the contents of the instrument, of which production can always be required.

*(art. 1334 of the present Code)*

**Art. 1302**

Where the original instrument is no longer in existence, copies constitute evidence in accordance with the following distinctions:

1. Copies certified for enforcement or top office copies have the same probative force as the original. So have copies which have been made with the authority of a judicial officer, with the parties present or having been properly summoned, or those which have been made in the presence of the parties and with their mutual consent.

2. Copies which, without the authority of a judicial officer, or without the consent of the parties, and after the delivery of the copies certified for enforcement or top office copies, have been made as an official record of the document by the notary who has received it, or by one of his successors, or by public officials who, in that capacity, are authorised to hold official records, may, in case of loss of the original, be used as evidence where they are ancient.

They are considered as ancient where they are more than thirty years old.

If they are less than thirty years old, they can only serve as a beginning of proof by writing.

3. Where copies which have been made as an official record of a document were not made by the notary who received it, or by one of his successors, or by public officials who, in that capacity, are authorised to hold public records, they can serve—whatever their age—as only a beginning of proof by writing.

4. Copies of copies may, in an appropriate case, be considered simply as information.

*(art. 1335 of the present Code)*

**Art. 1303**

The transcription of a document into a public register can serve only as a beginning of proof by writing; and for this it is also necessary:

1. That it be clear that all the notary's records for the year in which the document appears to have been made have been lost, or that it is proved that the loss of the record of this document has been caused by a specific accident;
2. That there be a register, in proper order, on the part of the notary, which establishes that the document was made at the particular date. If, by reason of these two conditions being satisfied, proof by witnesses is admissible, it is necessary that those who were witnesses of the instrument, if they are still living, be heard.

*(art. 1336 of the present Code)*

**Art. 1304**

In case of loss of the original instrument, a faithful and durable copy of a signed instrument may suffice to prove its existence.

**Art. 1305**

A formal acknowledgment does not dispense with the requirement to produce the original document, unless its content is set out in detail in the acknowledgment.

Anything contained in the acknowledgment which goes beyond the original document, or which is different from it, has no effect.

However, if there are a number of identical acknowledgments, supported by possession, of which one dates back thirty years, the creditor may be excused from producing the original document.

*(art. 1337 of the present Code, re-used)*

## *Section 3*

### *The Requirement of Proof in Writing and Witness Evidence of Juridical Acts (Articles 1306 to 1313)*

*Note: The title in the present Code is not satisfactory. The proposed title fits the contents of the provisions of this section, which sets out first the requirement of written proof and then governs witness evidence.*

**Art. 1306**

Proof in writing is required for juridical acts which exceed a sum of money or a value fixed by decree.

No witness evidence is admissible from the parties to the document against or beyond its contents, nor of what may be alleged to have been said before, at the time of, or since the juridical act, even in the case of a lesser sum or a lower value.

This is all without prejudice to the legislative provisions relating to commercial transactions.

**Art. 1307**

The above rule applies to the situation where the action contains, in addition to the claim for capital, a claim for interest which, when added to the capital, exceeds the sum provided for in the preceding article.

*(art. 1342 of the present Code)*

**Art. 1308**

A person who has formulated a claim exceeding the sum provided for in article 1306 may no longer be heard by way of witness evidence, even if he reduces his original claim.

*(art. 1343 of the present Code)*

**Art. 1309**

Witness evidence in support of a claim for a sum even below that provided for in article 1306 is not admissible where such sum is declared to be the balance or to form part of a larger debt which is not proved by writing.

*(art. 1344 of the present Code)*

**Art. 1310**

If, in the same proceedings, a party makes a number of claims, none of them supported by a written instrument, and which, taken together, exceed the sum provided for in article 1306, witness evidence may not be given in support of them even where the party claims that his rights arise from different grounds and that they arose at different times, unless the rights arise from different persons by succession, donation, or otherwise.

*(art. 1345 of the present Code)*

**Art. 1311**

All claims, whatever their basis, which are not entirely justified by writing must be contained in the same writ; after this, other claims of which there is no evidence in writing are inadmissible.

*(art. 1346 of the present Code)*

**Art. 1312**

There is an exception to the above rules where there is a 'beginning of proof by writing'.

It is so called where there is writing, which suggests that the alleged fact is likely to be true and which originates from the party against whom the claim is made, or from his representative.

The court may accept as equivalent to a beginning of proof by writing, declarations made by one party in giving evidence, his refusal to reply, or his failure to appear to give evidence.

*(art. 1347 C. civ., amended)*

All other forms of evidence become admissible, but the beginning of proof by writing must be corroborated by at least one of them to complete the proof of the instrument.

*Note: The beginning of proof by writing cannot of itself constitute proof of the alleged transaction. It must be supplemented by a form of proof outside the writing which constitutes it.*

**Art. 1313**

There is a further exception to the above rules where one of the parties either could not physically or morally secure written proof of the juridical act, or has lost the instrument which constituted his written proof following an act of God or *force majeure*.

There is also an exception where one party or the depositee has not retained the original instrument and presents a copy which is a faithful and durable reproduction of it. Any indelible reproduction of the original which involves an irreversible change of medium is deemed to be durable.

*(art. 1348 C. civ., amended)*

## *Section 4*

### *Rules Specific to Presumptions, Admissions and Oaths*

(Articles 1314 to 1326-2)

#### **§ 1 Presumptions**

**Art. 1314**

Presumptions are the consequences that legislation or the court draws from a known fact about an unknown fact, holding the latter to be certain on the basis of the fact which renders it likely to be true.

*(art. 1349 C. civ., amended)*

**Art. 1315**

A legal presumption is one which is attached by a particular legislative provision to certain acts or certain circumstances, such as:

1. juridical acts which legislation declares to be a nullity, as presumed to have been made in fraud of its provisions from their nature alone;
2. situations in which legislation declares ownership or discharge as a consequence of certain defined circumstances;
3. the authority which legislation attributes to a judgment;
4. the force which legislation attributes to an admission made by a party, or his oath.

*(art. 1350 of the present Code)*

**Art. 1316**

The authority of a judgment applies only with respect to the subject-matter of the judgment. The subject-matter of the claim must be the same; the claim must have the same ground; the claim must be between the same parties, and brought by and against them in the same capacity.

*(art. 1351 of the present Code)*

**Art. 1317**

A legal presumption exempts the party in whose favour it has been established from proof of the fact to which it applies, where the fact which renders it likely to be true is certain.

No evidence is admissible against a legal presumption where, on the basis of this presumption, it nullifies certain juridical acts or prevents a legal action from being brought, unless the right to bring contrary evidence is reserved and with the exception of what will be said on oaths and judicial admissions.

*(art. 1352 C. civ., amended)*

**Art. 1318**

Presumptions which are not established by legislation are left to the wisdom and good sense of the court, which must allow only presumptions which are weighty and definite or corroborative, and only in the situations where legislation allows witness evidence, unless the juridical act is challenged on the grounds of fraud or deceit.

Such presumptions may always be rebutted.

*(art. 1353 C. civ., amended)*

**§ 2 Admissions**

**Art. 1319**

An admission which is relied on against a party may be extrajudicial or judicial.

*(art. 1354 of the present Code)*

**Art. 1320**

An allegation of a purely oral extrajudicial admission serves no purpose in any case where the claim is such that witness evidence would not be admissible.

*(art. 1355 of the present Code)*

The probative force of such an admission is determined by the court in its unfettered discretion.

**Art. 1321**

A judicial admission is a declaration made in court by a party or his special representative.

It constitutes conclusive evidence against the party who made it.

It may not be divided against him.

It may not be revoked, unless it is proved to have been made in consequence of a mistake of fact. It may not be revoked on account of a mistake of law.

*(art. 1356 of the present Code)*

### § 3 Oaths

#### Art. 1322

Judicial oaths are of two kinds:

1. One which is required by the court on its own initiative of one or other party;
2. One which one party requires of the other on which to make the outcome of the case depend: this is known as *decisive*.

*(art. 1357 of the present Code)*

#### Art. 1323

An oath may be required of one of the parties by the court on its own initiative, either to make the outcome of the case depend upon it, or simply to settle the value of the award.

The probative force of such an oath is determined by the court in its unfettered discretion.

*(art. 1366 of the present Code)*

#### Art. 1324

The court may require an oath on its own initiative in relation either to the claim or to a defence which is raised against it, only on the two following conditions:

1. The claim or the defence must not be conclusively established; and
2. It must not be completely lacking in evidence.

Apart from these two situations, the court must either accept or reject the claim outright.

*(art. 1367 of the present Code)*

#### Art. 1324-1

An oath required of one of the parties by the court on its own initiative cannot be required by that party of the other.

*(art. 1368 of the present Code)*

#### Art. 1324-2

An oath on the value of the claim may be required by the court of the claimant only where it is impossible by other means to establish the value.

In such a case the court must also establish the sum up to which the claimant will be believed in his oath.

*(art. 1369 of the present Code)*

#### Art. 1325

A decisive oath may be required on any matter in dispute.

*(art. 1358 of the present Code)*

#### Art. 1325-1

It may be required only as to a fact which is personal to the party of which it is required.

*(art. 1359 of the present Code)*

**Art. 1325-2**

It may be required at any stage of the proceedings, and even when there is no beginning of proof of the claim or of the defence in respect of which it is brought.

*(art. 1360 of the present Code)*

**Art. 1325-3**

A person of whom an oath is required, who refuses it or does not consent to refer it in turn over to his opponent, or the opponent to whom it is referred and who refuses it, must lose his claim or his defence.

*(art. 1361 of the present Code)*

**Art. 1325-4**

An oath may not be referred over to the other party where the fact to which it relates is not one common to the parties, but is purely personal to the one of whom the oath was initially required.

*(art. 1362 of the present Code)*

**Art. 1326**

Where the required (or referred) oath has been taken, the opponent cannot be heard to establish that it is false.

*(art. 1363 of the present Code)*

**Art. 1326-1**

The party who has required or referred an oath may no longer withdraw it where his opponent has declared that he is ready to take the oath.

*(art. 1364 of the present Code)*

**Art. 1326-2**

An oath constitutes evidence only in favour of the party who has required it, or against him, and in favour of his heirs and successors or against them.

However, an oath required by one of two or more joint and several creditors of the debtor discharges the debtor only in relation to that creditor;

an oath required of the principal debtor also discharges his sureties;

one required of one of two or more joint and several debtors benefits his co-debtors;

and one required of a surety benefits the principal debtor.

In the last two situations, an oath by a joint and several co-debtor or by a surety benefits the other co-debtors or the principal debtor only where it has been required in relation to the debt, and not in relation to the joint and several nature of the liability, or the fact of the suretyship.

*(art. 1365 of the present Code)*

## Sub-Title II

# Quasi-Contracts

(Articles 1327 to 1339)

### Art. 1327

Quasi-contracts are purely voluntary actions, such as the management of the affairs of another person without authority, payment of a debt which is not due or unjustified enrichment, which result in a duty in a person who benefits from them without having a right to do so, and sometimes in a duty in the person intervening to the person so benefited.

Notes:

*(1) Article 1370 reuses the existing basic structure of article 1371. The reference to a person whose actions confer a benefit renders the qualification of 'action' as 'human' superfluous. The duty of a person who benefits from these actions towards the person intervening comes first, for it is shared by all quasi-contracts (and is inherent in the notion itself) while the duty of the person who intervenes only sometimes arises (and in practice belongs to the law of management of another person's affairs). 'Management of the affairs of another person without authority' means without any mandate, nor any legislative or judicial status which confers a right to intervene in another person's affairs.*

*(2) So stated, article 1370 develops the definition sketched out in article 1101-2 paragraph 2 in the Title on the Source of Obligations.*

*(3) The common element of the two individual examples of quasi-contracts and the general doctrine of unjustified enrichment is a benefit received by a person who has no right to it (a criterion grouping them together suggested by Carbonnier).*

*(4) The provision's insistence that the management of another's affairs be 'without authority' is made in order to highlight a common element for all quasi-contracts, being without legal title, undue, or without a justification.*

*This is not to be understood with certainty as regards the section which is dedicated to the management of another person's affairs (but it could be thought that the chapter should be entitled 'Management without authority in the affairs of another person'. Why not?*

## Chapter I

# *Management of Another Person's Affairs*

### **Art. 1328**

Where a person takes on of his own accord another person's affairs without the latter's knowledge or opposition and without hope of reward, he is bound in accomplishing any juridical acts or physical action which this entails to all the obligations which he would have owed if he had enjoyed an express mandate to act.

*Note: The gratuitous nature of mandate is made out sufficiently from the fact that remuneration of the person managing another's affairs does not feature as one of the obligations of the person whose affairs are managed. The utility of the management is a condition of these obligations and this is made sufficiently clear in this context. The inclusion of physical actions is by this provision henceforth made standard.*

### **Art. 1328-1**

Such a person must continue to manage the other's affairs (and any related matters) until the latter or his heir is in a position to see to them himself or until he can rid himself of them without the risk of loss.

*Note: This reuses two provisions: art. 1372 and 1373 C. civ.*

### **Art. 1328-2**

The circumstances which led to a person taking on another person's affairs may justify a court in reducing the damages which would otherwise result from his deficient management.

*Note: This wording is very close to what is provided by article 1374 paragraph 2 of the present Code. This flexibility is worth keeping as it directs the court towards the various circumstances which can surround any intervention (its necessity, the thinking of the person intervening etc.).*

### **Art. 1328-3**

A person whose affairs have been managed usefully must fulfil any undertakings which the person intervening contracted in his name, compensate him for any personal undertakings which he took on, reimburse him for all useful or necessary expenses which he incurred, and account for any losses which he has suffered, though without any allowance being made for his remuneration.

*Note: 'usefully': this is the key word and is placed at the very beginning of the obligations of the person whose affairs have been managed, thereby subjecting them to a condition that his management was useful; the reference to 'losses suffered' is welcome.*

**Art. 1329**

The rules governing management of another's affairs apply in a similar way where this is undertaken in the common interest of himself and another person, rather than in the exclusive interest of such another person.

Where the former is the case, the burden of any undertakings, expenses or losses is shared in proportion to each person's interest.

**Art. 1329-1**

If the action of a person intervening does not fall within the requirements of the doctrine of management of another's affairs but does nevertheless result in an advantage to the person whose affairs are managed, the latter must compensate the person intervening according to the rules governing the doctrine of unjustified enrichment.

*Note: This takes up an interesting suggestion, though its formulation has been refined.*

## Chapter II

# Undue Payment

### Art. 1330

Where a person receives something which is not due to him, either knowingly or by mistake, he has an obligation to restore it to the person from whom he received it unduly.

*Note: This is the present wording of article 1376, a very clear, basic provision which fits squarely within quasi-contract.*

Nevertheless, no obligation to make restitution arises where the recipient establishes that the payment resulted from an intention to confer a gratuitous benefit, from performance of a natural obligation, or from any other justification.

*Note: This is an obvious addition, but even so appropriate, given that it creates consistency with various other provisions.*

### Art. 1331

Restitution may take place where the debt which justified payment has subsequently been annulled or retroactively terminated, or loses its justification in any other way.

*Note: Quare: does this provision go beyond the area of quasi-contract? It marks an extension of cases which belong to the doctrine of the nullity of contracts (notably as regards its sanctions). This extension is moreover at the moment a matter of dispute (Civ. (1) 24 September 2002, D 2003.369).*

### Art. 1332

Where a person by mistake or under duress\* has discharged another person's debt, the former can elect to be reimbursed either by the true debtor\*\* or by the creditor, except where as a result of payment the latter has cancelled his instrument of title or released any security.\*\*\*

*Notes:*

*\*This addition is now generally accepted.*

*\*\* The grant of this option is interesting.*

*\*\*\*The reference to the release of any security is also interesting.*

### Art. 1333

If a person who receives what is not due is in bad faith, he is bound to make restitution of the capital together with any interest or fruits accruing from the date of payment.

*(art. 1378 of the present Code)*

**Art. 1334**

If the thing which is unduly received consists of ascertained property, where it still exists its recipient must make restitution in kind, but where it has perished or deteriorated by his fault, then he must restore its value as at the date of making restitution; where its recipient received it in bad faith he must in addition guarantee the payor against loss even in the case of unavoidable accident.

*Note: This is the present text of article 1379 but with a reference to ascertained property (its present form refers to 'movable corporeal property' which could consist of generic property and is not appropriate in this context).*

**Art. 1334-1**

If a person sells a thing which he received in good faith, he must make restitution only of the price which he received for it; but where he was not in good faith, he must make restitution of its value as at the date of doing so.

*Note: This is the present wording of article 1380 with the addition of the contrary hypothesis of bad faith.*

**Art. 1335**

A person to whom restitution is made must account to its former possessor for all necessary and useful expenses incurred in looking after the thing, even where he possessed it in bad faith.

*Note: This provision is at present found in article 1381.*

## Chapter III

# *Unjustified Enrichment*

### **Art. 1336**

Any person who is enriched without justification at the expense of another person must indemnify the person who is thereby made the poorer to an amount equal to the lesser sum as between the enrichment and the impoverishment.

*Note: This traditional formulation found in the case-law seems to be preferable to 'to the extent of the correlative enrichment'.*

### **Art. 1337**

An enrichment is unjustified where the loss suffered by the person at whose expense it is conferred does not stem from his intention to confer a gratuitous benefit on the person so enriched, nor from the fulfilment of any obligation which he owes him under legislation, as a result of a court order, or under a contract, nor from the pursuit of his own purely personal interest.

*Note: This formulation, which expounds the title of the chapter itself, is simpler and clearer than the inverse way of putting the matter ('a benefit is not unjustified') and allows the cases of absence of justification to be grouped together.*

### **Art. 1338**

A person at whose expense a benefit is conferred has no action where another means of recourse available to him encounters a legal obstacle such as prescription\*, or where his detriment results from his own serious fault.\*\*

*Notes:*

\* *The subsidiarity of the action de in rem verso ('action in respect of benefits conferred') is here indicated by its principal effect.*

\*\* *Making an exception for serious fault is close to the position adopted by the case-law.*

### **Art. 1339**

The enrichment and the impoverishment are to be assessed as at the date of the claim. Nevertheless, where the person enriched was in bad faith, his enrichment shall be assessed at the time when he derived the benefit from it.

*Note: This final article is useful.*

## Sub-Title III

### Civil Liability (Articles 1340 to 1386)

# Preamble

*Geneviève Viney*

The purpose of this preamble is to give an account of the essential features of the discussions which took place within the working group charged with the drafting of Title IV of the Civil Code, 'Civil Liability'. Our intention is to explain the significance of the choices which were made on the most important issues. It is supplemented by notes and comments which accompany the text itself.

I. One of the difficulties facing the group consisted of deciding **the level of generality considered appropriate to be adopted in selecting provisions to be inserted into the Civil Code.**

(1) In particular, a view had to be taken on the issue whether it was appropriate to include certain **special regimes** of liability side by side with the general provisions which arise from what it is conveniently termed 'the general law'.

Opinion was very divided on this question. Certain members of the group expressed the view that these special regimes should have no place in the Civil Code and that the decision, taken in 1998, to insert the legislative provisions implementing the European Directive of 25 July 1985 on liability for defective products into this Code was regrettable; others instead emphasised that it is desirable that the Civil Code should reflect the characteristic tendencies of the modern law and that the legal provisions most frequently applied by courts should find a place there.

In the end, it was decided to leave outside the Civil Code most of the special regimes of liability or of compensation which are at present regulated by special legislation,<sup>1</sup> but not to recommend removing from it the existing articles 1386-1 to 1386-18<sup>2</sup> which the working group left untouched since the French legislator cannot in future amend these without the approval of the European institutions. On the other hand, the majority of the group declared itself in favour of the inclusion in the Code of provisions regulating the right to compensation of victims of motor-vehicle accidents, at the same time making important changes to these both at a formal and substantive level compared to the Law of 5 July 1985.

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<sup>1</sup> Notably, laws which govern the liability of airline companies for harm caused by their machines in the course of flight; the liability of operators of cable-cars for harm caused to third parties; the liability of operators of nuclear reactors, etc. It follows from this that other legislative provisions are also excluded, such as those governing compensation for accidents at work, harm caused by criminal offences or terrorist attacks, from transfusions of blood contaminated with the HIV virus, from asbestos, etc.

<sup>2</sup> This recommendation was not unanimous.

(2) Secondly, it was in relation to the regulation of **compensation for personal injuries** where it appeared difficult to reconcile the requirement of a clear and concise form of words with the desire to introduce the technical elaborations which were considered necessary to define the parties' rights and obligations. Notably, the list of losses attracting compensation (article 1379) and above all the list of the benefits supplied by a third party to a victim which may give rise to a right of recourse in that third party (articles 1379-5 and 1379-6) can appear as a rather inelegant construction. However, the first of these seems to be indispensable. The second reproduces the current provisions of article 29 of the Law of 25 July 1985 and article L. 131-2 of the Insurance Code and while it may be thought that one could simply cross-refer to these provisions directly, the majority of the members of the group decided that it was preferable for reasons of convenience to include them within the Code so that it would contain all the rules applicable to the issues of compensation of personal injuries, these being so important in practice.

II. Choosing a **structure** suitable for this material raised at once the question of **the respective places to be assigned to issues relating to contractual and to extra-contractual liability**. Was it necessary to keep the rules governing contractual liability in the place assigned to it by the draftsmen of the Civil Code? Or was it instead preferable to re-categorise all this material under a single heading entitled 'Liability'? The members of the working group, who were divided on this point, put this problem aside until they had settled the substantive legal issues. It was only after having drafted the whole area and having found that to a considerable extent the rules common to the two branches of liability prevailed over all of it that the majority of the group's members adopted the latter course of action.<sup>1</sup> A chapter entitled 'Introductory provisions' was then placed at the very beginning so as to govern the relationship between the two branches of liability.

Following this introductory chapter come two chapters dedicated respectively to the conditions (chapter two) and effects (chapter three) of liability, then a final chapter entitled 'The principal special regimes of liability or compensation'.

As regards the conditions of liability (chapter two), it was quite easily agreed that reparable losses, causation and defences are defined in the same way in the contractual and extra-contractual contexts and this leads to their being grouped together in section 1, entitled 'Provisions common to contractual and extra-contractual liability'. By contrast, the various actions which attract the imposition of liability were the object of distinct treatment so that as regards extra-contractual liability on the one hand, section 2 treats in turn 'liability for personal action', 'liability for the actions of things', 'liability for the actions of other people', 'liability for nuisance' and 'liability for dangerous activities', while, as regards contractual liability on the other hand, section 3 makes no similar division.

Chapter III is dedicated to the effects of liability: its first section entitled 'Principles' deals with (§1) 'reparation in kind'; (§2) general rules concerning the assessment and methods of compensation by way of 'damages'; and (§3) the

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<sup>1</sup> However, certain members remained hesitant as they considered that this way of arranging the law does not bring out clearly enough the special features of contractual liability.

circumstances in which two or more persons are liable. Its second section makes detailed provision as to the rules applicable to the reparation of certain categories of harm, that is, (§1) ‘personal injury’; (§2) ‘damage to property’; and (§3) delay in payment of sums of money. Its third section defines the legal position of agreements relating to reparation, whether they (§1) purport to exclude or limit it or (§2) set in advance a fixed sum of money. A final, very brief section is dedicated to the prescription period governing liability actions.

Chapter IV is dedicated to the special legislative regimes and is divided into two sections, one dealing with the compensation of victims of traffic accidents and the other liability for defective products.

**III. As regards matters of substance**, the members of the group did not seek to innovate in a systematic way. Instead, they have given formal expression to most of the solutions which have been worked out in the case-law to complete the highly elliptical provisions which appear in the present Civil Code. Nevertheless, the members of the group did not wish to limit themselves to recommending a mere ‘codification of established law’, as they considered that they ought to take a view on those finely balanced questions on which the courts are divided or academic writers do not agree. Nor did they hesitate to expunge legal provisions which appeared outdated<sup>1</sup> to them or even merely inappropriate,<sup>2</sup> nor to introduce new provisions where they appeared suitable to adapt the positive law to the demands of modern life.<sup>3</sup>

In this preamble we shall confine ourselves to drawing attention to the most striking positions which we have adopted.

#### **(1) The position of the group on the concept of contractual liability**

It is well known that a recent line of thinking in legal scholarship denies the idea that contractual damages should be linked to the concept of liability.<sup>4</sup> Those writers who defend this point of view consider that these damages constitute merely a kind of performance of contractual obligations, and this leads them to deny that there should be a requirement of harm for their award and to propose that all court orders which do concern reparation for the harmful consequences of contractual non-performance should be governed by the extra-contractual regime.

This way of looking at things, which is contradicted by a large majority of the case-law, has not attracted the adherence of the majority of legal scholars and it was not adopted by the members of the working group. Indeed, they considered that an

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<sup>1</sup> As in the case of liability of an artisan for the actions of his apprentices at present provided for by article 1384 paragraph 6 or liability of an owner of a building for harm caused by a failure in its maintenance or defect in its construction stemming from article 1386.

<sup>2</sup> As in the case of the legal provision inserted as art. 1384 para. 2 by the Law of 7 November 1922.

<sup>3</sup> For example, those provisions which figure in articles 1358, 1360, 1362, 1371, 1373 and 1379-7 of the Reform Proposals.

<sup>4</sup> For a particularly complete review of this doctrinal position, see Philippe Rémy, “La responsabilité contractuelle”: histoire d’un faux concept’, *Rev. trim. dr. civ.* 1997. p. 323. This position was first developed by Philippe le Tourneau. It was then taken up by Denis Tallon.

unsatisfied creditor of a contractual obligation must keep the advantage of obtaining reparation for the harm which non-performance has caused him as well as his right to demand performance or to claim retroactive termination of the contract. The third of these three routes appeared to them entirely independent of the other two, both as regards the conditions required of a claimant for its use and the results which it may entail. It is the only route which guarantees a creditor against the harmful consequences of a contractual failure to perform and it forms an indispensable part of his protection. Moreover, its purpose in compensating a claimant and the fact that it results from non-performance—that is to say, an act which is, in a broad sense, unlawful—allow it to be attached to the concept of liability without denying that the regime which governs it possesses special features which are to be explained by the desire to protect the expectations of the parties and to avoid distorting the nature of the contract.

(2) Nevertheless, the group's decision to accept the genuine nature of contractual liability leads to a daunting problem facing the law, the problem of the **relationship between the two regimes of liability, contractual and extra-contractual.**

Traditionally, French law prohibits what is called the 'accumulation' of regimes of liability, that is to say in reality, the possibility for a victim of a contractual harm to choose the application of the delictual regime instead. In order to justify this ban, reliance is generally placed on the fact that to allow the rules governing this branch of liability to apply as between parties to a contract would risk frustrating their expectations and rendering the terms of their contract of no effect.

The members of the working group were divided on the appropriateness of giving formal recognition in the Code to this 'rule against accumulation' which is not found in the majority of foreign laws. Nevertheless, it was decided by a majority to write it into the Code in a new article 1341, though also providing a very important exception for the benefit of victims of personal injuries as it appeared desirable to allow the latter to opt for whichever regime is more favourable to them as long as they are in a position to establish the circumstances required to justify the type of liability on which they rely.

In its turn, article 1342 provides for the situation where non-performance of a contractual obligation causes harm to a third party. At present, the courts tend to recognise liability in a contractual debtor very widely here, but they remain particularly unsure as to nature of the liability. The majority of decisions classify liability here as 'delictual' or 'extra-contractual', and do not hesitate to declare that a mere failure in performance of a contract is enough to establish delictual fault or an 'act of a thing' as long as it has caused harm to a third party. Nevertheless, where ownership of a thing has been transmitted down a chain of contracts, its acquirer becomes endowed with a 'direct and necessarily contractual action' against all the earlier members of the chain of distribution. Furthermore, in some cases, the *Cour de cassation* has held that a contractual safety obligation benefits not merely its contractual creditor, but also any third party, without making clear in doing so whether the third party victim's claim is subjected to the contractual or to the extra-contractual regime. These solutions reveal therefore the uncertainty of the courts on this question, an uncertainty which is moreover felt equally by legal

scholars, legal writers showing themselves rather at a loss to put forward a consistent approach for the resolution of these problems.

This is why it appeared so absolutely necessary that these uncertainties should be removed.

In order to do so, the members of the group proceeded from two starting points.

First, the tendency in many cases to hold a debtor liable to third parties to whom he has directly caused harm by his contractual failure to perform reflects an aim which seems fair and which is, moreover, supported at a theoretical level by the law's acceptance of the principle of the 'opposability of contracts.' This is the reason why formal recognition was given to this liability by an express provision (found in article 1342 paragraph 1).

On the other hand, it is clear that subjecting liability in this situation to the extra-contractual liability regime risks frustrating the expectations of the parties by not applying any contract terms which are seen as incompatible with this regime (notably, those which exclude or limit a party's obligations or liability or which choose the competent jurisdiction or applicable law) while at the same time giving third parties who rely on the contract to ground their claim a more advantageous position than the creditor himself. This seems particularly anomalous.

The difficulty therefore stems from applying the extra-contractual regime to a third party's claim. Now, this application is usually justified by invoking the famous principle of 'the relative effect of contracts', but actually it is not required by article 1165 of the Civil Code at all. Drawing on the numerous important studies which have been dedicated to this principle, it becomes clear that the significance of article 1165 is limited to two essential consequences: at the stage of the formation of the contract, it forbids contracting parties from binding third parties and, at the stage of performance, it reserves to the parties the right to demand performance. What it does not do is to make any requirement as to the proper regime of liability to be applied in the case of non-performance.

This being the case, practical considerations must be brought to bear in order to decide which regime should apply and these require **the compulsory application of the contractual regime wherever the basis of the action lies uniquely in the defendant's contractual failure to perform.** This is in fact the only way in which third parties can be made subject to all the restrictions and limitations which the contract imposes on a creditor in order to obtain reparation in respect of his own harm.

On the other hand, if a third party can prove that a contractual debtor has done something beyond his mere contractual failure to perform and this attracts extra-contractual liability there is no longer any reason to deprive him of an action whose purpose is to establish this liability.<sup>1</sup>

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<sup>1</sup> Certainly, this leaves the third party at an advantage as compared with the creditor, but this advantage seems normal since the third party has not consented to any limitations on his right to compensation which the creditor may have accepted. Moreover, he has suffered a harm against which he had no means of protecting himself.

These are the solutions which article 1342 paragraphs 1 and 2 of the Proposals recommend should be formally adopted.

(3) Another important characteristic of the provisions put forward lies in **the preferential treatment** which they clearly show **towards victims of personal injuries**.

This tendency can be seen in article 1341 whose second paragraph empowers a victim of personal injuries to choose the regime of liability which is most favourable to him or her, without falling foul of the rule against the ‘accumulation’ of contractual and extra-contractual liability.

It is also to be found in article 1351 which provides that any fault committed by a victim of personal injuries which has contributed to his own harm will not count against him so as to cut down his right to reparation unless it is ‘serious’.

This tendency also lies behind article 1373’s denial of any power in the courts to reduce a claimant’s compensation on the ground of his refusal to accept treatment, even where the latter is of a nature to limit the effects of his harm, and of article 1382-1 which forbids any contractual restriction on compensation for personal injury.

Finally, the arrangements for compensation for this type of harm put in place by articles 1379 to 1379-8 seem as a whole favourable to victims.

(4) Another area in which a certain number of innovations is proposed is the area of **extra-contractual liability for another person’s action**.

As is well-known, since the *Assemblée plénière* of the *Cour de cassation* handed down its judgment in the *Blieck* case on 29 March 1991, the courts have profoundly changed the range of application of this kind of liability, though so far without achieving much stability in the area.

In order to try to do so, members of the group considered that it was appropriate first to indicate the two possible bases of liability for another person’s action being, on the one hand, the factual regulation of the way of life of people subjected to special supervision owing to their condition, and, on the other, the factual structuring and organising of the activity of another person in the interest of the person who exercises this control (article 1355).

For all situations, it appeared necessary to require proof of action on the part of the third party of a kind which would attract liability in a person who had directly caused harm (article 1355 paragraph 2). This condition does not reflect existing case-law governing the liability of fathers and mothers for their minor children which is at present imposed as soon as a simple ‘causal act’ is established on the part of the latter.

**(a) Persons whose way of life must be regulated** are, first, minors and, secondly, adults whose condition requires some special supervision by reason of their disability or as a result of a judicial decision to this effect.

Fathers and mothers were placed at the head of the list of those persons on whom strict liability for the acts of minor children is imposed. It seemed necessary to tie this liability to the exercise of parental authority, but this is the only condition

which is retained from the Civil Code, for by contrast cohabitation of the minor with the parents was jettisoned on the ground of the difficult issues raised by its definition and the problems to which the application of this requirement has led where it has been interpreted strictly.<sup>1</sup>

Where his parents have died, a child's guardian takes over the same liability. This ascription of liability, in preference to the family council, is inspired by practical considerations, the guardian being easily identifiable by a victim and being able to take out insurance to cover the risk of liability.

Finally, it is provided that liability is also borne by 'the physical or legal person charged by judicial or administrative decision, or by agreement, with regulating the minor's way of life.' This provision refers to educational institutions for children with special needs and to teaching establishments to whom parents have entrusted their child as a boarder under a contract, as well as to associations for educative action, establishments or organisations for re-education charged by a Judicial Officer for Educative Action, a Children's Judicial Officer or a Children's Court to take charge of a minor who was in danger or who had committed a criminal offence.

The wording of the provision makes clear that these different cases of liability are not mutually exclusive, but may apply concurrently (article 1356 *in fine*).

An analogous liability is borne by 'a physical or legal person charged by judicial or administrative decision, or by agreement, with regulating the way of life' of adults 'whose condition requires some special supervision.' This deals not merely with adults who are subject to guardianship, but also with young adults who have been made the subject of a placement order following commission of a criminal offence and with mental patients who have been hospitalised in the circumstances provided for by Title 1 of Book II of the third part of the Code of Public Health (articles 3211-1 *et seq.*).

These liabilities would be strict and could be avoided only by proof of an external event which possesses the attributes of *force majeure*.

Furthermore, it seemed useful to provide that any other person—that is to say any person who does not incur liability under articles 1356 and 1357, but who takes on the task of supervising another person in the course of business or by way of his profession—is liable for the action of the person who directly caused the harm unless he proves that he committed no fault.

b) The really classic case of employers falls within the new category of **liability based on the structuring or organisation of another person's activity by a person who benefits from this activity** and their liability would remain imposed on the same basis as at present.

On the other hand, the Reform Proposals envisage a change to the personal position of employees, as their liability would not simply be ruled out as was held by the *Assemblée plénière* of the *Cour de cassation* in its judgment in *Costedoat* on 25

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<sup>1</sup> Indeed, it then favoured the parent who had abandoned the child to the detriment of the one who actually looked after him.

February 2000; instead it would become subsidiary to liability in their employers, this seeming to be more protective of the interests of victims while at the same time ensuring a sufficient protection for employees.

Moreover, since the Reform Proposals redefine the relationship of employer/employee in quite a strict way, they provide a further case of liability for another person's action to cover the situation where a professional person or business regulates or controls the activity of another professional or business who is economically dependent on them, whether the latter are members of a liberal profession (such as, for example, a doctor who works for a private hospital) or traders (such as a subsidiary company which is dependent on its parent company or a person acting under a concession or franchise who exercises his activity partly for the benefit of the person granting the concession or the franchisor). Liability in the dominant professional or business would then be imposed where a harmful act is committed by the person who is dependent on him and is directly related to the exercise of his control.

This example of liability would be entirely new, but the members of the working group thought that it would be extremely useful to adjust the law of liability so as to reflect the radical changes which have occurred in the way in which economic relations are structured, as regards both production and distribution. It would allow the imposition of some part of the liabilities incurred as a result of harm caused in the course of economic activities on the real decision-makers, which would be fairer to dependant professionals or businesses and at the same time more protective of victims.

(5) Among the innovations being proposed, particularly worthy of note is a new example of **strict liability** where liability **would be imposed on a person undertaking an abnormally dangerous activity** for harm consequential on this activity (article 1362).

This provision was the subject of considerable discussion within the group. Its advocates emphasised that its inclusion would bring French law closer to the majority of neighbouring countries and would be consonant with the case-law of the administrative courts which is to the same effect. However, certain members of the group objected that other provisions, in particular those which concern liability for the actions of things, would make it almost useless. To this argument it was countered that the new provision would overwhelmingly be concerned with industrial disasters whereas liability for the actions of things is more apt to deal with harm taking place between individuals.

In the end it was decided to retain this rule for the situation of catastrophic harm caused by activities bearing special risks.

(6) As regards the **purposes attributed to the imposition of liability**, the draft provisions recommend that first place be given to reparation, following the position of the present law.

Nevertheless, by article 1372 cautious provision is made to open the way for the award of **punitive damages**. This provision subjects the pronouncement of this sanction to proof of a 'deliberate fault, and notably a fault with a view to gain', that is to say, a fault whose beneficial consequences for its perpetrator would not be

undone by the simple reparation of any harm which it has caused. It also requires a court to give a special reason or reasons for such an award and to distinguish between those damages which are punitive and those which are compensatory. Finally, it forbids their being covered by insurance, a rule which is absolutely necessary to give to the award the punitive impact which constitutes its very *raison d'être*.

**Prevention**, for its part, is not put forward as one of the specific purposes of liability. However, an unobtrusive place has been reserved for it under the cover of reparation in kind. So article 1369-1 provides that 'Where harm is liable to become worse, to reoccur or to linger, a court may, at the request of the victim, order any measure appropriate to avoid these consequences, including if need be an order for the discontinuation of the harmful activity in question.'

The same idea also inspires article 1344 according to which 'expenses incurred in order to prevent the imminent occurrence of harm, to avoid its getting worse, or to reduce its consequences, constitute a reparable loss as long as they were reasonably undertaken.'

(7) Among the legal provisions which are proposed to guide courts in their assessment of damages, the majority confirm the present positions taken by the courts.

However, one provision deserves to be mentioned, not least because it is not unrelated to article 1344, which has just been quoted. This is article 1373, which **authorises a court to reduce a victim's compensation where the latter has by a specified act of negligence allowed his own harm to get worse without reacting or doing anything to reduce it.**

The recognition of this possibility of reducing a victim's compensation responds to a desire to make victims responsible for themselves. This is accepted today by the majority of the laws of countries neighbouring to France as well as by the Vienna Convention on the International Sale of Goods,<sup>1</sup> and the *Principles of European Contract Law* recommend its adoption.<sup>2</sup>

It should also be noted that the provision which is proposed creates merely a possibility for a court and that the exercise of its discretion is conditional on its finding that a reduction of the harm could have been achieved by 'reasonable and proportionate measures'. Furthermore, as has already been underlined, it is made clear that no reduction could be allowed where the measures would be of a nature to compromise the victim's physical integrity. In other words, a refusal of health care could never be a ground for a diminution in compensation for losses resulting from personal injury.

(8) The provisions which deal with '**agreements relating to reparation**' put forward several changes from the existing law.

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<sup>1</sup> Art. 77 CISG.

<sup>2</sup> Article 9-505.

First, they formally recognise the **validity of contract terms which exclude or limit reparation, even if these concern extra-contractual liability** (article 1382), except where this liability is based on fault (article 1382-4 paragraph 2).

In the extra-contractual context, this recognition principally concerns agreements relating to liabilities between neighbours or between persons who undertake a common activity without being bound by a contract of partnership or association.

A first limitation on the validity of contract terms which restrict liability or reparation concerns compensation for personal injuries which would be incapable of being cut down by agreement (article 1382-1). This solution, which has been advocated for a long time by an almost unanimous body of scholarly opinion, has never been clearly confirmed by the courts.

Another provision recommends that contract terms which are included in a contract by a professional or business to the detriment of a consumer are to be deemed a nullity where they are not balanced by some 'something real, significant and clearly stipulated in return'. This is quite in line with the solutions which are to be drawn from the recommendations of the Commission on Unfair Contract Terms.

The provision which is proposed also formally recognises certain solutions which are already accepted by the courts, notably the ineffectiveness of contract terms which exclude or limit liability in the case of fraud or other dishonesty, gross fault, and the nullity of terms which try to free a contractual debtor from any liability for the results of failure to perform one of his essential obligations. Finally, it subjects the ability of a person to rely effectively on a clause to a condition that the victim could have known of it before the conclusion of the contract (where the clause is sought to have contractual effect) and to a condition of 'unequivocal acceptance' outside such a contractual context.

However, the most important innovations relate to clauses which are at present termed 'penalty clauses' and which it is proposed should be called '**Agreements for a pre-set reparation and penalty clauses**'. The working group considers in fact that it is not necessary to retain articles 1226 to 1230, 1232 and 1233 of the present Civil Code, which are hardly ever applied. By contrast, it does wish to preserve the judicial power of review of penalty clauses introduced by legislation in 1975, but thinks that it is necessary only in the direction of the reduction of clauses which stipulate sums which are 'manifestly excessive'. As to clauses stipulating for the payment of 'derisory' sums, the rules provided by articles 1382-1 to 1382-4 appear to be adequate.

The possibility of a court's reducing the reparation provided for by the contract where a debtor's failure to perform is only partial (and which is at present allowed by article 1231 of the Civil Code) equally deserves to be retained.

9) At the same time as recommending the insertion into the Civil Code of the legal provisions which define **the rights to compensation of victims of traffic accidents**, the members of the group wished to modify them in certain respects.

The most important respect concerns **the fate of a driver who is a victim of personal injuries**. The time seems to have come to treat drivers in the same way

as other victims, so that their compensation is denied them only where they have committed an 'inexcusable fault' which was the 'exclusive cause of the accident'.

Certainly, in 1985, such an assimilation of drivers and other victims could have been thought premature given that the effects of reducing the defences for those liable for traffic accidents had not yet been assessed, but a further step forward appears necessary today. In fact drivers are exposed to traffic risks in exactly the same way as pedestrians, cyclists and passengers. The taking on of their compensation by way of compulsory insurance whose very reason is precisely the guaranteeing of these risks seems therefore both logical and necessary. Moreover, the courts have in a number of cases already reached this very result.

Similarly, the exclusion from the special regime of railway and tramcar accidents which was conceded in 1985 scarcely appears justifiable any longer. Moreover, it is to be noted that the courts have for a while almost systematically refused to accept any defences by SNCF to claims for personal injuries, any exterior causes which it invokes to escape liability which it incurs on the basis of a failure in its safety obligation of result being practically never found to count as *force majeure*, even if they concern the victim's own fault and even more as regards acts of God or acts of third parties. The application of the same regime of liability to all the victims of accidents which involve an earth-bound motorised means of transport is therefore appropriate as a matter both of simplicity and of fairness.

Finally, the very strict interpretation which the *Cour de cassation* today adopts of the notion of the inexcusable fault of a victim of a traffic accident means that there is no longer any need to maintain the special provisions for children and for old or handicapped persons. For all victims, it appears to be enough to require proof of their inexcusable fault before their compensation is refused or limited.

The explanations contained in this preamble concern only the most clearly important questions. They will be supplemented by those which accompany the text of the provisions itself.

# Chapter I

## *Introductory Provisions*

This chapter is particularly important as it takes a position on the fundamental and most controversial questions.

*It requires an unlawful or abnormal action to ground liability, but makes clear that this action does not require any understanding in its perpetrator.*

*The chapter formally recognises the notion of contractual liability as well as the rule against the accumulation of contractual and extra-contractual liability which it rules out except for the case of personal injuries.*

*It allows a third party to a contract to claim reparation for the harm caused to him by the non-performance of a contractual obligation but in that case subjects the third party's claim to the rules of contractual liability as long as he is able to show the existence of circumstances of a kind which would attract extra-contractual liability in the defendant. Where this is the case, the third party has a choice between the two regimes of liability.*

### **Art. 1340<sup>1</sup>**

Any unlawful or abnormal action which has caused harm to another obliges the person to whom this is attributable to make reparation for it.

Similarly,<sup>2</sup> any non-performance of a contractual obligation which has caused harm to its creditor obliges the debtor to answer for it.

### **Art. 1340-1<sup>3</sup>**

A person who has caused harm to another while lacking understanding is nonetheless obliged to make reparation for it.

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<sup>1</sup> This article, which is put forward as an announcement for later articles, uses the notion of 'unlawful or abnormal action' to introduce the provisions governing extra-contractual liability.

<sup>2</sup> This expression seeks to make clear the identity of the two liabilities despite the use of different words (to be answerable for, to make reparation for) chosen for reasons of style.

<sup>3</sup> The working group chose to insert this provision after the general text announcing the different instances of liability rather than to amend the definition of fault given by article 1352. This solution allows one to avoid saying that a person lacking understanding can commit a fault. Moreover, it bears a general significance for the liability of persons suffering from a mental disorder (and possibly of infants) which is valid for all the actions which give rise to extra-contractual liability and even for contractual liability.

It is to be noticed that article 1351-1 rules out any exclusion of liability on the ground of fault in the victim where the latter lacks understanding. The members of the group consider that in effect such exclusion of liability on the ground of the victim's fault acts as a private penalty which must therefore be applied only to those persons who are conscious of the consequences of their actions.

**Art. 1341**

In the case of non-performance of a contractual obligation, neither the debtor nor the creditor may escape the application of legal provisions specifically governing contractual liability by opting in favour of extra-contractual liability.

Nonetheless, where such a non-performance causes personal injury, the other party to the contract can, in order to obtain reparation for this harm, opt in favour of the rules which are more favourable to him.

**Art. 1342<sup>1</sup>**

Where non-performance of a contractual obligation is the direct cause of harm suffered by a third party, the latter can claim reparation from the contractual debtor on the basis of articles 1363 to 1366. The third party is then subject to all the limits and conditions which apply to the creditor in obtaining reparation for his own harm.

He may equally obtain reparation on the basis of extra-contractual liability, but on condition that he establishes one of the circumstances giving rise to liability envisaged by articles 1352 to 1362.

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<sup>1</sup> This text is the result of lengthy consideration...

After receiving notice of the work of Group 10 of the wider working group on the effects of contracts as regards third parties, the most balanced solution appeared to be to grant in principle an action for reparation to third parties allowing them to rely on non-performance of the contract where it has caused them a loss (this being at present accepted by the *Cour de cassation* by means of the assimilation of contractual and delictual fault), but by subjecting the third party to all the restrictions which arise from the contract (limitation or exclusion clauses, jurisdiction clauses, the extent of the foreseeability of harm, etc.). This solution would address the argument which is most often put against the assimilation of contractual and delictual fault (which at the moment allows a third party to base a claim on the contract but at the same time avoid its disadvantages). It would also lead to the extinguishing of all the controversies and the distinctions tied to chains of contracts and contractual groups, as well as mopping up the cases dealing with indirect victims. Nevertheless, the working group preserves the possibility for a third party who wishes to escape the restrictions of a contract to which he has not been a party to rely on extra-contractual liability, but he must then establish all the conditions which this liability requires for its imposition.

## Chapter II

# *The Conditions of Liability*

### *Section 1*

#### *Provisions Common to Contractual and Extra-Contractual Liability*

#### **§ 1 Reparable loss**

*The definition of reparable loss remains quite general, but the allusion to the prejudicing of a collective interest seems useful, notably in order to serve as a basis for the reparation of environmental damage.*

*It also seems desirable to dedicate some special provisions to expenses which are incurred to mitigate the consequences of a harmful act and to loss of a chance.*

#### **Art. 1343<sup>1</sup>**

Any certain loss<sup>2</sup> is reparable where it consists of the prejudicing of a legitimate interest, whether or not relating to assets and whether individual or collective.<sup>3</sup>

#### **Art. 1344**

Expenses incurred in order to prevent the imminent occurrence of harm, to avoid its getting worse, or to reduce its consequences, constitute a reparable loss as long as they were reasonably undertaken.

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<sup>1</sup> A discussion took place as to the appropriateness of providing in the Code a definition of reparable harm [*dommage*] (or of reparable loss [*préjudice*]), which at the moment it lacks. Despite the difficulty of doing so, the working group decided not to miss this opportunity. The group decided after discussion to dedicate two provisions to two debated points: expenses incurred to prevent harm occurring and loss of a chance. On the other hand, it did not seem useful to dedicate a special article to loss of profits.

<sup>2</sup> As far as possible, the working group tried to give distinct meanings to the terms ‘harm’ [*dommage*] and ‘loss’ [*préjudice*]: harm designates the actual injuring of the victim’s person or property, whereas ‘loss’ designates the prejudice to the victim’s interests which is thereby caused, whether or not relating to his assets.

<sup>3</sup> The term ‘collective’ was introduced in order to permit the courts to accept the compensation of environmental damage. Nonetheless, the group did not take a view on the question as to who can claim reparation for this sort of loss (whether individual persons harmed, associations of groups of such persons, etc.). It considered that this question was one of procedure.

#### **Art. 1345**

Future loss is reparable where it consists of the certain and direct continuation of a present state of affairs.<sup>1</sup>

Where the certainty of a loss depends on a future and uncertain event, the court may give immediate judgment against the person responsible, though subjecting the execution of its decision to the occurrence of the event.<sup>2</sup>

#### **Art. 1346**

Loss of a chance constitutes a reparable loss distinct from the advantage which would have inured to the claimant's benefit if the chance had materialised.

### **§ 2 Causation**

*It seems pointless to try to define the requirement of a causal connection by a general formula. On the other hand, the declaration of the joint and several liability of members of a group from whose activities a harm emerges (where the actual person who caused the harm is not identified) seems useful, this joint and several liability being capable of applying in a variety of situations.*

#### **Art. 1347**

Liability rests on a causal connection between an action attributable to the defendant and the harm.

#### **Art. 1348**

Where harm is caused by an unascertained member of a group, all its identified members are answerable for it jointly and severally, except that any one of them may escape liability by showing that his own actions were not implicated.<sup>3</sup>

### **§ 3 Defences**

*The text of the following provisions formally recognises the notion of an external cause but at the same time is content to do so by setting out the circumstances in which it arises. On the other hand, it defines force majeure by taking up one of the formulations refined by the Cour de cassation.*

*The modifications proposed when put beside the present solutions concern fault in the victim, whose exempting effect is excluded where the victim lacks understanding and reduced where he suffers personal injuries. On the other hand, it makes clear that any intentional fault of the victim deprives him of any claim to reparation.*

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<sup>1</sup> This form of words is borrowed from certain judgments of the *Cour de cassation*.

<sup>2</sup> This solution which has been accepted by the courts for the benefit of HIV victims who are threatened by AIDS, seems capable of generalisation.

<sup>3</sup> This text, which invokes the very well-known case-law on hunting accidents, should also provide a solution in many other situations, in particular in the case of harm caused by a product distributed by several identified businesses, but where it cannot be established which of them sold the product which was the source of the losses caused to the victims.

**Art. 1349**

Liability is not imposed where the harm is due to an external cause which qualifies as *force majeure*.

An external cause may arise from an act of God, from an action of the victim, or from an action of a third party for whom the defendant is not responsible.

*Force majeure* consists of an unpreventable event which the defendant could not foresee or whose consequences he could not avoid by appropriate measures.

**Art. 1350**

A victim cannot recover any reparation where he deliberately sought the harm.

**Art. 1351**

A partial defence to liability can apply only where the victim's fault contributed to the production of the harm.<sup>1</sup> In the case of personal injury, only a serious fault can lead to a partial defence.<sup>2</sup>

**Art. 1351-1**

The defences provided for in the two preceding articles may not be relied on against persons lacking understanding.

## *Section 2*

### *Provisions Special to Extra-Contractual Liability*

#### **§ 1 Liability for personal action**

*Here, the group recommends a general definition of fault, coupled with a clarification that fault in a legal person may relate either to its organisation or to its operation.*

**Art. 1352**

A person must make reparation for the harm which he has caused through any type of fault.

Fault consists of breach of a rule of conduct imposed by legislation or regulation or failure to conform to a general standard of care and diligence.

Where a person's action falls within one of the situations governed by articles 122-4 to 122-7 of the Criminal Code no fault is committed.<sup>3</sup>

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<sup>1</sup> Discussion took place to decide if it is appropriate to write 'for his harm', which would have had the effect of refusing to allow the initial victim's fault to prejudice indirect victims (the solution accepted by the *Cour de cassation* which so held on this point in *assemblée plénière* in 1981). The form of words chosen offers the advantage of leaving open the possibility of development.

<sup>2</sup> This solution is not at present accepted in the law as it stands. It is a manifestation of the special treatment of victims of personal injuries.

<sup>3</sup> These provisions define justifying circumstances.

**Art. 1353**

A legal person may commit a fault not only through its representative, but also by a failure in its organisation or operation.<sup>1</sup>

**§ 2 Liability for the actions of things<sup>2</sup>**

*This paragraph seeks to give formal recognition to existing case-law solutions*

**Art. 1354**

A person is liable strictly<sup>3</sup> for harm caused by the action of things within his keeping.

**Art. 1354-1**

An action of a thing is established wherever, while moving, it comes into contact with the person or property which is harmed.

In other situations, it is for the victim to prove the action of the thing, by showing either its defect, or the abnormality of its position or of its condition.

**Art. 1354-2**

The keeper of a thing is the person who has control of it at the time of its causing harm.

The owner of a thing is presumed to be its keeper.

**Art. 1354-3**

It is no defence to a keeper of a thing to show its own defect nor any physical problem in himself.

**Art. 1354-4**

Articles 1354 to 1354-3 apply to harm caused by animals.

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<sup>1</sup> The notion of a 'failure in organisation or operation', which is at present used by the administrative courts, seems usefully to be transplanted into private law.

<sup>2</sup> Discussion took place within the group as to the usefulness and the appropriateness of maintaining the special regime of liability for the actions of things as it has been built up by case-law on the basis of article 1384 para.1 of the Civil Code.

This construction lost part of its significance after the enactment of the Law of 5 July 1985 on the compensation of traffic accident victims.

Furthermore, no other country recognises a similar special regime and by comparison with foreign laws it appears very harsh. Some members of the group wondered whether it would be desirable to replace it with a principle of strict liability for dangerous activities, like the one accepted by French administrative courts. Such a solution would draw French law closer to most of the other European national laws.

At the end of the day, however, the majority of the group decided in favour of preserving and giving formal recognition to the established case-law.

<sup>3</sup> This clarification is made in order to indicate that no defence is available on proving an absence of fault.

### § 3 Liability for the actions of other people

*The list of situations in which liability is imposed for the actions of other people is profoundly changed from the position under the present law. The special regimes of liability of artisans for the actions of their apprentices and of teachers for the actions of their pupils are abolished.*

*The situations where liability is preserved follow two different models. Some are founded on the control over the way of life of minors or over adults whose condition or situation require some special supervision. Other situations concern persons who organise and profit from the activity of another person. This second model underpins not only employers' liability for the actions of their employees, but also the liability of physical or legal persons who organise and have an interest in the activity of professionals or businesses (not being their employees).*

*These liabilities are strict. They do not rest on proof of fault in the person to be held liable, but on proof of an action which would have attracted a personal liability in the person directly behind the harm if he had not acted under another person's control.*

*Employees are not to be liable personally unless the victim is unable to obtain reparation either from his employer or the latter's insurer. On the other hand, the liability of professionals or businesses who are not employed, for whom another person is answerable, remains governed by the general law.*

#### **Art. 1355<sup>1</sup>**

A person is liable strictly for harm caused by persons whose way of life he governs or whose activity he organises, regulates or controls in his own interest.<sup>2</sup>

This liability may arise in the situations and subject to the conditions provided for by articles 1356 to 1360. It rests on proof of an action of a kind which would attract liability in a person who caused the harm directly.

#### **Art. 1356**

The following are liable for harm caused by their minor children:

- fathers and mothers to the extent to which they exercise parental authority;
- guardians in the case of the death of both parents;
- the physical or legal person charged by judicial or administrative decision, or by agreement, with regulating the minor's way of life. This liability may arise concurrently with liability in a minor's parents or guardian.<sup>3</sup>

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<sup>1</sup> This article is an introductory provision of the different situations of liability for the actions of others.

<sup>2</sup> Some doubt was expressed as to whether to choose 'profit', 'advantage' or 'interest'. This last term was preferred as being more neutral than the others and more capable of including the case where a person helps another without reward.

<sup>3</sup> *Sed quaere*. This possibility of concurrence is presently rejected by the *Cour de cassation*. It was the subject of discussion within the working group.

**Art. 1357**

A physical or legal person is liable for harm caused by an adult whose condition or situation<sup>1</sup> require some special supervision where they are charged by judicial or administrative decision, or by agreement, with regulating the adult's way of life.

**Art. 1358**

Other persons who take on the task of supervising another person in the course of business or by way of their profession are answerable for the action of the person directly behind the harm, unless they show that they did not commit any fault.<sup>2</sup>

**Art. 1359**

Employers are liable for harm caused by their employees. Employers are persons who have the power to give orders or instructions in relation to the performance of the work or duties of their employees.<sup>3</sup>

Employers are not liable on this basis if they prove that their employees acted outside the sphere of their duties for which they were engaged, without authority and for purposes outside their own roles.<sup>4</sup> Nor are they liable if they prove that the victim could not legitimately believe that the employee was acting on behalf of the employer.<sup>5</sup>

**Art. 1359-1**

Employees who, without committing an intentional fault, have acted within the limits of their functions, for purposes which conform to their roles and without disobeying their employers' orders, cannot incur personal liability towards their victims unless the latter on their side establish their inability to obtain reparation for their harm from the employer or his insurer.<sup>6</sup>

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<sup>1</sup> 'Condition' relates to a person's physical or mental deficiencies, whilst 'situation' envisages the case, for example, of a person being imprisoned or controlled by judicial authority or its delegate.

<sup>2</sup> This text concerns, for example, child-minders, leisure centres or schools to whom a child is temporarily entrusted by its parents.

<sup>3</sup> This definition is narrower than the one which is at present accepted by the courts. This is explained by the existence in the Reform Proposals of other cases of 'control over the activity of another person' (see article 1360).

<sup>4</sup> This formula is the one used by the *Assemblée plénière* of the *Cour de cassation* in its judgment of 19 May 1988.

<sup>5</sup> This text reflects a well-established line of case-law. It starts from the idea that if the victim is in bad faith, the employer must be excused from liability even if the standard three conditions for this (which are set out in the first part of the article and define an employee's abuse of functions) are not satisfied.

<sup>6</sup> This provision recommends that the solution adopted by the *Assemblée plénière* of the *Cour de cassation* in the *Costedoat* case of 25 February, 2000 be amended. Instead of ruling out personal liability of employees, it renders it subsidiary to the liability of employers.

**Art. 1360<sup>1</sup>**

Apart from cases involving a relationship of employment, a person is liable for harm caused by another person whose professional or business activity he regulates or organises and from which he derives an economic advantage where this occurs in the course of this activity. This includes notably the liability of healthcare establishments for harm caused by the doctors to whom they have recourse. The claimant must show that the harmful action results from the activity in question.

Similarly, a person who controls the economic or financial activity of a business or professional person who is factually dependent on that person even though acting on his own account, is liable for harm caused by this dependent where the victim shows that the harmful action relates to the first person's exercise of control. This is the case in particular as regards parent companies in relation to harm caused by their subsidiaries or as regards those granting a concession in relation to harm caused by a person to whom the concession is granted.

**§ 4 Liability for nuisance**

*Here, the regime of liability built up by the courts is maintained. On the other hand, its ambit is modified for it appeared that the liability of a building contractor for harm caused to the neighbours of the person commissioning the building work rests on another rationale.*

**Art. 1361**

A person who owns, holds or exploits land and who causes a nuisance exceeding the normal inconveniences to be expected of neighbours, is liable strictly for the consequences of this nuisance.

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<sup>1</sup> The situations envisaged by these two paragraphs are not exactly the same: The first paragraph refers to 'independent workers', that is, those who do not receive 'either orders or instructions' (for example, a salaried doctor). The second paragraph is concerned essentially with the relationships of franchisors and franchisees and parent companies and their subsidiaries (hence the clarification 'even though acting on his own account').

## § 5 Liability for dangerous activities<sup>1</sup>

*This provision is innovative. It is intended to provide for French law a regime of liability suitable notably to deal with large-scale industrial catastrophes.*

### Art. 1362

Without prejudice to any special regulation governing particular situations,<sup>2</sup> a person who undertakes an abnormally dangerous activity is bound to make reparation for the harm which results from this activity even if it is lawful.

An activity which creates a risk of serious harm capable of affecting a large number of people simultaneously is deemed to be abnormally dangerous.<sup>3</sup>

A person who undertakes an abnormally dangerous activity cannot escape liability except by establishing a fault in the victim in the circumstances set out in articles 1349 to 1351-1.

## Section 3

### *Provisions Special to Contractual Liability<sup>4</sup>*

*The action which forms the basis of contractual liability is non-performance of the contract and this is itself assessed as a function of the content of the contractual undertakings. For this reason, reference should be made to article 1149 which defines 'obligations to take necessary steps' and 'obligations of result'. All the same, another version of this text is proposed in order to avoid any redundancy.<sup>5</sup>*

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<sup>1</sup> It was seen (above, p. 189, note 2) that a discussion took place within the group as to the appropriateness of maintaining the category of liability for the actions of things or whether instead to adopt a model of the type known by many foreign laws which rests on 'liability for harm caused by dangerous activities'. In the view of some members, having once decided to retain liability for the actions of things there was no point in creating a strict liability for dangerous activities unless the latter regime were to be distinguished by a stricter set of defences (as set out by paragraph 2). In the view of others, the provisions contained in articles 1354 to 1354-4 on the one hand, and in article 1362 on the other, would not apply to the same situations: see further on this subject, the introductory report at section III(5).

<sup>2</sup> This qualification concerns legal provisions imposing strict liabilities on certain operators, notably, air companies for harm caused to land by their machines, telecommunications companies for harm caused to third parties, nuclear energy undertakings for accidents on site, etc. The proposed scheme is very similar to that which inspires these special legal provisions. In the end, one might therefore expect that some of the latter might be absorbed by the general provision and disappear.

<sup>3</sup> The situation envisaged here is of catastrophic harm, for example, the harm which results from an industrial accident such as the one which destroyed the AZF factory at Toulouse.

<sup>4</sup> On the place assigned to the special characteristics of contractual liability, see the Preamble, II and III(1).

<sup>5</sup> This version is as follows:

'An obligation is termed an "obligation of result" where the debtor undertakes the accomplishment of an aim defined by the contract.

An obligation is termed an "obligation to take necessary steps" where the debtor undertakes

*This section also makes clear the role of giving notice to perform.*

*After discussion, it was decided to include a formal denial of reparation for unforeseeable contractual harm.*

**Art. 1363**

A creditor of an obligation arising from a validly concluded contract can claim from the debtor reparation for his loss in the case of its non-performance<sup>1</sup> on the basis of the provisions contained in the present section.

**Art. 1364**

Where a debtor undertakes to procure a result within the meaning of article 1149, non-performance is established from the mere fact that the result is not achieved, unless the debtor justifies this failure by reference to an external cause within the meaning of article 1349.

In all other situations, a debtor must make reparation only if he has failed to use all necessary care.

**Art. 1365**

Reparation for loss resulting from delay in performance presupposes a prior notice to perform made to the debtor. As regards reparation for any other loss, a notice to perform is required only where it is necessary in order to establish that the debtor has indeed failed to perform.<sup>2</sup>

**Art. 1366**

Apart from cases of his deliberate or dishonest non-performance or gross fault, a debtor is liable to make reparation only for the consequences of non-performance which were reasonably foreseeable at the time of the conclusion of the contract.

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merely to use the effort and care which are normally necessary for the accomplishment of this aim. This type of obligation is more or less onerous in the case of certain types of contracts whose effects in this respect are explained in the 'Titles which deal with them' (this last phrase is taken from article 1137 of the present Civil Code).

<sup>1</sup> Non-performance for this purpose is to be understood in a broad sense so as to include both defective and late performance.

<sup>2</sup> The rules governing 'notice to perform' [*mise en demeure*] were referred to the group working on the performance of contracts.

## Chapter III

# *The Effects of Liability*

## *Section 1* *Principles*

### **Art. 1367**

A right of reparation accrues as at the date when harm takes place or, in the case of future harm, the date when its occurrence has become certain.

*This provision is intended to clarify the existing law which is ambiguous on this point.*

### **Art. 1368**

Reparation of harm may at the court's discretion take the form of reparation in kind or of an award of damages and these two types of measures may be ordered concurrently so as to ensure full compensation of the victim's loss.

*The notion of 'reparation in kind' is in this way formally recognised, including for the contractual context.*

### **§ 1 Reparation in kind**

*This paragraph governs only measures of reparation in kind in the strict sense. Those which are envisaged by articles 1143 and 1144 of the present Civil Code concern performance and are not therefore relevant to a title concerning 'liability'.*

### **Art. 1369**

Where a court orders a measure of reparation in kind, the latter must be specifically suitable to extinguish, reduce or make up for the harm.

### **Art. 1369-1**

Where harm is liable to become worse, to reoccur or to linger, a court may, at the request of the victim, order any measure appropriate to avoid these consequences, including if need be an order for the discontinuation of the harmful activity in question.

Equally, a court may authorise the victim himself to take such measures at the expense of the person liable. The latter may be ordered to pay in advance an amount needed for this purpose.

### **§ 2 Damages**

*The principal innovations envisaged here concern punitive damages which are authorised on certain conditions (article 1371); the possibility of reducing the victim's compensation where he has not shown that he took sufficient care in mitigating his own harm or preventing it from getting worse (article 1373); the imposition of a duty in courts to*

*evaluate distinctly each of the heads of loss which are claimed (article 1374); and the recognition that a court may in special circumstances allocate damages to a specific measure of reparation (article 1377).*

**Art. 1370**

Subject to special regulation or agreement to the contrary, the aim of an award of damages is to put the victim as far as possible in the position in which he would have been if the harmful circumstances had not taken place. He must make neither gain nor loss from it.<sup>1</sup>

**Art. 1371**

A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned in addition to compensatory damages to pay punitive damages, part of which the court may in its discretion allocate to the Public Treasury. A court's decision to order payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance.

**Art. 1372**

The court must assess the victim's loss as at the date of its judgment, taking into account all the circumstances which could affect its constituent elements, their value and its reasonably foreseeable future development.

**Art. 1373**

Where the victim had the possibility of taking reliable, reasonable and proportionate measures to reduce the extent of his loss or to avoid its getting worse, the court shall take account of his failure to do so by reducing his compensation, except where the measures to be taken were of a kind to have compromised his physical integrity.

**Art. 1374**

The court must assess distinctly each of the heads of loss claimed of which it takes account. Where a claim concerning a particular head of loss is rejected, the court must give specific reasons for its decision.

**Art. 1375**

If the victim establishes that a head of loss had not already been the object of a claim by him or that his harm has become worse, he may obtain in any case a supplementary reparation, where appropriate by means of bringing a new action.

**Art. 1376**

A court may in its discretion award compensation either in a lump sum or by way of periodic payments, subject to the provisions contained in article 1379-3.

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<sup>1</sup> The qualification as regards regulation or agreement to the contrary allows this text to be rendered compatible with those governing clauses for a pre-set reparation (article 1383) as well as with legal or regulatory provisions limiting reparation in respect of certain types of harm. In addition, it ought to ensure consistency with the following article concerning punitive damages.

**Art. 1377**

Except where particular circumstances justify the allocation by the court of damages to a specific means of reparation,<sup>1</sup> the victim is free to dispose of the sums awarded to him as he thinks fit.

**§ 3 The circumstances in which two or more persons are liable**

*The solutions adopted are very close to those at present accepted by the courts.*

**Art. 1378**

All persons liable for the same harm are held jointly and severally<sup>2</sup> liable to make reparation for it.

If all those who have caused the same harm were held liable on the basis of proven fault, their contribution is to be assessed in proportion to the seriousness of their respective faults.

If none of those liable are within this category, their contributions must be made in equal parts.

Where neither of these situations is the case, then the contribution of each person liable is to be assessed as a function of the seriousness of their respective faults where proved whether by the victim or merely at the stage of any claim for contribution.<sup>3</sup>

**Art. 1378-1<sup>4</sup>**

A claim for contribution is not admissible against a victim's relative where the latter is not insured and where the claim would have the effect directly or indirectly of depriving the victim of his rightful compensation because of their shared life together.

A claim for contribution by a person held liable to compensate is equally inadmissible against the victim's estate or his insurer.

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<sup>1</sup> The text does not define these 'particular circumstances'. One of the cases where the allocation of damages is most often advocated is the case of environmental damage.

<sup>2</sup> It seemed useless to maintain the distinction between *obligations in solidum* and *solidarité*.

<sup>3</sup> On this last point, the solution proposed is different from the one adopted by existing case-law.

<sup>4</sup> This provision extends solutions accepted by the courts in the context of traffic accidents.

## *Section 2*

### *Rules Special to the Reparation of Certain Types of Harm*

#### **§ 1 Rules special to the reparation of losses resulting from personal injuries**

*The purpose of the following provisions is to give a proper legal framework to the assessment of compensation for personal injuries which is now almost entirely abandoned to the unfettered discretion of the lower courts. Their intention is to restore to this area legal certainty, an equal treatment to all litigants and the effectiveness of reparation.*

##### **Art. 1379**

In the case of personal injuries, the victim has the right to reparation for his financial, business or professional losses and in particular to those losses which relate to expenses incurred and future outlay, to loss of income and to lost profits, as well as to reparation for his non-financial and personal losses such as physical impairment,<sup>1</sup> pain and suffering, disfigurement, any specific lost pursuit or pleasure, sexual impairment and any costs of investigation of the injury.

Indirect victims have the right to reparation of their financial losses which consist of various expenses and lost income as well as their personal losses of love and affection, and companionship.

In giving judgment, a court must set out distinctly each of the financial or personal losses for which it awards compensation.<sup>2</sup>

##### **Art. 1379-1**

The extent of physical impairment is to be determined according to a scale of disability established by decree.

##### **Art. 1379-2**

Personal injuries must be assessed without taking into account any possible predispositions of the victim as long as these had not already caused any prejudicial consequences at the time when the harmful action took place.<sup>3</sup>

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<sup>1</sup> This loss could be described by other expressions such as 'physiological loss' of 'functional impairment'.

<sup>2</sup> This enumeration of the heads of loss is useful, not only so as to oblige lower courts to give sufficient reasons for their decisions on reparation, but also so as to allow the attribution to each individual head of loss of recourse claims by third parties who have indemnified the victim as is provided for by article 1379-7.

<sup>3</sup> The question of the impact of a victim's predisposition has given rise to a very complex case-law. The formula which is recommended expresses the position apparently adopted by the majority of current decisions.

#### **Art. 1379-3**

Compensation due under the headings of business or professional lost profits, of loss of physical maintenance or loss incurred by requiring the help of a third party is to be awarded in the form of index-linked periodic payments, unless the court decides otherwise for special reasons. The court possesses a discretion as to which index is to be used for this purpose.<sup>1</sup>

The court may provide in its judgment that any periodic payment shall be revised if the harm becomes smaller or more extensive, on condition that it expressly sets out the period within which and the conditions on which such a revision is to take place.

#### **Art. 1379-4**

Third parties who have paid the victim the benefits set out in the following list in respect of a loss caused by his personal injury enjoy a subrogated claim against the person held liable or his insurer by way of attributing to them the victim's own rights.

#### **Art. 1379-5<sup>2</sup>**

The following benefits give rise to a right of recourse where they have a direct link to the harmful action attracting liability:

1. Benefits supplied by organisations, bodies or services operating a compulsory regime of social security and by those which are mentioned in articles 1106-9, 1234-8 and 1234-20 of the Rural Code;
2. Benefits listed at §II in article 1 of the Ordinance no. 59-76 of 7 January 1959 on actions for civil reparation brought by the State and certain other public bodies;
3. Sums paid by way of the reimbursement of the cost of medical treatment and rehabilitation;
4. Salaries and their incidental costs which an employer continues to pay during a period of inactivity following an event which caused the harm;
5. Daily sickness payments and invalidity benefits paid by friendly societies governed by the Code of Friendly Societies, provident institutions governed by the Code of Social Security or the Rural Code and insurance companies governed by the Insurance Code.

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<sup>1</sup> This provision ought to lead to the abrogation of article 1 of the Law of 27 December 1974 concerning the revaluation of compensatory periodic payments in the area of road accidents.

<sup>2</sup> Articles 1379-5 and 1379-6 reproduce articles 29 and 33 paragraph 3 of the Law of 5 July 1985 and article 131-2 of the Insurance Code. They could be replaced with a simple cross-reference to these provisions (see on this subject the Preamble I(2)) but the working group preferred to reproduce them here for reasons of practical convenience and so as to give formal recognition to the solution provided by the *Assemblée plénière* of the *Cour de cassation* on 1 December 2003 on the subject of compensatory benefits paid by personal insurers.

**Art. 1379-6**

Where it is so provided in the contract, a subrogatory recourse of an insurer which has made the victim an advance payment on his compensation arising from the occurrence of the accident can be brought against the person held liable to make reparation up to the extent of the funds available after payment of the third parties designated by article 1379-4. Where applicable, it must be brought within the periods allowed by legislation for third parties to claim their rights.

In contracts of insurance which guarantee compensation for losses resulting from personal injury, the insurer can be subrogated to the rights of the policy-holder or his successors in title against a third party liable for his harm so as to obtain the reimbursement of compensatory benefits provided for by the contract. These benefits are deemed to have a compensatory nature where they are measured by reference to and depend for their manner of calculation and attribution on the loss suffered by the victim even if they are calculated as a matter of predetermined elements.

**Art. 1379-7<sup>1</sup>**

Recourse claims by third parties by way of subrogation are to be brought for each head of loss individually up to the limit of the share of the compensation attributed to the person liable and which make reparation for the heads of losses which they have partially compensated by providing their benefits. These recourse claims are to be brought subject to the same conditions if a court has made reparation only for the loss of a chance.

**Art. 1379-8**

Apart from the benefits mentioned in article 1379-5, no supply of a benefit to the victim gives rise to a right of action against the person liable or against his insurer, whether these are made by virtue of a legislative, contractual or institutional obligation.<sup>2</sup>

Any contractual provision contrary to the requirements of articles 1379 to 1379-8 is struck out unless it is in favour of the victim.

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<sup>1</sup> The adoption of this provision would lead to the abrogation of article 31 of the Law of 5 July 1985 and the amendment of articles 736-1 paragraph 3 and 454-1 paragraph 3 of the Social Security Code.

It concerns a reform which is called for by numerous writers.

<sup>2</sup> This provision reflects article 33 paragraphs 1 and 2 of the Law of 5 July 1985.

## § 2 Rules special to the reparation of losses resulting from damage to property

*These rules reproduce the solutions adopted by the case-law and which are generally approved by legal writers.*

### Art. 1380

Where property is destroyed or physically damaged, the victim has the right to compensation which would allow him to replace it or to put it back as it was before this occurred without any deduction on the ground of its age. No account is to be taken of any increase in value which may arise as a result of repair.

Nevertheless, the victim may choose only the cost of replacement where this is exceeded by the cost of repair.

### Art. 1380-1

Where the property cannot either be repaired or replaced, the victim has the right to its value in the state in which it was before it was damaged as calculated at the date of the court's decision. The person liable can demand that the property be handed over to him in its present state. This is also the case where property which was intended for sale is no longer in a fit state to be sold.

### Art. 1380-2

If the property has lost part of its value despite its repair, the victim has the right to compensation for this depreciation.

He also has the right to compensation for harm consequential on his being deprived of the enjoyment of his property and, in an appropriate case, for consequential loss of profits.

## § 3 Rules special to the reparation of losses resulting from delay in payment of sums of money

*These rules are those which are set out by article 1153 of the present Code. On the other hand, those which at present feature in article 1153-1 do not belong to the Civil Code but to the New Code of Civil Procedure.*

### Art. 1381<sup>1</sup>

Compensation for loss resulting from delay in the payment of a sum of money consists of an award of interest at the rate set by legislation.

These damages are due without the creditor needing to justify any loss. They are due only from the date of service of a notice to perform<sup>2</sup> except where legislation provides that they accrue by operation of law.

Where a creditor facing delay in performance by his debtor suffers a further loss he may recover damages distinct from his award of interest for delay in payment.

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<sup>1</sup> This provision reproduces almost entirely the present article 1153. It is merely that in the last paragraph 'independent of any delay' is replaced with 'further' and the rather mysterious exception provided for 'special rules governing trade and guarantees' has been expunged.

<sup>2</sup> The definition of notices to perform (formal demands for payment etc.) is not set out. It will be worked out by the group charged with 'performance'.

## Section 3

### Agreements Relating to Reparation

#### § 1 Agreements excluding or limiting reparation

*It is proposed that contract terms which limit extra-contractual liability should be authorised where liability is not based on fault. On the other hand, the various restrictions which the case-law has introduced or which are recommended by legal writers to restrict the validity or effectiveness of these terms in a contractual context are formally recognised.*

*Special provision is made so as to require the acceptance of a contract term by the person who is to be subjected to its effects.*

##### **Art. 1382**

In principle agreements whose purpose is to exclude or to limit reparation are valid both as regards contractual and extra-contractual liability.<sup>1</sup>

##### **Art. 1382-1**

No person may exclude or limit the reparation in respect of personal injury for which he is responsible.<sup>2</sup>

##### **Art. 1382-2**

A party to a contract cannot exclude or limit the reparation for harm caused to his co-contractor by his deliberate, dishonest or gross fault or by a failure to perform one of his essential obligations.<sup>3</sup>

A person acting in the course of business or a profession cannot exclude or limit his obligation to make reparation for a contractual harm caused to a consumer or to a person not in business or a profession in the absence of something real, significant and clearly stipulated in return.<sup>4</sup>

##### **Art. 1382-3**

In the contractual context, the party who is faced with a term excluding or limiting reparation must have been able to be aware of it at the time of concluding the contract.

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<sup>1</sup> The recognition of the validity of agreements which restrict liability of a delictual nature marks an important innovation in relation to the existing law. It principally concerns the relations between neighbours or other persons who take part in a common activity without having made a contract of partnership or of association. This validity is accepted by many foreign laws.

<sup>2</sup> This solution has not so far been explicitly adopted by the courts, even though it is almost unanimously advocated by legal writers.

<sup>3</sup> These solutions are formally accepted by the courts today.

<sup>4</sup> This solution may look new. Actually, it is well within the line of positions taken by the Commission on Unfair Contract Terms.

#### **Art. 1382-4**

In the extra-contractual context, a person cannot exclude or limit the reparation in respect of harm which he has caused by his fault.<sup>1</sup>

In other situations, an agreement is effective only if the person relying on it proves that the victim accepted it in an unequivocal way.

### **§ 2 Agreements for pre-set reparation and penalty clauses**

*It seemed pointless to maintain the distinction between penalty clauses and contract terms setting a compensation in advance since the provisions contained in articles 1226 to 1230, 1232 and 1233 of the existing Code are hardly ever applied and their meaning is controversial. On the other hand, the two sets of rules providing for judicial revision of sums set by contract terms at present found in articles 1152 and 1231 are retained, with the exception of the possibility of increasing the amount of a penalty which is manifestly derisory which seems hardly ever to be used.*

#### **Art. 1383**

Where the parties have fixed in advance the reparation which will fall due, the court may, even on its own initiative, reduce the agreed sanction if it is manifestly excessive.

The court enjoys the same power as regards contract terms whose purpose is to force the contractual debtor to perform.

Without prejudice to the preceding paragraph, where an undertaking has been performed in part, the agreed sanction for its non-performance may be reduced by the court, even on its own initiative, in proportion to the benefit which the partial performance has produced for the creditor.

Any stipulation to the contrary is struck out.

## *Section 4*

### *Prescription of Actions Claiming Liability*

*The legal provision which appears today as article 2270-1 of the Code is repeated except for the word 'extra-contractual'. It is therefore recommended that actions claiming liability should be subject to the same prescription period whether they are contractual or extra-contractual.*

#### **Art. 1384**

Actions claiming civil liability become prescribed after ten years commencing from the manifestation of the harm or its getting worse, though in the case of personal injuries without having regard to whether their effects have stabilised.<sup>2</sup>

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<sup>1</sup> This provision limits significantly the impact of the principle posed by article 1382 of the Reform Proposals.

<sup>2</sup> This detail does not conform to the case-law of the *Cour de cassation* which has introduced this reference to the date of stabilising of the injury contrary to the wording of the provision itself.

## Chapter IV

# *The Principal Special Regimes of Liability or Compensation*

## *Section 1*

### *Compensation for the Victims of Traffic Accidents*

*These provisions follow very closely articles 1 to 6 of the Law of 5 July 1985. They differ from them, however, on three points:*

*Drivers are treated in the same way as other victims;*

*Railway and tramway accidents are treated in the same way as other accidents in which a motor-vehicle is involved;*

*The provision which deals specially with children, old people and handicapped people is expunged, so that all victims cannot be faced with a defence of their own contributory fault unless this was inexcusable and was the exclusive cause of the accident.*

#### **Art. 1385**

The victims of a traffic accident in which an earth-bound motor-vehicle is involved (including trailers and articulated lorries) are to be compensated for harm attributable to the accident by the driver or keeper of the vehicle involved, even where they were being carried under a contract.

For this purpose, a traffic accident does not include an accident which results from use of a stationary vehicle which is unrelated to its function of transportation.

In the case of a complex accident, every vehicle which was part of the accident's occurrence in whatever way is implicated in it.

Even where only one vehicle is involved in an accident, any category of victim may claim reparation from one of those liable to compensate, including the keeper against the driver or the driver against the keeper.<sup>1</sup>

#### **Art. 1385-1**

Act of God or act of a third party may not be raised as a defence against victims of a traffic accident even where these circumstances possess the characteristics of *force majeure*.

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<sup>1</sup> These three last paragraphs make explicit solutions which the case-law has worked out since 1985.

**Art. 1385-2**

Victims of a traffic accident are to be compensated for losses resulting from their personal injury without being faced with a defence of their own contributory fault unless the latter was both inexcusable and the exclusive cause of the accident.

Nevertheless, in the situation envisaged by the preceding paragraph, victims are not to be compensated by the author of the accident for losses resulting from their personal injury where they deliberately sought the harm which they suffered.

**Art. 1385-3**

Fault committed by the victim has the effect of limiting or excluding his compensation in respect of losses resulting from damage to property; an exclusion of compensation must be specifically justified by reference to the seriousness of his fault.

Apparatus or other things supplied under a medical prescription to the victim give rise to compensation according to the rules applicable to personal injuries.

Where the driver of an earth-bound motor vehicle is not its owner, this driver's fault can be relied on as a defence against the owner as regards the compensation of damage caused to his vehicle. The owner possesses a recourse claim against the driver.

**Art. 1385-4**

Losses suffered by indirect victims are the subject of reparation taking into account any restrictions or exclusions faced by the direct victim.

Fault in the indirect victim may be relied on against him subject to the conditions provided for in articles 1385-2 and 1385-3.<sup>1</sup>

**Art. 1385-5**

Those owing compensation are liable jointly and severally to the victim.

Where third parties are liable for a traffic accident on the basis of the general law, they are also liable jointly and severally.

A driver or keeper of an earth-bound motor vehicle involved in a traffic accident possesses a recourse claim by way of subrogation against other drivers or keepers of vehicles involved or against third parties liable for the accident under the general law. Equally, a person liable for a traffic accident on the basis of the general law can bring a recourse claim by way of subrogation against the drivers or keepers of vehicles involved in the accident.

Contribution to the compensation payable for these purposes is governed by the provisions found in articles 1378 and 1378-1.

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<sup>1</sup> This legal provision formally recognises and extends case-law which accepts that fault in a driver who suffers loss as an indirect victim of an accident may be relied on against him.

## *Section 2*

### *Liability for Defective Products*

*The existing articles 1386-1 to 1386-18 of the Civil Code become 1386 to 1386-17, the terms 'of the present title' which figure in several of these articles having to be replaced with 'of the present section'.*

BOOK THREE

TITLE XX

PRESCRIPTION AND  
POSSESSION

(Articles 2234 to 2281)

# Preamble

*Philippe Malaurie*

More than any other doctrine, prescription marks man's relationship with time and with the law: it dominates all rules and all the law. Not only the law of obligations which forms its domain of choice, but also all other branches of the law, the whole of private law, public law, criminal law and the law of procedure. The provisions of the Civil Code relating to prescription are applicable to all other Codes and all other laws, except for the exceptions made clear in these Reform Proposals. Prescription is of considerable importance for all practitioners, for all users of the law and for all the actors in human activity.

## *1. Defects of the French law of civil prescription*

In the view of everyone, the existing regime of prescription in civil matters possesses three essential defects of an equal seriousness.<sup>1</sup>

First, the excessive length of its periods which lead to a stagnation in human activity: length is to be equated with languor. No-one can understand any longer why the prescription period of the general law should today still last for thirty years (article 2262 of the Civil Code). Many of the other periods are also too long. The frequently accurate notion found in contemporary ideology that history is accelerating calls for the shortening of these periods.

The second defect, which is also generally noted, is the multiplicity of periods, which extend from three months (as regards defamation and published libel) to thirty years and even to a point where prescription vanishes, and passing all sorts of intermediate periods (six months and one, two, three, four, five, ten, and twenty years): this state of affairs has been called really chaotic and even a shambles, and it provides a basis for disregarding the law and a source of muddles and interminable arguments.

The third and less frequently denounced defect lies in the lack of detail and even inconsistencies found in its surrounding regime: as to the prescription periods' starting point, their interruption, suspension, the relative roles of legislation, case-law and contractual provision, the proper role of courts, contractual freedom, and even uncertainties revealed in the concepts which are used. As well as prescription properly so-called, there also exists a hazy cloud of prescriptions which are more or less related to it: non-suspendable periods, foreclosure periods, guarantee

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<sup>1</sup> A. BENABENT, *Le chaos du droit de la prescription extinctive*, Et. L. Boyer, Presses universitaires Toulouse, 1996, p. 123 *et seq.*; B. FAUVARQUE-COSSON, *Variations sur le processus d'harmonisation du droit à travers l'exemple de la prescription extinctive*, R.D.C., 2004 801 *et seq.*; V. LASSERRE-KIESOW, *La prescription, les lois et la fausx du temps*, JCP éd. N, 2004 1225; *Les désordres de la prescription*, ouv. Collectif sous la direction de P. Courbe, P.U., Rouen, 2000.

periods, quite apart from periods governing the stages of legal proceedings. These uncertainties constitute a cause of frequent litigation.

In this way, because of its excessively long periods, their multiplicity and their uncertainty the law of prescription, which ought to contribute to the making of peace in human relations and support their dynamism, has become an abundant source of litigation.

Among the defects which it now possesses, we do not include a special feature of the French law of prescription, that is, that prescription is both acquisitive and extinctive, as it may be thought that this important feature of the French notion of prescription offers more advantages than disadvantages. As a result of its history and its structure, French law has a unified conception of prescription as is clear both from its definition and from its surrounding regime.

### *2. Preliminary issues: method*

Every reform raises preliminary issues of method. This is not the place for an exposition of the theoretical discussions which have taken place on the subject of prescription, however famous they may be, unless they have some practical effect. For example, in the case of extinctive prescription, does it extinguish the right or merely the legal action, a question which concerns only the conflict of laws? Or in the case of the language used, should one refer to extinctive prescription, or rather to liberating or negative prescription, or to usucapion or acquisitive prescription? In the present Proposals, the language and terminology of the Civil Code have been retained as they are, since they are generally seen as satisfactory. To take another example, what is the proper place for the law of prescription within the framework of the Civil Code? Should it be moved, for example, putting it after Title III of Book III (Contracts and Obligations Created by Agreement in General) by creating a Title IIIB with articles numbered 1364-1 *et seq.*? This rearrangement was considered to be awkward, useless and contrary to the unified nature of acquisitive and extinctive prescription which it is thought should be maintained. So too, therefore, the present place of prescription ought to be maintained, being situated at the end of the Code in Title XX of Book III whose heading is also preserved (articles 2219 to 2281 of the present Code). In actual fact, cross-reference to the special title of Book III governing prescription (article 1234, a provision retained by the working group as article 1218) is made in the introductory provisions of Chapter V of Title III of Book III of the Code.

### *3. Preliminary issues: the policy pursued by the legislation*

More difficult are issues of the policy to be pursued by the legislation.

First, all periods of prescription set out in international treaties or European law were deliberately excluded from the Reform Proposals since they are superior to internal law and cannot be modified by French legislation, even though this is not without its disadvantages, not because of their length (which is never excessive) but because of their diversity (one, two or three years), a diversity which reflects a piecemeal approach rather than a rational and simplifying policy, each being made one by one almost specially for each purpose with all the disadvantages which stem from a multiplicity of periods.

It was also considered useful to exclude from the Reform Proposals criminal law, civil procedure, means of enforcing judgments, press law, law governing banking and finance, the law governing collective procedures, family law, the law of succession and matrimonial property regimes, each one of which possesses rules of prescription whose special features are marked, except that no period ought to exceed a maximum of ten or thirty years as the case may be, with the exception of those situations where prescription is ruled out which ought to be retained.

We have also excluded all the periods which are less than or equal to six months during which a right must be exercised or an action brought on pain of expiry; for example, as regards the regime governing co-ownership of immovable property, challenges to decisions of general assemblies of co-owners, which must be brought on pain of expiry within a period of two months (Law of 10 July 1968, article 41, paragraph 2). These are not prescription periods properly so-called.

#### 4. *The duration of prescription*

The first problem which prescription raises for the legislator is the setting of its duration, it being agreed that it is appropriate to curtail at least the period set by the general law and to reduce the number of periods as much as possible.

#### 5. *A limited reform?*

It appeared indispensable to us that we should not restrict ourselves to reducing the prescription period set by the general law which today everyone considers excessively long, even if this minimal position would indeed present some advantages: first—and in common with every simple solution—it would make reform easy. Furthermore, a general consensus would easily accept the amendment of article 2262 of the present Civil Code so as to reduce the period of prescription to ten years. However, despite these advantages of simplicity and general acceptability, this solution would be no more than a mini-reform. Reform of the law of prescription calls for a much more drastic and all-encompassing vision.

#### 6. *Three years*

The present proposals which put forward a general prescription period of three years are very much inspired by the new rules which modified the German Civil Code (the B.G.B.) (Law of 26 November 2001 which came into force on the 1 January 2002<sup>1</sup>) and the proposals set out by the *Principles of European Contract Law*<sup>2</sup> which envisage a single period of three years for extinctive prescription. Such a period would, however, require a certain separation of this law from the law governing acquisitive prescription where a period of three years would clearly be inconceivable and for which it would be necessary to provide a period of ten years. Without doubt, at first such a scheme would come as rather a surprise: would not moving from thirty years to three years mean going from one extreme to another?

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<sup>1</sup> J. BAUERREIS, *Le nouveau droit de la prescription* (dans le BGB), RIDC, 2002, p. 1023 *et seq.*; V. LASSERRE-KIESOW, *loc. cit.*

<sup>2</sup> The French version translated by G. Rouhette, *Société de législation comparée*, 2002; cf. also the *Unidroit Principles*, cited by B. Fauvarque-Cosson, *op. cit.*, p. 811.

But such a move would have a number of advantages, notably the following. First, it would give expression to the new way of private law thinking in countries which form part of the European Union and of modern EC law (from which reform of the Civil Code is inspired whenever it is appropriate). This way of thinking does not merely involve a tendency towards a degree of unification but above all an increasing awareness of the rapidity of contractual transactions, and so it is understandable that German business circles (if not, it would seem, all university jurists) are in favour of it. Furthermore, such a change has the merit of simplification, which would make it more easily accessible which is a particularly valuable characteristic in a society which has become as complex as our own.

At first sight, the German Civil Code, the *Principles of European Contract Law* and the *Unidroit Principles* recognise only a single prescription period. This simplification is partly illusory; German law itself has made very many exceptions to this position (in the context of family law, the law of succession, compensation for personal injuries in delictual liability) quite apart from those which stem from international or European law. The brief periods allowed for litigation before it is excluded are also partly a mirage notably because of German law's special set of rules governing the starting point of prescription periods.

#### *7. Why three prescription periods?*

Despite the resulting disadvantages, we have become persuaded to recommend a variety of periods of prescription, but a variety reduced to three: a general rule of three years, a different period of ten years for special situations, and a back-stop period of ten or thirty years running from the circumstances which give rise to the obligation governing all prescription without exception—even for those belonging to family law, the law of succession, matrimonial property regimes or the law governing banking and finance.

Anyway, a reform of this breadth relies on the existence of great political courage for it will be met with an outcry of opposition. For example, insurance companies and social security institutions will ask why one should move from a prescription period of two years to three years given that the former meets with universal satisfaction. Conversely, employees will protest if the prescription of periodic debts (such as salaries) changes from five to three years. Our response is that it is absolutely necessary for the law to be simplified: to escape its fragmentation we must take drastic action.

#### *8. Freedom of contract*

The entire body of these rules ought to be made more flexible by extending the impact of freedom of contract, as at present is the case with German law, the *Principles of European Contract Law* and also the French Reform Proposals for the law of obligations. At present our law draws a distinction in relation to contract terms governing prescription: those whose purpose is to extend a prescription period are in principle a nullity because, at least where the period is a long one, they would be equivalent to its renunciation, a renunciation which is forbidden by legislation (article 2220 of the Civil Code); by contrast, restrictive contract terms are valid as long as in fact they do not deprive a creditor of his right to act.

The new principle ought to be one of party freedom in relation to prescription without any distinctions, apart from checks on the shortening or lengthening of the periods which it sets.

#### *9. Freedom of contract and public policy*

The two checks which limit the possibility of shortening or lengthening the duration of extinctive prescription periods by contract would have as their consequence the removal of the perverse effects of the recent case-law of the *Cour de cassation* according to which the legislative enumeration of grounds of interruption of prescription is not considered a matter of public policy and therefore may be derogated from by the parties.<sup>1</sup>

#### *10. The interruption of prescription*

The first ground of interruption of prescription recognised by existing law (articles 2244 to 2247 of the Civil Code) is bringing an action. Since the end of the nineteenth century, the courts have interpreted the notion of bringing an action in a very extensive way: this judicial enlargement of the principal ground of interruption of prescription is at the same time the result of and the cause of a good deal of litigation. In this way the grounds of interruption of prescription are multiplied and extended and this is contrary to one of the aims of the present Proposals which intend to reduce its duration, to simplify its regime and as much as possible to do away with the law's uncertainties.

In common with the recent reform of the German law of obligations, it is appropriate to convert the majority of what are now grounds of interruption of prescription into grounds of its suspension, and to recognise only two grounds of interruption which do not attract ambiguity: acknowledgement by a debtor of the validity of his creditor's allegation and action by the creditor to enforce his rights. It would be enough to reproduce the present wording of article 2248, adding that an acknowledgment by a debtor can be implied, for example: 'Prescription is interrupted by an acknowledgment, even if implied, by a debtor or a person in possession, of the right of the person against whom time is running.' Therefore bringing an action would cease to be a ground of interruption of prescription, which would instead become suspended while any proceedings lasted.

#### *11. The disappearance of the conversion of one extinctive prescription period into another*

The first effect which the interruption of prescription at present produces, and which ought to be retained, is the wiping away of all the previous consequences of prescription, so that a new period of prescription of the same duration as before starts to run. Existing law also provides that some (but not all) interruptions result in the conversion of some (but not all) prescription periods into a different prescription period. Where a short—and, above all, very short—prescription period based on a presumption of satisfaction is involved, or even where a periodic debt is involved, an interruption of prescription is deemed to lead to its conversion in this sense as long as the debtor has acknowledged the existence of his obligation by a written instrument recording the amount of the debt and has

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<sup>1</sup> Civ. (1) 25 Jun. 2002, Bull. civ. I, no. 214; D 2003.195 note P. Stoffel-Munck.

undertaken to discharge it. In these circumstances, a new prescription period—the period of the general law—is substituted for the short prescription which has been interrupted. To give a legal basis for this rule, the courts generally invoke the provisions set out in article 2274 which actually say nothing of the kind.

However traditional it may be, this judicial doctrinal construction is complicated, appears inconvenient and ought to be abandoned. It is a breeding-ground for litigation, for uncertainty continues to reign as to where it applies: which prescriptions are liable to conversion? What type of act of interruption is to count as attracting conversion? For such a conversion, is it always necessary for there to be a written acknowledgement which records the amount of the debt made by the debtor? Furthermore, the significance of this doctrine appears above all in relation to very short prescriptions whose disappearance would render conversion useless. Finally, conversion has the effect of lengthening the periods necessary for prescription, which is contrary to one of the principal aims of these Reform Proposals.

And today the recent German reform of the provisions of the German Civil Code concerning the law of obligations and the *Principles of European Contract Law* have simply abandoned it.

This rejection of the conversion of an extinctive prescription period ought not to be carried over to the completely different situation of conversion which applies in the case of usucapion (article 2253 of the Reform Proposals; article 2238 of the present Civil Code). So, a holder of property with the permission of its owner is in principle unable to acquire it by usucapion (article 2251 of the Reform Proposals; article 2236 of the present Civil Code), but he can do so if he converts his own title, by declaring that he is no longer a permitted holder and for the future will possess it on his own account. The regimes governing extinctive prescription and usucapion are not identical.

### *12. Suspension*

The suspension of prescription does not wipe out the period which has already run; it stops time running temporarily. Once the suspension has ended, the prescription period resumes its course, taking into account the period which has already run.

Our law governing suspension has developed a lot over time, and its present regime possesses many uncertainties. Reform ought to get rid of these uncertainties as far as possible and recognise as established some of these developments.

French law before the Revolution tied suspension strictly to equity which it was in the power of the courts to assess, so that a period of prescription was suspended on a case-by-case basis whenever the court thought that one or another event made the exercise of a right impossible. In keeping with their concept of law and their attachment to the majesty and the exclusivity of legislation, the draftsmen of the Civil Code sought to get rid of the judicial character of suspension which was in reality replete with the risk of uncertainty and arbitrariness and so they decided that there could be no suspension unless legislation had so provided. As article

2251 states: 'Prescription runs against all people unless they fall within an exception established by legislation.'

The most important ground of suspension relates to guardianship for incapacity (whether during minority or where an adult so requires) and this applies to all prescription periods except those which are very short which are not suspended (though without prejudice to any subsequent recourse by the incapable person against his guardian) (article 2278).

Under the present law, the principle of legality—that law should rest on legislation—therefore apparently dominates suspensions of prescription which exist only in the circumstances set by legislation. However, the courts have undermined this position in two different ways. On the one hand, there are cases where a prescription period ought to have been suspended if the legislative rule had been strictly applied, but where it was not on the basis that the case concerned non-suspendable periods. On the other hand (and conversely), there are cases where a prescription period was suspended by the court even though this was not provided for by any legislative provision, by application of the rule *contra non valentem* ('prescription does not run against a person who is unable to act').

#### 13. *The suppression of non-suspendable periods*

The courts have accepted, often in the absence of any legislative authority, the existence of 'non-suspendable periods' which cannot be suspended even on the ground of incapacity, for example, the two-year period during which an action for rescission of a contract of sale of immovable property on the ground of gross undervalue may be brought as expressly provided for by article 1676 paragraph 2 of the Civil Code. Similarly, even though no legislative provision so provides, the case-law holds that the period of three years during which movable property which is lost or stolen may be reclaimed (article 2272 paragraph 2 of the Civil Code) is also a non-suspendable period.<sup>1</sup> Furthermore, often—though not always—the case-law holds that a court may raise the issue of the expiry of a non-suspendable period on its own initiative.

There is no precise criterion on the basis of which one can determine which periods are or are not non-suspendable. On this point too, the existing law of extinctive prescription suffers from uncertainty, which is a cause of litigation and often interminable arguments. Reform ought to get rid of the notion of a non-suspendable prescription period, without prejudice to the possibility of legislation deciding otherwise expressly—as indeed it does in the case of article 1676 of the Civil Code which provides in derogation from the general legal position that this or that prescription period runs against incapable persons.

#### 14. *Contra non valentem*

In the area of extinctive prescription a very old, very abundant and almost unwavering case-law has restored to the courts the creative and corrective power with which pre-Revolutionary law had endowed them and which the Civil Code had probably intended to remove from them.

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<sup>1</sup> Crim. 30 Oct. 1969, JCP 1970.II.16333 note G. Goubeaux.

Case-law has resuscitated the equitable maxim *contra non valentem agere non currit praescriptio*: prescription does not run against a person who is unable to act. Therefore, the courts are able to hold back the starting-point of prescription where the creditor was unable to act owing to *force majeure* and even where the creditor was unaware of the existence of his right if this ignorance had a legitimate ground: as in the pre-Revolutionary law, the courts intervene as equity demands and in the light of the particular circumstances. The *Cour de cassation* announces this judge-made rule in a formal legal ground of principle which it quite often repeats in almost the same way: ‘prescription does not run against a person who finds it impossible to act as a result of any impediment whether this results from legislation, from an agreement or from *force majeure*.’<sup>1</sup>

The courts apply this equitable rule in a very contextual way. One of the criteria used by the courts relates to the moment when the impossibility to act appears. The courts apply the rule only if this impossibility to act appeared only at the very end of the prescription period and so they refuse to apply it if the creditor enjoyed a sufficient period to sue after the disappearance of the obstacle.<sup>2</sup>

The recent German reform of the law of obligations in the German Civil Code intended to give a legislative basis for the rule by providing detailed figures: so, *force majeure* which prevents the creditor from acting is not a ground of suspension of prescription unless it took place in the six months preceding the expiry of the prescription period (B.G.B. paragraph 206 and cf. the *Principles of European Contract Law*, article 14.303(2)). The present Reform Proposals are inspired by this rule.

#### 15. *The role of the court*

‘A court cannot raise a plea of prescription on its own initiative.’ This rule set out by article 2223 applies even where prescription is a matter of public policy. It meets with general agreement and ought to be retained. It is debated by legal writers only as regards non-suspendable periods of prescription and so if the notion and doctrine of non-suspendable periods of prescription were to disappear, this debate would lose its point.

#### 16. *The starting point of the prescription period*

The principle is that the starting point of a prescription period is the day when the creditor can act rather than the day when his right arises. For example, as regards successive rights (such as in the case of rent), prescription runs from the day when each payment falls due; similarly, for a debt whose payment is deferred, it is the day when the period of credit expires.

As regards debts which are not enforceable, legislation provides that the starting point of prescription is held back: for a debt whose payment is deferred, to the day

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<sup>1</sup> E.g. Civ. (1) 22 Dec. 1959, JCP 1960.II.11494 note P.E.

<sup>2</sup> E.g. Com. 11 Jan. 1994, Bull. civ. IV no. 22, RTDCiv. 1995.114 comments J. Mestre: ‘the rule according to which prescription does not run against a person who finds it impossible to act as a result of any impediment whether this results from legislation, from an agreement or from *force majeure* does not apply where at the time when this impediment has ended the person with the right of action still has the time necessary to act before the expiry of the prescription period’.

when the period of credit expires; for a debt subject to a suspensive condition, to the day when the condition is satisfied (article 2257 of the Civil Code); as regards an action for annulment on the ground of defect in consent, to the day when the defect ceased or to the day when the victim became aware of it (article 1304 paragraph 2 of the Civil Code). But some back-stops are necessary here; so even if a victim of a defect in consent was unaware that his consent was given by mistake, or obtained by fraud, or extracted by duress, his action becomes prescribed after a back-stop period of ten years from the formation of the contract. For actions claiming extra-contractual liability, the prescription period of three years (in the present Proposals) runs from the day when the victim was able to act, that is, when he became aware of the harm, its extent or its worsening (article 2270-1 of the Civil Code). But even if the victim was unaware of the damage, its extent and its worsening, his action becomes prescribed after a back-stop period of ten years from the commission of the action which caused the harm, a period which is extended to thirty years if it involves personal injury or results from an act of barbarism or harm to the environment.

The majority of the present provisions of the Civil Code governing the starting point for the running of prescription periods ought therefore to be retained, except that a rule should be added providing a back-stop date for the situation where a creditor was unaware of the existence of a defect in consent or a victim was unaware of the existence, extent or worsening of the harm.

#### *17. The effect of prescription*

Liberating prescription has an essentially extinctive effect. However, payment of a debt which has become prescribed can never be claimed back, a rule which the courts often explain as the result of a natural obligation (article 1239 of the Civil Code). This explanation is debatable as it does not matter whether or not the person paying was mistaken in being unaware of the expiry of the prescription which had in fact released him. Thus it is appropriate to add a third paragraph to article 1235 of the Civil Code stating that ‘payment of a debt once prescribed cannot be recovered.’

#### *18. Transitional provisions*

The case-law has adopted simple rules by way of transitional provisions from which the present Proposals take their inspiration.

#### *19. Numbering*

The simplification of the law of prescription would have the effect of getting rid of many articles of the Civil Code. It was thought useful to retain the number of article 2279—which is deeply rooted in national culture and memory in the same way as articles 544 and 1134.

# Chapter I

## *General Provisions* (Articles 2234 to 2242)

### **Art. 2234**

Prescription is a means of acquiring something or of being freed after a certain lapse of time and subject to conditions set by legislation.

### **Art. 2235**

A person may renounce the benefit of a completed prescription.

The duration of an extinctive prescription period can be shortened or prolonged by the agreement of the parties or of their legal representatives, but it may not be reduced below a year nor extended to more than ten years.

### **Art. 2236**

Renunciation of a prescription period may be express or implied; an implied renunciation results from an action which assumes the abandonment of the right to be acquired by prescription.

### **Art. 2237**

A person cannot renounce a prescription period if he does not have the legal right to dispose of property.

### **Art. 2238**

A court may not raise a plea of prescription on its own initiative even where it is a matter of public policy.

### **Art. 2239**

A plea of prescription may be put in defence at any stage in the proceedings, even before the Court of Appeal, unless the party who failed to do so earlier ought to be presumed in the circumstances to have impliedly renounced his right to do so.

### **Art. 2240**

Creditors or any other person having an interest in the completion of a period of prescription may put it in defence or invoke it even where the debtor or the owner have renounced the right to do.

### **Art. 2241**

Things which may not be owned or alienated may not be subject to any form of prescription.

### **Art. 2242**

The State, local authorities and public bodies are subject to the same prescriptions as individuals and equally may put them in defence or invoke their benefit.

## Chapter II

### *Possession*

#### **Art. 2243**

Possession is the detention or enjoyment of a thing or a right which we hold or which we exercise ourselves or through another person who holds or exercises it in our name.

#### **Art. 2444**

In order for prescription to take place, possession must be continuous and uninterrupted, peaceful, public, unequivocal and as an owner.

#### **Art. 2245**

A person is always presumed to possess something for himself and as its owner unless it is proved that he started to possess it on behalf of another person.

#### **Art. 2246**

Where a person starts to possess something on behalf of another he is always presumed to possess it on the same basis, unless there is proof to the contrary.

#### **Art. 2247**

Acts which are merely permitted or which are simply tolerated cannot support either possession or prescription.

#### **Art. 2248**

Nor can acts of force provide a basis for possession capable of attracting prescription.

Effective possession may arise only when any force has ceased.

#### **Art. 2249**

A present possessor who shows that he was formerly in possession is presumed to have been in possession during the intervening period, subject to proof to the contrary.

#### **Art. 2250**

In order to complete the period set for prescription, a person may add to his own period of possession any time of possession by his predecessor in title by whatever way in which he succeeded him, whether universally or individually, and whether gratuitously or for value.

## Chapter III

### *The Grounds on which Prescription is Impeded*

#### **Art. 2251**

A person who possesses property on behalf of another person can never benefit from prescription however much time elapses.

So, tenants, depositors, usufructuaries and all other persons who hold property as a result of its owner's permission cannot acquire it by prescription.

#### **Art. 2252**

The heirs of those who have held property on one of the legal bases indicated by the preceding article cannot acquire it by prescription either.

#### **Art. 2253**

Nevertheless, the persons referred to by articles 2251 and 2252 can acquire property by prescription if the basis of their possession changes either for a reason originating from a third party or as a result of the opposition which they have mounted to the rights of the owner.

#### **Art. 2254**

Persons to whom tenants, depositors and other persons who have held a thing with its owner's permission have conveyed it may acquire it by prescription.

#### **Art. 2255**

A person may not rely on prescription inconsistently with his own title, in the sense that he cannot himself change the legal ground or the principle of his own possession.

#### **Art. 2256**

A person may rely on prescription inconsistently with his own title in the sense that he can be freed by prescription from an obligation which he has contracted.

## Chapter IV

### *The Grounds on which the Running of Prescription is Interrupted or Suspended*

#### *Section 1*

#### *The Grounds on which Prescription is Interrupted*

**Art. 2257**

Prescription can be interrupted either naturally or civilly.

**Art. 2258**

A natural interruption occurs where a possessor of a thing is deprived of its enjoyment for more than a year either by its former owner or even by a third party.

**Art. 2259**

A civil interruption occurs where a debtor or a possessor of a thing acknowledges the right of the person against whom time is running, even where this acknowledgement is implied.

**Art. 2260**

Prescription is also interrupted by an act of enforcement such as the service of a summons or seizure of the thing.

**Art. 2261**

Interruption wipes out time already run for prescription and it causes a new period to run of the same duration as the previous one.

*Comment: article 2253, which is concerned with another different situation where a prescription period is converted, is retained.*

## *Section 2*

### *The Running of Time for Prescription and the Grounds on which it is Suspended*

#### **Art. 2262**

The starting point for the running of time for prescription is the day when the creditor can act.

#### **Art. 2263**

Time does not run:

in the case of a right under an obligation which is subject to a condition, until that condition is fulfilled or fails;

in the case of an action on the guarantee of title, until dispossession has taken place;

in the case of a right under an obligation which is set for a fixed day, until that day arrives.

#### **Art. 2264**

Time does not run or is suspended while the parties negotiate in good faith.

The same rule applies for as long as the debtor is unaware of the existence or extent of the right against him.

#### **Art. 2265**

The suspension of prescription halts the running of time temporarily without wiping out time already run.

#### **Art. 2266**

Time runs against any person who does not find it impossible to act owing to an impediment caused by legislation, a contract or *force majeure*.

Where *force majeure* is temporary it is a ground of suspension of prescription only where it occurred within six months of expiry of its period.

#### **Art. 2267**

Prescription is suspended during the course of proceedings until their conclusion.

#### **Art. 2268**

Time does not run against unemancipated minors or adults subject to guardianship.

#### **Art. 2269**

Time does not run as between husband and wife.

#### **Art. 2270**

Equally, the running of time is suspended against an heir with benefit of inventory as regards rights which the heir possesses against the estate.

**Art. 2271**

But time runs against a vacant estate even where it does not have the benefit of a curator.

It also runs during the time set for an heir to decide whether or not to accept an estate.

## Chapter V

# *The Periods of Time Required for Prescription*

### *Section 1*

#### *General Provisions*

**Art. 2272**

Prescription is to be counted in days and not in hours.

**Art. 2273**

It is completed when the last day of the period has ended.

**Art. 2274**

All actions become prescribed after three years. A person who claims the benefit of such a prescription does not have to adduce any legal basis for it nor can he be faced with a defence alleging his bad faith.

### *Section 2*

#### *Special Prescription Periods*

**Art. 2275**

Nevertheless, the following become prescribed after ten years:

1. actions claiming civil liability whose aim is the reparation of personal injury or any loss caused by an act of barbarism;
2. actions claiming absolute nullity;  
actions relating to a right upheld by a court's decision or by some other authority whose decision brings a right of enforcement;
3. actions claiming liability or the benefit of a guarantee against a builder of a work employed under articles 1792 to 1792-2.

**Art. 2276**

Immovable property is acquired after its possession for ten years.

Variation: Immovable property is acquired after its possession for twenty years. Nevertheless, this period is reduced to ten years where the possessor acquired the property in good faith and under a transaction which on its face would transfer ownership.

**Art. 2277**

The application of the rules set out in this Title is without prejudice to the provisions of the New Code of Civil Procedure, the Criminal Code, the Code of Criminal Procedure, to Book I, Titles I and V of Book III the present Code, to Books V and VI of the Commercial Code, to the Law of 29 July 1881 on the freedom of the press, to international treaties ratified by France and to rules of the European Union.

They do not apply either to periods equal to or lower than six months during which an action must be brought or a right exercised on pain of its extinction.

### *Section 3*

## *The Maximum Period for Extinctive Prescription*

**Art. 2278.**

Nevertheless, and without prejudice to the position governing crimes against humanity which are not subject to prescription, all actions become prescribed ten years after the circumstances which give rise to the obligation, whatever its subject-matter, their starting-point or any interruptions, suspensions or agreements which amend their duration.

In the case of actions claiming civil liability for the reparation of a loss resulting from personal injury, from an act of barbarism or from damage to the environment, the period is thirty years.

### *Section 4*

## *The Possession of Movable Property*

**Art. 2279**

In the case of movable property, possession is equivalent to title.

Nevertheless, a person who has lost or from whom has been stolen a thing may reclaim it for a period of three years starting from the day of its loss or theft, from the person in whose hands he finds it, without prejudice to any recourse by the latter against the person from whom he holds it.

**Art. 2280**

If the present possessor of a stolen or lost thing bought it at a fair, at a market, at a public auction, or from a trader selling similar things, the original owner can have it returned only if he reimburses its possessor with the price which it cost him.

A landlord who under article 2102 reclaims movable property removed from the premises without his consent and which has been bought in the same circumstances must also reimburse the buyer for the price which it cost him.

## *Section 5*

### *Transitional Provisions*

#### **Art. 2281**

Any legislative provision which lengthens the duration of a prescription period has no effect on a prescription which is already completed; it applies to actions which have not become prescribed at the time of entry into force of the legislation in question.

Where legislation reduces the duration of a prescription period, time starts to run from the day of entry into force of the legislation as long as this does not lead to the total duration of the prescription exceeding that set by the previous law.