

PART XIII

ENFORCEMENT

CHAPTER 4

ENFORCEMENT OF NON-PECUNIARY CLAIMS

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1 INTRODUCTION

- 1 In general, a creditor has several options against a defaulting debtor. One of them is forced execution. If the option pursued consists in fulfilment of an obligation *in natura* (specific performance), it must be examined with respect to feasibility and proportionality to weigh up the best alternative for the creditor with the least damage to the debtor.¹ In this context, several possibilities exist: i) certain rights are difficult to enforce *in natura* such as the case of abducted child, environmental law, consumer law or labour law; ii) there are rights that may be enforced – at the option of the creditor – by means of either a financial equivalent (monetary compensation) or specific performance.²
- 2 Most contemporary legal systems provide for the enforcement by both compensation and specific performance. These options for the creditor are supported by arguments based on efficiency and economic effectiveness. The obligation imposed on the debtor is based on the reasonableness of satisfying the creditor's interest in the specific case compared with the reasonableness of the debtor's interest: (i) an appropriate relationship between the interest of the creditor to be satisfied and the conduct required of the debtor; (ii) performance is still possible for the debtor; (iii) the performance required by the creditor is a fair and proportionate solution.
- 3 The creditor's interest may be protected by specific protection (specific performance), or alternatively by means of an equivalent payment of money. These options can be found in both civil and common law.³
- 4 Contracts operate unobtrusively when the parties comply with their obligations. When the debtor breached a contract, the main problem is the consequent dissatisfaction of the creditor's interest. The same could be said when the obligation is giving rise to civil liability from another source of obligations.⁴ In both cases (contract or another source of obligations) the creditor could request the best solution according to his interest to restore the previous state: in some cases it is possible to enforce the specific performance, in

¹ M P Weller, *Die Vertragstreue* (Tübingen, Mohr Siebeck 2009) 30.

² M P Weller, 'Die Struktur des Erfüllungsanspruches im BGB, common law und DCFR- Ein kritischer Vergleich' (2008) *Juristen Zeitung*, 764.

³ K Nehlsen-von Stryk, 'Grenzen des Rechtszwangs: Zur Geschichte der Naturalvollstreckung' (1993) 193 *Archiv für die civilistische Praxis* 193, 529.

⁴ M P Weller (n 1) 34.

another cases he has only the right to demand the compensation .⁵ There are some simple cases, where the debtor is faced with performing a pecuniary obligation or deliver a generic thing.⁶

- 5 Against the historical background of Roman law, medieval law, and the modern age of industrialization, it is possible to see the concern about non-compliance and the claim for specific performance from a substantive point of view. The fundamental question was whether the creditor had the (unlimited) right to demand performance. If so, the second issue was whether the creditor could request that the courts require specific performance from the debtor.⁷
- 6 The question that arises is whether performance can be obtained from a third-party on the market after converting the original obligation of the debtor subject to enforcement into an obligation to provide funds, that is, a monetary obligation. If, on the other hand, it is only the debtor subject to enforcement in person, who can perform this obligation, a further question is whether there are suitable and effective coercive measures, or whether, in the end, the creditor must renounce his interest in actual performance and accept the pecuniary equivalent.⁸
- 7 In the case of obligations to undertake an action, the legal system is faced with a dilemma: whether to provide the creditor with mechanisms that guarantee and contribute to the fulfilment of the debtor's promise, or not, since the freedom of the debtor is considered more valuable.⁹ The responses provided by different legal systems must be analysed at a substantive level as well as at a procedural level.¹⁰

⁵ R P Meagher, W M C Gummow and J R F Leahne, *Equity, Doctrine and Remedies* (4th edn, London, LexisNexis 2002) para 20-005/020; N Andrews, M Clarke, A Tetenborn and G Virgo, *Contractual duties, specific relief: the grant of specific performance* (London, Thomson Reuter 2011) 541-598; J Smits, D Haas and G Heslen, *Specific Performance on Contract Law, Nacional and other Perspectives* (Portland, 2008) 15-40; I Spry, *The Principles of Equitable Remedies* (London, Thomson Reuter 2010) 340; R Kreitner, 'Multiplicity in Contract Remedies' in N Cohen and E McKendrick (ed), *Comparative Remedies for Breach of Contracts* (Oxford University Press 2005) 19-49.d

⁶ F Gómez Pomar, 'El incumplimiento contractual en el derecho español' (2007) (4) Revista para el análisis del Derecho, 3.

⁷ M P Weller (n 1) 109.

⁸ Ibid 110-112.

⁹ Ibid 111.

¹⁰ Ibid 112.

2 ENFORCEMENT OF NON-PECUNIARY CLAIMS: LEGAL AND CULTURAL THOUGHTS

2.1 Brief Historical Law Perspective from the Roman and Medieval Ages

- 8 In Roman law, pecuniary enforcement, or compensatory damages, prevailed over specific performance. This had its origins in the formulary procedure and was later received by the Emperor Justinian in the form of the procedure of 'extraordinary cognition'. Initially, the idea of *obligatio* was framed within the need for the personal subjection of the debtor, so that *in natura* performance was not so far removed from the debtor being subject to a form of slavery to the creditor. The only constitution of Justinian's that referred to fulfilment in kind was preserved in the Justinian Code. Judgments ordering compensatory payments appeared in the Institutions of Gaius in the second century AD.¹¹ But due to the fact that in the post-classical period growing inflation and economic instability made it impossible to resort to pecuniary compensatory relief, a preference for specific performance prevailed.¹² But there is also evidence of the use of compensatory damages. Compensatory damages appear in a very specific situation related to a 'stipulation' and not to obligations in general, making it unclear in this particular case whether the creditor was limited to demanding compensation for damages or could also demand an alternative remedy.¹³
- 9 Medieval jurists found sufficient support in the *Corpus Iuris Civilis* to maintain that under the law of Justinian it was possible to sue and obtain specific performance. They found this, for example, in the *Institutiones* of Justinian (4,6,32).¹⁴ These provisions do not exclude the satisfaction of a judgment for specific performance. The problem for medieval jurists was not whether Justinian's legislation was familiar with the concept of specific performance and the possibility of this method of enforcement, but rather to identify the specific cases in which one could sue and obtain a judgment that could then be executed in this way. Digest 42.1,13.1 describes the situation where there is an obligation to do something, as long as it cannot be done in kind by a third party.¹⁵ It is worth mentioning here that the Glossa of Accursio subsequently strengthened the opinion prevailing in the days of Bartolo

¹¹ See the background and details of this initial interpretation in: F Schulz, *Classical Roman Law* (Oxford University Press 1951) 785-787; M Kasser, *Das Römische Privatrecht* (München, Beck 1971) 238.

¹² R Sohm, L Mitteis and L Wenger, *Institutionen: Geschichte und System des römischen Privatrechts* (Berlin, Duncker & Humblot 1949) 692; F C von Savigny, *System des heutigen römischen Rechts* (Berlin, Veit 1840-1849) V, Sec 215, 75; in the same way H Dondorp, 'Specific Performance, A Historical Perspective' in J Smit, D Haas and G Heslen (ed), *Specific performance in contract law, national and other perspectives* (Antwerp, Intersentia 2010) 280-282.

¹³ C Sintenis, 'Was ist Gegenstand der Klagen aus Obligationibus ad faciendum überhaupt und der action emti im Besonderen' (1838) *Zeitschrift für Civilrecht und Prozess*, 75; G Wagner, 'Ansprüche auf Unmögliches?' (1998) *Juristen Zeitung*, 482-485.

¹⁴ T Repgen, *Vertragstreue und Erfüllungszwang in der mittelalterlichen Rechtswissenschaft* (Paderborn 1994) 30.

¹⁵ J Rückert, *Leistungsstörungen und Juristenideologien heute und gestern. Ein problemgeschichtlicher Beitrag zum Privatrecht im Europa, en Festschrift Kilian* (Baden-Baden 2004) 705-710, 730.

de Saxoferrato, at least in relation to contractual obligations. It was thus held that an obligation to undertake an action, imposed by a provision of the Corpus and not voluntarily assumed through a contract, was directly executable. The same was also applicable to obligations that resulted from a unilateral testamentary disposition. In this way, specific performance was limited to those contractual cases in which performance of the obligation could not be obtained through a third party. Bartolus' view was influential in Italian customary law, based on the fact that when the debtor is in default, the obligation to undertake an action continues to exist, but parallel to it, an alternative obligation arises in the interest of the creditor.¹⁶

- 10 In the *Corpus Iuris Civilis* and around the jurisprudence formed between the eleventh and sixteenth centuries, the principle of specific performance was the subject of important controversies. First, a distinction was made between obligations in giving and obligations in doing.¹⁷ Most obligations to give a thing can be specifically performed.¹⁸ Formally, this possibility was inferred from a passage in Ulpian¹⁹ that the debtor could be subject to compulsion if he was under an obligation to deliver something that could be seized by way of forced execution by the executing judge and handed over to the creditor.²⁰ In Bartolo's commentary, the view that the buyer's demand for the goods purchased could be classified as an obligation to give prevailed and so this approach was taken.²¹
- 11 But, by contrast, there was a discussion as to whether the promisor of an obligation to undertake a specific act could be obliged to perform that act, or whether he could obtain a final release from his obligations by compensating the promisee's interest.²² In the end, commentators between the thirteenth and sixteenth centuries minimized the impact and importance of the principle of specific performance.²³ The debtor was free to decide whether to satisfy the creditor's interest 'in nature' or through pecuniary reparation. This is based on the principle of compliance through pecuniary equivalent. The law was further developed under the strong influence of Baldus with respect to obligations to undertake an

¹⁶ H Dilcher, *Die Theorie der Leistungsstörungen bei Glossatoren, Kommentatoren und Kanonisten* (Frankfurt am Main, 1960) 119-122.

¹⁷ H Dilcher, 'Geldkondemnation und Sachkondemnation in den mittelalterlichen Rechtstheorie' (1961) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 78, 277-280.

¹⁸ R Zimmermann, *Law of Obligations* (Oxford, 1996) 773-775.

¹⁹ K Nehlsen von Stryk, 'Grenzen des Rechtszwangs, Zur Geschichte der Naturalvollstreckung' (1993) *Archiv für die civilistische Praxis* 193, 529-538.

²⁰ H Dilcher, 'Geldkondemnation und Sachkondemnation in den mittelalterlichen Rechtstheorie' (1961) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 78, 277-279, 284.

²¹ T Repgen (n 14) 107, 321.

²² H Dilcher, 'Geldkondemnation und Sachkondemnation in den mittelalterlichen Rechtstheorie' (1961) 78(1) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 120.

²³ T Repgen (n 14) 52, 65-80.

action, correcting the earlier premise and correctly maintaining the radical thesis that specific performance was permissible in some cases.²⁴

- 12 The creditor's claim for specific performance came to be recognized, albeit indirectly, by Pope Innocent IV by establishing a (canonical) alternative parallel to the demand for natural performance – the so-called evangelical denunciation.²⁵ The violation of the promise and of the loyal obligation of fulfilment was considered a sin punishable by excommunication. This resulted in a contumacy procedure whereby the ecclesiastical judge could use coercion based on the threat of excommunication to obtain performance in nature or specific performance. Until the fifteenth century, this was the dominant approach to the immediate fulfilment of every promise or agreement to undertake an action. The claim to specific fulfilment was supported by the canon law requirements.²⁶ Even though it could not be enforced by the secular courts, it had an impact and was recognized in important areas of society, thus allowing ecclesiastical decisions to produce significant effects.²⁷ Thus, for example, merchants and clerics submitted to these rulings. And in this way, canon law granted the creditor the possibility of demanding specific performance in relation to all kinds of obligations.²⁸

2.2 The Modern Age's Innovations and Dilemmas

- 13 In modern law, the principle of pecuniary equivalent governs the enforcement of obligations.²⁹ This is manifested in the *Codex Maximilianeus Bavaricus Civilis* of 1756, where a distinction is made between the obligation to give something and the obligation to undertake an action, in which case the debtor may discharge his obligation by satisfying the creditor's interest in money.³⁰ A similar mechanism is recognised by the Civil Code of 1804, Article 1142 of which provides that every obligation to do or not to do resolves itself into damages in the case of non-performance on the part of the debtor. The significance attributed to the principle of performance by pecuniary equivalent can be traced to the importance of freedom as a fundamental right in eighteenth century thought.³¹

²⁴ R Zimmermann (n 18) 773.

²⁵ A Söllner, 'Die causa im Konditionen- und Vertragsrecht des Mittelalters bei den Glossatoren, Kommentatoren und Kanonisten' (1960) 77 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 182.

²⁶ Ibid 182; M Stathopoulos, 'Probleme der Vertragsbindung und Vertragslösung in rechtsvergleichende Betrachtung' (1994) 194 *Archiv für die civilistische Praxis*, 542-547.

²⁷ D Liebs, *Römisches Recht* (Göttingen, V & Ruprecht 1982) 218.

²⁸ R Zimmermann (n 18) 780.

²⁹ T Repgen (n 14) 328.

³⁰ Part IV, 1 Sec 17 *Codex Maximilianeus Bavaricus Civilis*.

³¹ T Repgen (n 14) 24.

- 14 According to canon law, and especially Castilian law (with its influence in Latin America), contained in the *Siete Partidas*, the creditor is entitled to receive compliance in kind with respect to obligations to do. This was especially the view of the Jesuit scholastics of the second half of the sixteenth century, and Luis de Molina deserves special mention in relation to performance via pecuniary equivalent, being the main jurist who discussed the issue.³² He was opposed to the idea that the debtor of an obligation to do could choose to pay compensation to the creditor. Rather, the debtor was obliged to comply in kind whenever possible. According to de Molina, the only thing that could be inferred from Roman Law (Dig 42,1,13,1) was that the debtor who had negligently failed to comply with his obligation to undertake certain actions was subject to the possibility of an option – but one that was in the mind of the creditor. The person who could choose between pecuniary compensation and specific enforcement of the obligation to undertake a certain action was the creditor, and not the debtor. When in 1604 the French magistrate Antoine Fabre (1557-1624) enunciated the maxim that no one can be coercively forced to act ‘*nemo praecisi coegit ad factum*’³³, the practical meaning of this principle had lost its force – even in relation to the obligation to do. Specific performance was always concerned with identifying ways of obtaining what the debtor had agreed to do, and this led to the distinction created for obligations to do, which consisted of giving or delivering something. In such a case, there was no doubt that it was possible to obtain compliance in kind by resorting to coercion.
- 15 The problem of coercive measures focused rather on pure obligations to undertake an action when such action was not likely to be fulfilled by a third-party. This was because coercive measures could consist of fines, monetary sanctions in favour of the creditor or imprisonment. In fact, the laws of Castile provided for the possibility of a prison sentence for cases of non-performance of their obligations by domestic servants.³⁴ But this was countered by the argument that freedom, as a natural right, could not be undermined by enabling coercive compliance and the enforcement of obligations to do, which should instead become obligations to pay damages or compensation.³⁵
- 16 This was considered and incorporated into the original Article 1142 of the French Civil Code. However, in France, Domat was in favour of the primacy of specific performance.³⁶ In

³² K Luig, ‘Wissenschaft und Kodifikation des Privatrechts im Zeitalter der Aufklärung in der Sicht vom Christian Thomasius’ in *Festschrift Helmut Coing* (München, Beck 1982) 177-189.

³³ E Acolas, *Manuel de droit civil* (Paris, Hachette BNF 1869) 720; K Nehlsen-von Stryk, ‘Grenzen des Rechtszwangs: Zur Geschichte der Naturalvollstreckung’ (1993) 193 *Archiv für die civilistische Praxis* 193, 529-555.

³⁴ T Repgen (n 14) 25.

³⁵ M P Weller (n 1) 97-98.

³⁶ J Domat, *Les lois civiles dans leur ordre naturel* (I, Paris, Schelte, 1702) 24, with this comment: ‘[...] le premier effet de la convention, est que chacun des contractants peut obliger l’ autre a exécuter son engagement’; See also R J Pothier, *Traite des Obligations, en Œuvres de Pothier* (vol III, Paris, Beaucé 1818) 156-158.

relation to the obligation to give, he stated that the creditor is in a pre-eminent position and can always require natural or in kind performance.³⁷ Conversely, the debtor cannot free himself from the will of the creditor through pecuniary reparation or satisfaction of the creditor's interest.³⁸ In short, the concept of compliance *in natura* is analogous to the concept of real performance or performance in kind in the original version of the *Bürgerliches Gesetzbuch* (German Civil Code, BGB). The right to specific performance or *in natura* is established as having priority, followed by pecuniary compensation of the creditor's interest. In Germany, the person who represents the argument for the principle of natural or specific performance is Christian Thomasius.³⁹ He sees in the fulfilment of claims *in natura* not only an element of differentiation between law and morality, but also one of the characteristic details of legal duties: the possibility of their specific fulfilment and their enforceability. It is possible to identify specific or *in natura* performance in the Prussian *Allgemeines Landrecht* of 1794, Part 5 Sec 270 first part ('[...] müssen die Verträge nach ihrem ganzen Inhalt erfüllt werden').

- 17 The discussion in Pandect law in Germany revolved around the distinction between 'duty' and 'patrimonial liability' as the essence of the law of obligation.⁴⁰ Thus, for Brinz, the essence of the obligation is patrimonial liability and therefore all claims can be replaced by a pecuniary compensation. Hartman maintains that the essence of the obligation is duty, and therefore *in natura* compliance is manifested as the primary content or the primary right, since performance by an equivalent is simply a surrogate that replaces the original object of the obligation.⁴¹ According to Savigny, personal freedom is modified by obligation. Thus, from the creditor's point of view, freedom is expanded since the obligation can be claimed in court; while from the point of view of the debtor, freedom is limited since he has acquired the duty to perform his obligation in order to provide the creditor with specific or *in natura* satisfaction of the commitment he has undertaken.⁴²
- 18 The differentiation between substantive and procedural law was one of Windscheid's great contributions in the Editorial Commission for the German BGB. He supported the elimination of Roman law by the application of German local law.⁴³ Consistent with this is

³⁷ M P Weller (n 1) 99-100.

³⁸ Ibid 100-101.

³⁹ J Rückert, *Leistungsstörungen und Juristenideologien heute und gestern. Ein problemgeschichtlicher Beitrag zum Privatrecht in Europa, en Festschrift Kilian* (Baden-Baden, Nomos 2004) 705-708, 730.

⁴⁰ K Ziebarth, *Realexecution und Obligations-Mit besonderer Rücksicht auf die Miethe erortet nach römischen und deutschem Recht im Vergleich mit dem preussischem* (Halle 1866) 23-25; A von Brinz, *Lehrbuch der Pandekten* (vol II, Erlangen, Deichert 1879) 1-25; A von Brinz, 'Obligation und Haftung' (1886) 70 *Archiv für die civilistische Praxis*, 374—390.

⁴¹ G Hartmann, *Die Obligation-Untersuchungen über ihren Zweck und Bau* (Erlangen, Deichert 1875) 159.

⁴² F C von Savigny, *Das Obligationenrecht als Theil des heutigen römischen Rechts* (vol I, Berlin, 1853) 1-6.

⁴³ B Windscheid, *Die Actio des römischen Zivilrechts vom Standpunkte des heutigen Rechts* (1856, reprint Aalen 1969) 1-10, 210-230.

the fact that the German Civil Procedure Code (GCCP) of 1879 regulated coercive measures ranging from fines to imprisonment to guarantee practical performance *in natura*. Windscheid argued that the more *in natura* performance was embedded in conceptions of the rule of law and the operation of the market, the less questions related to enforcement arise, since the regulation would be sufficiently dissuasive to encourage compliance.⁴⁴

- 19 The principle of pecuniary awards therefore no longer governed enforcement, since the judge, in accordance with the provisions of the civil procedural code, could enforce the judgment through the application of penalties and coercive measures.⁴⁵ It should also be remembered that in Germany in the nineteenth century it was still possible to demand the specific performance of certain acts.⁴⁶ For example, in the field of family law, due to the secularisation of marriage and its indissolubility the duty to contract marriage could be enforceable *in natura*.⁴⁷

3 THE RESTITUTION OF GOODS

- 20 The restitution of goods occupies a special place in the field of enforcement of non-monetary claims. Indeed, contrary to an obligation to perform or not to perform a specific act, the restitution of goods can be the object of a forced execution in the strict sense, ie, a direct forced execution. In other words, it is not merely a matter of exerting psychological pressure on the debtor's mind by the threat or application of a sanction but of directly forcing the debtor to perform through coercion. The obligation to make restitution may concern an order for the restitution of real property; the creditor may then request an eviction. It may also concern the restitution of movable property, in which case the creditor may then request a seizure of that property. In these cases, direct execution is admitted by the national law because it allows the creditor to be satisfied more efficiently and without questioning the debtor's fundamental rights.

3.1 Immovable Goods (Eviction)

- 21 Eviction is a very old practice that has long been relatively unregulated to the point that some legislations still do not consider it as a real civil enforcement procedure.⁴⁸ It can be defined as the action of removing a person from a place where he or she is illegitimately staying, if necessary, by force. Forcing the occupant to leave the premises allows the owner

⁴⁴ Ibid 88-99.

⁴⁵ Ibid 230-232.

⁴⁶ Ibid 1-25.

⁴⁷ J Kohler, 'Ungehorsam und Vollstreckung im Civilprozeß' (1893) 80 Archiv für die civilistische Praxis, 141, 197.

⁴⁸ This was the case in France before the 1991-1992 reform; P Cuche, *Précis des voies d'exécution et des procédures de distribution* (5th edn, Dalloz 1943).

to regain the possession and use of their property. Eviction is therefore a measure of direct execution which applies only to the execution of a non-monetary obligation. Although it concerns the restitution of property, some authors consider eviction as a measure of constraint on the person.⁴⁹ This definition deserves approval since most States tolerate the use of physical coercion with respect to the occupant who tries to resist eviction.

- 22 Eviction is a very singular procedure because the social and political stakes are high. From a social standpoint, eviction from housing generally affects poor or modest households and can increase precariousness in employment, education, and health. It can be traumatic for the occupant and his or her family. It is therefore necessary to find a balance between the debtor's right to dignity and housing and the creditor's right to enforcement and property. This balance is sometimes a very delicate one. In countries where the legislation is particularly protective of the debtor, creditors sometimes resort to the use of unlawful physical force against the person in possession. Conversely, in jurisdictions where the legislation primarily protects landlords, the fundamental rights of tenants are infringed. From a political point of view, it is worth noting that the public authorities of certain countries – such as France – are reluctant to proceed with evictions because of the risk of public order disturbances or the absence of a rehousing solution for the debtor and his family. With respect to the principle of separation of powers, such an approach provides an example of a curious obstruction to the enforcement of a court decision.
- 23 In France, eviction was for a long time a relatively unregulated practice, which was rather favourable to the owner. With the law of 9 July 1991, the situation was reversed, and the judicial eviction procedure is now excessively protective of occupants.⁵⁰ Today, eviction can only be carried out by a bailiff on the basis of a court decision. It cannot be carried out on the basis of other enforcement titles such as a notarial deed. The procedure to be followed depends on the use of the premises. It becomes complex, to say the least, when the eviction concerns a dwelling. The procedure starts with an order to leave the premises. The occupant then has two months – which can be extended – to comply. The *juge de l'exécution* (enforcement judge) can also establish an additional grace period. In addition, no eviction can be carried out during a 'winter truce' (1 November – 31 March). In addition, the prefecture must be informed of the eviction. The bailiff must also contact the prefect in order to obtain the immediate assistance of the local competent authorities at the moment of eviction if the occupant refuses to leave the premises. The steps taken by the bailiff during the eviction process are recorded in a report.

⁴⁹ G Couchez, D Lebeau and O Salati, *Procédures civiles d'exécution* (13th edn, Paris, Sirey 2021) 395.

⁵⁰ Art L 411-1 s and R 411-1 s *Code des procédures civiles d'exécution* (Code of Civil Enforcement Procedures) (France).

- 24 It should be noted that there is also an accelerated procedure for the administrative eviction of squatters from a dwelling or a secondary residence.⁵¹ To benefit from this procedure, the owner must file a complaint alleging invasion of his home and have the illegal occupation noted by a judicial police officer. He must then ask the prefect to give the squatters formal notice to leave the dwelling. If the formal notice is not complied with within 24 hours, the prefect must order the forced eviction. The 'winter truce' is not applicable.
- 25 In Belgium, the eviction procedure is quite like the French procedure.⁵² The actual eviction can only take place after a period of one month following the notification of the judgment. The judge can extend or reduce this period in the case of particularly problematic circumstances. The bailiff notifies the tenant by mail of the date and time when the eviction is scheduled. In the case of resistance, the bailiff can be assisted by the police. Outside the Flemish region, a winter truce must be respected (1 November – 15 March in the Walloon region; 1 December – 28 February in the Brussels-Capital region). There is an accelerated judicial – not administrative – procedure for occupants with no right or title.⁵³
- 26 In Switzerland, eviction depends essentially on cantonal law and can only be carried out based on a judgment or a judicial settlement. The procedure is sometimes lengthy as it may involve two authorities. In the canton of Vaud, a first judgment will order the ex-tenant to leave within a given period and it is only in the absence of voluntary execution that the owner can refer the matter to the *juge de paix* (Justice of the Peace) so that he can order forced execution. The municipality must then arrange for the former tenant to be rehoused and for his belongings to be stored if he has not found a solution by the date set for the eviction. There is no winter truce as such, but in most *cantons* it is customary not to evict people at the end of December.
- 27 In Italy, there are specific provisions concerning the *esecuzione per rilascio* (execution by release).⁵⁴ This is also a judicial eviction procedure that allows the *ufficiale giudiziario* (bailiff) to execute the court's decision ordering the handover of the building by going directly to the premises where the occupant is located. The enforcement officer may, if necessary, be accompanied by the police. A comparable system is found in Germany where the *Gerichtsvollzieher* (bailiff) can be charged by the court to carry out an eviction under the conditions it determines.⁵⁵

⁵¹ Art 38 *Loi instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale*, Law establishing the enforceable right to housing and various measures to promote social cohesion, No 2007-290 of 5 March 2007 (France).

⁵² Art 1344*bis* s *Code judiciaire* (Judicial Code) (Belgium).

⁵³ Art 1344*octies* s *Code judiciaire*.

⁵⁴ Art 608 s *Codice di procedura civile* (Code of Civil Procedure, ITCCP) (Italy).

⁵⁵ Sec 885 German Code of Civil Procedure (GCCP).

- 28 In Latin America, eviction used to be authorized in simple declaratory proceedings. In such proceedings, enforcement takes place on the basis of a judicial title when there is a judgment for the restitution of property. The legislation has its origin in the old Spanish legislation and has always been characterised by a marked state interventionism due to the social interests at stake (protection of the right to housing, or the development of a productive activity). Many different statutes of the twentieth and twenty-first centuries are evidence of the problem of ruling on an eviction, balancing the rights of the parties. Uruguay's General Code of Procedure (GCP, 1988) preserved several provisions from the previous laws and provided the regulations for eviction from rural and urban properties (Art 546, which refers to Art 354-360)⁵⁶. Finally, Law 19.889 (2020) is intended to encourage the enforcement of unsecured lease agreements as a means of resolving the problem of access to housing. There are some grounds for suspending or postponing ejectments in special cases. In Brazil, indeed, the legal treatment of eviction lawsuits is provided by the so-called 'Rental Rule' (Law no 8.245/91). According to this rule, eviction orders may be granted as urgent measures in several situations (such as a default on payment of rent). Moreover, it establishes that eviction orders may be voluntarily complied with by the defendant within a period of 15 days. Otherwise, they can be enforced using of police force.
- 29 Common law countries or common law-influenced countries are generally even more favourable to landlords. In Quebec, eviction is extremely simple, and its framework is limited to two articles of the Code of Civil Procedure.⁵⁷ The procedure begins with the service of a notice of execution ordering the debtor to leave the premises and remove his furniture within a period specified by the notice, which may not be less than five days. If the debtor does not comply, the eviction can take place, if necessary, by force. A winter truce exists but it is reduced (24 December – 2 January). In the United States of America, the procedure is often extremely expeditious. It depends on the law of each state. In Florida⁵⁸, for instance, the landlord must give a formal notice to the tenant as soon as the first payment is overdue. If the notice is not served, the landlord must file eviction papers with the local County Clerk's Office to issue a complaint against the tenant. At this point, the tenant can still file the amount owed with the Court to initiate mediation or pay the debt directly. If the tenant fails to do so, the sheriff proceeds directly with eviction within 30 days (and often much sooner). To do this, the sheriff sends the tenant and the landlord a writ of possession. If this notice is not sufficient to remove the tenant from the property, the sheriff will enter the property, and the occupant will have 15 minutes to leave the premises empty of their belongings and furniture. It should be noted, however, that these procedures are extremely rare in the United States of America. This is because each tenant is tracked by a personal Public Record

⁵⁶ The old Civil Code of Procedure (CPC, 1878) regulated this simplified declaratory procedure under title XVIII ('Eviction Lawsuit', Art 1247-1266).

⁵⁷ Art 692 and 693 *Code de procédure civile* (Code of Civil Procedure) (Quebec, Canada).

⁵⁸ Title VI Ch 83 s Florida Statutes (US).

that records all his or her actions as a defaulting debtor. If a tenant is evicted, it will be very difficult for him or her to find a new home. That is why tenants usually prefer to leave quickly.

- 30 In Japan, the eviction procedure also requires that it be ordered by a court,⁵⁹ but the court's enforcement officer is often given a great deal of freedom. Unless the court orders otherwise, he may choose to proceed immediately with the eviction. He may also decide to make a demand for surrender of the property (meaning a demand for the delivery or surrender of real property) by specifying the time limit for delivery. This time limit shall be when one month has elapsed from the day on which the demand for surrender was made.

3.2 Movable Goods (Seizure)

- 31 By contrast with eviction, seizure is used both for monetary and non-monetary obligations. For monetary obligations, the seizure of the movable property is usually not sufficient to fully satisfy the creditor's claim. Indeed, the creditor has to sell the seized property to obtain repayment of the debt. This is not the case for obligations to deliver goods. In this situation, the creditor of the claim for delivery or restitution – who is the owner of the property or has a right of use – will request a seizure in order to obtain the delivery. There will be no forced sale of the movable property following the seizure but direct delivery to the creditor. The difference is important, but it does not erase the close relationship between seizure for sale and seizure for delivery. In many States that have adopted this procedural duality, the regime of the latter is thus very often inspired by the regime of the former as regards the seizure phase itself.
- 32 In France, since the law of 9 July 1991, there has been, in addition to the *saisie-vente* (seizure for sale), a *saisie-appréhension* (seizure for delivery) intended to seize tangible movable goods in the hands of the debtor of the obligation or of a third-party.⁶⁰ To have recourse to it, the creditor must have an enforceable title, but the Code of Civil Enforcement Procedures provides exceptionally two special procedures for those who lack such a title. The creditor can then choose between an accelerated procedure for obtaining a title via a judicial injunction or a special conservatory measure called *saisie-revendication* (seizure under a prior claim).⁶¹ In practice, the procedure of *saisie-appréhension* (seizure for delivery) is simple. The Judicial Officer normally delivers a summons to the debtor requiring them to deliver or return the property. If the debtor does not voluntarily hand over the property

⁵⁹ Art 168 s Civil Execution Act (Japan).

⁶⁰ Art L 222-1 and R 222-1 s *Code des procédures civiles d'exécution* (Code of Civil Enforcement Procedures) (France). This general procedure does not apply to the apprehension of goods contained in a safe or to motor vehicles which are the subject of specific texts.

⁶¹ Art L 222-2 and R 222-17 s *Code des procédures civiles d'exécution* (France).

within eight days, or if the matter is contested, the Judicial Officer can proceed with the direct seizure of the property, in the debtor's residence if necessary. If the property is held by a third party, authorization by the enforcement judge is then necessary. A very comparable procedure also exists in the African countries that are members of the Organization for the Harmonization of Business Law in Africa (OHADA).⁶²

- 33 In Quebec, the Code of Civil Procedure proceeds to evocative assimilation between eviction and seizure for delivery by setting up rules specific to 'forced execution in real actions'.⁶³ In practice, and even if this procedure remains less regulated than others, the phase of seizure of the property is more like the seizure for enforcement of monetary claims. This similarity is also found in Japanese law. The Civil Execution Act⁶⁴ has a single section on 'Compulsory Execution for a Claim not Intended for Payment of Money', whereas the procedure by which the court enforcement officer 'confiscates' the property to hand it over to the creditor is very similar to that by which he proceeds to its 'seizure'.
- 34 In Italy, particular provisions concern the *esecuzione per consegna* (execution by delivery).⁶⁵ This is also a simplified procedure that allows the *ufficiale giudiziario* (bailiff) to execute an order to return property by going directly to the place where the property is located to seize it.⁶⁶ This is also the case in Germany where the *Gerichtsvollzieher* (bailiff) can be charged with the removal of one or more movables in order to hand them over to the creditor.⁶⁷ If the thing to be returned is not found, the debtor is then obliged, at the request of the creditor, to declare under oath in a report that he does not possess the thing and that he does not know where it is to be found.
- 35 In Latin America, specific seizure procedures have also been established. In Bolivia, for instance, seizure must be preceded by a warning.⁶⁸ The debtor has three days in which to comply. The same mechanism is used as for the coercive execution of sums of money. It should be noted, however, that some States have not established any direct enforcement procedure for the seizure of property to be returned or delivered – the claimant needs a condemnatory judgment in earlier proceedings – which makes the performance of the

⁶² Art 218 s *Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution* (Uniform Act on the organisation of simplified recovery and enforcement procedures) (OHADA).

⁶³ Art 692 s *Code de procédure civile* (Quebec, Canada).

⁶⁴ Art 169 Civil Execution Act (Japan).

⁶⁵ Art 605 s ITCCP.

⁶⁶ M A Lupoi, 'Civil Enforcement in Italy: a Coparative Perspective' in R Stürner and M Kawano, *Comparative Studies on Enforcement and Provicional Measures* (Mohr Siebeck 2011) 90.

⁶⁷ Sec 883 GCCP; The same mechanism applies to fungible property by analogy according to Sec 884 GCCP.

⁶⁸ Art 429 *Código de Procedimiento Civil* (Code of Civil Procedure) (Bolivia).

debtor's obligation more uncertain, since it is then based on indirect enforcement mechanisms. Such is the case in Cuba⁶⁹, Peru⁷⁰, and Argentina⁷¹.

4 SPECIFIC PERFORMANCE AND ENFORCEMENT PROCEEDINGS

- 36 Contractual compliance is related to the will of the parties, since contracts are concluded in order to be fulfilled, and the will of the parties is the basis for their formation. Indeed, a distinction between specific performance and compensation in damages is not straightforward, since they are two possible alternatives that the creditor could offer to the debtor.⁷² The central question is how best to protect the creditor's interest.⁷³
- 37 In the case *Alfred MacAlpine Construction Ltd. v Panatown Ltd.*⁷⁴ Lord Millett remarked that there had for some time been a growing consensus among academics that English law adopted an unduly narrow approach to the concept of loss. Through a broad definition of economic loss, English law thus prioritises compensatory remedies in the form of a pecuniary equivalent over specific performance.⁷⁵ Another important contribution to this discussion is that proposed by the House of Lords in the case *Ruxley Electronics and Construction Ltd. v Forsyth*.⁷⁶ The Law Lords noted that damages for breach of contract normally proceed based on the assumption that each contracting party has a purely commercial interest and therefore the losses resulting from non-compliance are measurable from a purely economic point, but that this view was not appropriate in all cases.⁷⁷

4.1 Discussion of the Remedies for the Creditor

- 38 The economic analysis of contracts can be examined based on theories on efficiency and strategic behaviour, that is, the behaviour that the parties expect to obtain the greatest benefit with the least damage. The idea of a so-called efficient breach of contract is supported by this theory, permitting a contracting party, who subsequently realises that

⁶⁹ Art 479 *Ley de Procedimiento Civil, Administrativo y Laboral* (Civil, Administrative and Labour Procedure Law) (Cuba).

⁷⁰ Art 521 *Código de Procedimiento Civil* (Code of Civil Procedure) (Peru).

⁷¹ Art 804 *Código Civil y Comercial* (Civil and Commercial Code) (Argentina).

⁷² J Jacob, *The Fabric of English Justice* (London, 1987) 188.

⁷³ A Zuckerman, *Civil Procedure* (Oxford University Press 2003) no 22.77; K Nehlsen-von Stryk, 'Grenzen des Rechtszwangs: Zur Geschichte der Naturalvollstreckung' (1993) 193 *Archiv für die civilistische Praxis*, 529-555.

⁷⁴ *Alfred McAlpine Construction Ltd v Panatown Ltd* (House of Lords, UK), Judgment 18 June 2019 [2001] 1 AC 518.

⁷⁵ A Zuckerman (n 73).

⁷⁶ *Ruxley Electronics and Construction Ltd. v Forsyth* (House of Lords, UK) [1995] UKHL 8.

⁷⁷ *Ibid* 353.

they could obtain higher profits by engaging in an activity other than the one for which they contracted in breach of contract, since this is a rational economic option.⁷⁸ Thus, contractual remedies include all those mechanisms available for the protection of the interest in contractual performance – whether specific performance, termination of the contract, rescission or compensation for damages, and also the question of whether punitive damages should be available, according to this understanding of efficiency.⁷⁹

- 39 Adequate substantive remedies for the breach of an obligation need sanctions in the event that the losing party does not comply with what has been ordered. It is therefore evident that in the Common Law tradition, more than elsewhere, a strong link has been created between the nature of the claim, the nature of the remedy granted and the procedural technique for enforcement – that is, the sanction in the strict sense (sanction). The two main remedies in the English Law of Equity with respect to obligations to do or obligations to abstain are on the one hand an order for specific performance and an injunction on the other. Both of these share the use of civil contempt of court as the sanction for their violation. And it is to these two institutions that we must now briefly turn our attention. In principle, however, common law legal systems award damages for a breach of contract. Thus, the grant of an order for specific performance or an injunction is exceptional and consequently the use of civil contempt is a subsidiary remedy with respect to compensation for damages, which appears entirely appropriate.⁸⁰
- 40 By contrast, from the point of view of historical comparative law, it can be argued that French law has always offered contractual remedies that are noticeably more protective of the interest in compliance, even with the 2016 reform of the Civil Code. In fact, the interest in specific performance has weak protection in England and much stronger protection in France. This is demonstrated by Laithier's comparative study⁸¹ and Treitel's important text on remedies for breach of contract in English law published in 1988.⁸²
- 41 French law substantively regulates certain consequences that can be procedurally enforced, but at the time of enforcement the debtor can always offer a substitution or replacement, a damages payment being the debtor's final option.⁸³ To this, it must be added that the substantive regulation of punitive damages is only incorporated in the civil law system in a few cases. The amount and manner of application of punitive damages is an important

⁷⁸ P Atiyah, *Essays on Contract* (Oxford University Press 1988) 121-124.

⁷⁹ G Treitel, *Remedies for Breach of Contracts. A Comparative Account* (Oxford, 1988) 15-35.

⁸⁰ I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (London, Thomson Reuter 2010) 51; A Burrows, *Remedies for Torts and Breach of Contract* (Oxford, Oxford University Press 2004) 456.

⁸¹ Y M Laithier, *Étude comparative des sanctions de l'inexécution du contrat* (LGDJ Paris 2004) 10-35.

⁸² G Treitel, *Remedies for Breach of Contracts. A Comparative Account* (Oxford, 1988) 20-35.

⁸³ S Rowan, *Remedies for Breach of Contract* (Oxford, 2012) 68.

support for specific performance in the Anglo-Saxon model. Punitive damages play a complementary role to compensatory damages, since it may be possible to demand specific conduct with the guarantee of the possibility of applying a pecuniary sanction that exceeds the level of the damages available.⁸⁴

- 42 Article 699 of the Spanish LEC states that when the enforcement title contains an obligation to do or not to do or to deliver something other than a sum of money, the debtor must comply precisely with what is established in the enforcement title. That means that a decision concerning a preference for one form of performance over another has already been made during the proceedings, and the decision in favour of specific performance is already reflected in the judgment. It is only when specific performance is not possible, or no longer satisfies the legitimate interest of the creditor, that the court will establish, at the request of the person seeking enforcement, compensation for the damage and loss caused, in accordance with the provisions of Art 712 ff *Ley de Enjuiciamiento Civil* (Code of Civil Procedure (Spain), LEC).⁸⁵

4.2 The Specific Performance in Debate

- 43 The options between the creditor-debtor interest and balance could be summarized as follows: i) An economically efficient and morally neutral approach that prioritises equivalent performance or pecuniary compensation;⁸⁶ ii) an approach whereby the debtor has the option to comply *in natura* and only subsidiarily pays a pecuniary equivalent, which is the traditional model under the influence of the old article of ‘*nemo praecisi coegit ad factum*’ of Article 1142 French Civil Code of Civil Procedure (FCCP)⁸⁷ for several countries in this tradition;⁸⁸ iii) finally, there is a third option where it is the creditor who has the ‘option’ to

⁸⁴ T Riehm, *Der Grundsatz der Naturalerfüllung* (Tübingen, 2014) 15.

⁸⁵ J L Lacruz Berdejo, *Elementos de Derecho civil, Derecho de obligaciones* (vol 2, 2nd edn, Madrid, Dykinson 1999) 513.

⁸⁶ A Farnsworth, ‘Damages and Specific Relief’ (1979) 27(2-3) *American Journal of Comparative Law*, 247-253; S Sloof, H Oosterbeek and J Sonnemans, ‘On the Importance of Default Breach Remedies’ (2007) 5 *Journal of Institutional and Theoretical Economics*, 163 (‘parties often remain loyal to the default remedies because they fail to agree about possible alternatives’); T Ulen, ‘The Efficiency of Specific Performance, Towards a Unified Theory of Contract Remedies’ (1984) 83 *Michigan Law Review*, 341- 343: ‘the bulk of the scholarship on efficient remedies has concerned the award of money damages, and a consensus has been reached on the form of damages that is most likely to promote economic efficiency’.

⁸⁷ H Dondorp, ‘“Precise cogi”. Enforcing Specific Performance in Medieval Legal Scholarship’ in J Hallebeek and H Dondorp (ed), *The right to specific performance. The historical development* (Antwerp, Intersentia 2010) 21-53; R Sefton-Green, ‘French and English Crypto-Nationalism and European Private Law’ (2012) 8 *European Review of Contract Law*, 260.

⁸⁸ V Pardo Iranzo, *Ejecución de sentencias por obligaciones de hacer y de no hacer* (Valencia, 2001) 15-40; J Oosterhuis, ‘Industrialization and Specific Performance in the German Territories During the 19th Century’ in J Hallebeek and H Dondorp (ed), *The right to specific performance. The historical development* (Antwerp,

freely choose between options i) and ii) according to his best interests, with all options being equally available.⁸⁹

- 44 According to the third proposal, there is no primary or secondary remedy, but equal alternatives.⁹⁰ If a judgment debtor fails voluntarily comply with a judgment or ruling eligible for enforcement, justice will still be ensured by the State's enforcement apparatus, which is vested in the state power.⁹¹ That being so, it is essential to consider the application of the principle of proportionality and the extent to which this option is acceptable for the debtor.⁹² As a result, the coercive enforcement of a judgment must be carefully planned by an enforcement agent in accordance with the law.⁹³ Thus, coercive measures take on an additional and necessary role for the maintenance of the rule of law.⁹⁴

Intersentia 2010) 97-133; Y M Laithier, 'Comparative Reflections on the French Law of Remedies for Breach of Contract' in N Cohen and E McKendrick (ed), *Comparative Remedies for Breach of Contracts* (Oxford, 2005) 103-122.

⁸⁹ M Hevia, *Reasonableness and Responsibility. A Theory of Contract Law* (Dordrecht, Springer 2013) 103-114, 67-89; B Depoorter and S Tontrup, 'How Law Frames Moral Intuitions. The Expressive Effect of Specific Performance' (2012) 54 *Arizona Law Review*, 673; P López Díaz, 'La indemnización compensatoria por incumplimiento de los contratos bilaterales como remedio autónomo en el derecho civil chileno' (2010) 15 *Revista chilena de Derecho Privado*, 65-113.

⁹⁰ R Kreitner, 'Multiplicity in Contract Remedies' in N Cohen and E McKendrick (ed), *Comparative Remedies for Breach of Contracts* (Oxford University Press 2005) 19-49.

⁹¹ J Lebre de Freitas, *A acção executiva* (Gestlegal 2024); S Pielievre, *Droit de l'exécution* (Paris, Economica 2016); P Wéry, 'Les pouvoirs du juge en matière de contentieux contractuel dans les principes du droit européen du contrat' in J P de Bandt (ed), *Liber Amicorum Jean-Pierre de Bandt* (Bruxelles, 2004) 707-736; X Zhao, 'Nicht-Geldvollstreckung in Deutschland, England und China' (Hamburg, 2008) 10-2; D Haas and C Jansen, 'Specific Performance in Dutch law' in J Smits, D Haas and G Heslen, *Specific Performance in Contract Law, National and other Perspectives* (Antwerp, 2008) 11-29; A Proto Pisani, 'L'effettività dei mezzi di tutela giurisdizionale con particolare riferimento all'attuazione della sentenza di condanna' (1975) *Rivista di Diritto Processuale*, 4; A Saletti, '614bis. Attuazione degli obblighi di fare infungibile o di non fare' in B Saletti and A Sassani (ed), *Commentario a la Riforma* (Torino, 2009) 192-205; M Taruffo, 'L'attuazione esecutiva dei diritti, profili comparatistici' (1988) *Rivista Trimestrale di Diritto e Procedura Civile*, 142; G G Treglia, 'L'attuazione dei provvedimenti' in A Saletti and G Tarzia (ed), *Il processo cautelare* (Milano, 2008) 572-576; L Díez-Picazo-Ponce de León, *Los principios del derecho europeo de los contratos* (Madrid, 2002) 350-353; H Lando and C Rose, 'On the Enforcement of Specific Performance in Civil Law Countries' (2004) 24(4) *International Review of Law and Economics*, 47.

⁹² M Stürner, *Der Grundsatz der Verhältnismäßigkeit im Schuldvertragsrecht* (Tübingen, Mohr Siebeck 2010) 193-207; D Friedman, 'Rights and Remedies' in N Cohen and E McKendrick (ed), *Comparative Remedies for Breach of Contracts* (Oxford, 2005) 3-17; M Eisenberg, 'Actual and Virtual Specific Performance. The Theory of Efficient Breach and the Indifference Principle in Contract Law' (2005) *California Law Review* 93, 975.

⁹³ P Delebecque, 'L'exécution forcée' (2006) *Revue des Contrats*, 99-103; U Jacobson and J Jacob, *Trends in the enforcement of non-money judgments and orders* (Antwerp, Kluwer 1988) 7-102.

⁹⁴ W Kennett, *The Enforcement of Judgments in Europe. Non-Money Judgment* (Oxford 2000, Reprint 2005) 287; K Kerameus, 'Enforcement Proceedings' in M Cappelletti (ed), *International Encyclopedia of Comparative Law* (vol XVI, Tübingen, 2002) 19-2294-102; K Kerameus, 'Enforcement of Non-Money Judgments and Orders in a Comparative Perspective' in J Nafziger and S Symeonides (ed), *Law and Justice*

- 45 The economic conditions of today are different to those in which the law developed: There is an open and diversified market that is continually expanding. In such a market, specific non-fungible obligations are scarce, a situation facilitated by the existence of various equally valid alternatives enabling contractual obligations to be satisfied. This also applies to the traditional positive obligations of giving something, of doing or performing a service or work. That is to say, the available option for the creditor is not always compensation (in substitution for the object owed to him), but rather his interest can be satisfied in kind or in nature, understood as that which satisfies the interest of the creditor according to his past, current and future expectations.⁹⁵ This interest in *in natura* satisfaction may be opposed to the interest of the debtor, when it would be disproportionate to require specific performance, since it would cause greater harm to the debtor than that which would be caused if the loss were mitigated by seeking a pecuniary equivalent or substitute to satisfy the creditor's interest.
- 46 In addition, new rights have emerged, such as those arising from consumer relations, or the supra-individual and diffuse interests that exist in relation to environmental matters, free competition, the protection of industrial, copyright, trademark and patent rights, health, relationship and family law rights, and others, where specific compliance can be translated into positive or negative behaviour: as the right to perform an act, to abstain from an act, to cease an act or to tolerate an act without impeding another's actions. In these cases, the fungibility of the object is usually not easy to determine, and the costs for both interested parties (many arising from extra-contractual relationships) are high: i) the creditor could suffer damage that is difficult or impossible to repair if the action required of the debtor is not carried out, and the debtor could suffer a loss greater than the pecuniary equivalent of his performance; ii) monetary measurability as a substitute is neither easy nor reliable; and iii) the relevant relationships occur in situations involving markets, regulated situations and important public policies.
- 47 Notwithstanding the above, both continental and common law systems decided that monetary compensation should be considered an optional remedy for the creditor. That is, they recognised hierarchies between primary and secondary remedies:⁹⁶ the creditor has

in a Multistate World, Essays in Honor of Arthur von Mehren (New York, 2002) 107-119; M Donnier and J B Donnier, *Voies d'exécution et procédures de distribution* (10th edn, Paris, LexisNexis 2020) 147-188.

⁹⁵ A Proto Pisani, 'L'effettività dei mezzi di tutela giurisdizionale con particolare riferimento all'attuazione della sentenza di condanna' (1975) *Rivista di Diritto Processuale*, 620-630.

⁹⁶ J Jacob, 'General Report' in U Jacobson and J Jacob, *Trends in enforcement of non-money judgments and orders* (Deventer, Kluwer 1988) 16-19.

the right to sue and demand specific performance.⁹⁷ In practice, creditors can always demand pecuniary compensation as an alternative to specific performance.⁹⁸

- 48 The new 2016 French regulation on ‘breach of contract’, systematises a matter that was regulated in a fragmented manner in the original text of the *Code civil*, an approach that was considered by the majority of the doctrine as defective. The section begins with an enumeration of the creditor's remedies in the case of default by the debtor. The use of *remède* (a Gallicism for remedy) is already an important innovation. These remedies are: the suspension of the obligation itself, forced execution, reduction of the price, rescission and compensation for damages (Art 1217 FCCP). The provision excludes a ranking of the remedies available to the creditor and expressly indicates that any that are not incompatible may be accumulated, so that compensation for damages may be claimed together with any other remedy.
- 49 There is a legal principle permitting forced execution in kind. However, according to the text the action for forced execution can only be brought after the debtor has been given notice to perform his obligation.⁹⁹ The old Article 1142 FCCP provided that the violation of an obligation to do or not to do could only give rise to an order to pay damages. However, jurisprudence has completely reversed the rule, based on the old Article 1184 FCCP ‘if an obligation undertaken for the benefit of one of the parties has not been fulfilled, that party has a choice between forcing the other to perform the agreement, if that remains possible, or seeking termination of the contract along with the payment of damages’. The 2016 *Ordonnance* abandoned the distinction between obligations to do, not to do and to give, and has thus established as a principle the possibility of obtaining the forced performance in kind of an unfulfilled obligation. The text, however, provides two limits to this principle.¹⁰⁰ Forced execution in kind is excluded ‘when it is impossible’ (Art 1221 FCCP). Here again, the text only adopts what had been established by previous case law. There are traditionally three types of impossibilities which can hinder compulsory execution in kind.
- 50 The impossibility can be material. For example, the debtor might have undertaken to renovate a property which has perished in the meantime: as the property no longer exists, it is materially impossible to force the performance in kind. The impossibility can also be a

⁹⁷ N Andrews, M Clarke A Tettenborn and G Virgo, *Contractual duties, specific relief: the grant of specific performance* (2nd edn, Sweet & Maxwell 2017) 541-598.

⁹⁸ K D Kerameus, ‘Enforcement of non-money judgments and orders in a comparative perspective’ in *Law and justice in a multistate world: essays in honor of Arthur von Mehren* (Brill 2002) 107-119; M Eisenberg, ‘Actual and virtual specific performance, the theory of efficient breach, and the indifference principle in contract law’ (2005) 93(4) *California Law Review*, 975.

⁹⁹ Art 1221 French Code of Civil Procedure (FCCP).

¹⁰⁰ Y M Laithier, ‘Le droit à l’exécution en nature : extension ou réduction?’ in P Stoffel-Muck (ed), *Réforme du droit des contrats et pratique des affaires* (Paris, Dalloz 2015) 97.

moral one. The usual example is that of an artist who undertakes to paint a picture. The impossibility of performing an act can finally be legal. The often quoted example is that of a lessor who successively concludes two lease contracts relating to the same building but with two different lessees. Once the first lessee has settled in the building, the second lessee can no longer obtain compulsory performance of the lessor's obligation to do (make the property available), because this would require evicting the first lessee, who has just as much right to occupy the premises, since he also benefits from a lease contract.¹⁰¹

- 51 Forced execution in kind is also excluded 'if there is a manifest disproportion between the cost to the debtor and the interest of the creditor' (Art 1221 FCCP). This is a new provision. In the case that enforcement proves to be extremely onerous and disproportionate for the debtor, damages may be the best option. The text of Art 1221 appears to be a concrete expression of the theory of abuse of rights, formulated in a more precise manner, to provide a framework for the judge's assessment and encourage increased legal certainty.¹⁰² The reference to the 'interest of the creditor' leaves a significant margin of appreciation to the judge, who must, however, also assess the requirement of 'manifest disproportion' regarding the costs of specific performance.
- 52 The provisions relating to procurement of performance and the destruction of work done in violation of an obligation are slightly modified in Art 1222 FCCP. The option of procuring performance becomes unilateral and extrajudicial: it is no longer necessary to obtain the prior authorization of the judge to have the obligation carried out by a third party and to ask the debtor to pay the sums expended for this purpose (cf old Art 1144 FCCP). Three conditions are provided for by the text. The creditor must first give notice to the debtor. He must then, after formal notice, give the debtor a reasonable time to comply.¹⁰³ And any expenditure must be reasonable.
- 53 Usually, a creditor might trust that the debtor will perform his or her obligations. However, when this does not happen a legal system must provide for a remedy. This raises the question of whether the creditor can in fact demand the performance of the obligation itself.¹⁰⁴ Two fundamental legal principles are at odds here: on the one hand, the binding effect of contracts (involving contractual good faith) and, on the other, the debtor's personal freedom. In the course of history, two competing forms of satisfaction of the creditor have

¹⁰¹ N Ancel, 'Le juge et les remèdes à l'inexécution du contrat' (2016) *Revue des contrats* 408; H Lando-Rose, 'On the Enforcement of Specific Performance in Civil Law Countries' (2004) 24(4) *International Review of Law and Economics*, 473.

¹⁰² Case 03-21.136 (Court of Cassation, France), Judgment 11 May 2005; Case 14-14.612 (Court of Cassation, France), Judgement 16 June 2015.

¹⁰³ M Brochier, 'Les nouveaux rôles du juge dans l'inexécution du contrat' (2016) 259 *Droit et patrimoine*, 44.

¹⁰⁴ M Mekki, 'Le juge et les remèdes à l'inexécution du contrat' (2016) (2) *Revue des contrats*, 400.

developed regarding contractual performance: performance *in natura* or specific performance and pecuniary or equivalent performance.¹⁰⁵

- 54 Specific performance in common law countries is a remedy that can be granted in the event of a violation of contractual obligations (breach of contract), and which has the purpose of imposing on the debtor – exclusively through the completion of positive acts – the execution in kind of what was promised.¹⁰⁶ The aim here is to develop the enforceability of specific performance as an objective. The first specific objective (explaining the action to be undertaken) is based on the need to adapt procedural rules in such a way that they adequately and flexibly protect the best interests of the creditor in enforcement, but with respect for the principle of proportionality and due account of the debtor's position. The second specific objective (explaining the reason for the action) is to demonstrate the need for the enforceable protection of new rights (contractual, environmental, consumer, family, non-discrimination, labour), which allow only a flexible recognition of the creditor's best interests (whether for a specific satisfaction *in natura*, specific, restitutive or substitutive and not exclusive, but complementary by equivalent (compensatory)).¹⁰⁷ Finally, the third objective (explaining how enforcement can be achieved) is to demonstrate the feasibility of a mixed system from a comparative standpoint (with the best substantive and procedural tools of the civil law and common law traditions) in relation to non-monetary obligations and to advocate for an adequate regulation of the claim for specific performance (including positive obligations to do, to give or to provide a declaration of will, or negative obligations to cease from action).
- 55 In the traditional view of Roman and French law (Art 1142 FCCP before the 2016 reform), which has had a strong influence on other legal systems, specific performance is limited with respect to the person of the debtor and the will of the creditor. In this way, any obligation to do or not to do is resolved in damages in the case of non-performance by the debtor. This limit is inconceivable for monetary obligations: In theory, it is always possible to obtain specific performance, with the forced auction of the debtor's assets. This prevents the debtor of an obligation to do or not to do, or to cease action from being subject to forced execution without further delay.

¹⁰⁵ Association Capitant (ed), *Terminologie contractuelle commune* (Paris, Société de législation comparée 2008) 88.

¹⁰⁶ A Farnsworth, 'Specific Relief in American Law' in *Études offertes à Jacques Ghestin, le contrat au début du XXI^e siècle* (LGDJ Paris 2001) 331; T Riehm, *Der Grundsatz der Naturalerfüllung* (Tübingen, Mohr Siebeck, 2015) 25-40; O Remien, *Rechtsverwirklichung durch Zwangsgeld* (Tübingen, 1992) 1; J Himmelschein, 'Erfüllungszwang und Lehren von den positiven Vertragsverletzungen' (1932) 135 *Archiv für die civilistische Praxis*, 255- 258; H Stöckli, *Synallagma im Vertragsrecht* (Zürich, 2008) 237.

¹⁰⁷ R Wilhelmi, *Risikoschutz durch Privatrecht* (Tübingen, Mohr Siebeck 2009) 10-25.

5 EFFECTIVE ENFORCEMENT AND COERCIVE MEASURES

- 56 This difference between the role and the societal view of a judge recalls the distinction, mentioned several times, between the entirely public dimension of common law coercive measures and the various¹⁰⁸ private (the *astreinte* is paid to the creditor him or herself) or public (it is paid to the State) concepts underlying the continental coercive measure.
- 57 In common law systems, coercive measures ensure that the effectiveness of and respect for a judge's order is absolute and they have always been perceived in this way.¹⁰⁹ The common law tradition maintains that judicial power to punish non-compliance with court orders under the doctrine of contempt of court is inherently and incontrovertibly necessary for the workings of a system of administration of justice. Chesterman notes that this concept is simply unknown in the civil law system: there are laws regarding interference with the administration of justice, but not such a strong overarching principle.¹¹⁰
- 58 As we mentioned, the relationship between remedies and sanctions has given shape to the mentality of the common lawyer. The dynamic of the courts was the main driver of the development of English law. To fully understand the creation, consolidation and current structure of a multifaceted and varied institution like the common law *contempt of court*, it is necessary to identify two influences: (i) the development of English legal thought with its lack of any original separation between substantive law and procedural law; and (ii) the good administration of justice as a common good of both private law and public law.¹¹¹
- 59 Civil law systems also provide for judicial sanctions for failure to comply with court orders. However, if the civil law sanctions – such as the French *astreinte* (fine; penalty payment) and the German *Zwangsgeld* (fine; penalty payment) and *Zwangshaft* (mandatory detention) – are compared with the common law contempt of court, it is evident that the two systems have a different conceptual starting point. The main reason for this divergence appears to be different visions of the role played by the courts in the respective jurisdictions.

¹⁰⁸ R Goldfarb, 'The History of Contempt Power' (1961) (1) Washington Law Review, 6-10; C Giabardo, *Effettività della tutela giurisdizionale e misure coercitive nel processo civile* (Torino, 2022) 200-210.

¹⁰⁹ M Chesterman, 'Contempt: In the Common Law, but Not the Civil Law' (1997) 46(3) International and Comparative Law Quarterly, 521-560; P Macmahon, 'Proceduralism, Civil Justice and American Legal Thought' (2013) 34 University of Pennsylvania Journal of International Law, 545-555.

¹¹⁰ M Chesterman, 'Contempt: in the Common Law, but not the Civil Law' (1997) 46(3) International and Comparative Law Quarterly, 521-560.

¹¹¹ K Kerameus, 'Enforcement Proceedings' in M Cappelletti (ed), *International Encyclopedia of Comparative Law* (vol XVI, Tübingen, 2002) 19-22; T O Main, 'The Procedural Foundation of Substantive Law' (2010) 87 Washington University Law Review, 801; S Chiarloni, *Misure coercitive e tutela dei diritti* (Milano, 1980) 27-33.

- 60 The contrast between the French and the German approach to coercive enforcement of judgments is evidence of the differences between civil law systems.¹¹² Despite their long exposure to ideas derived from Roman law, each civil law system is the product of independent and conscious choices. Indeed, the German lawyers who drafted and adopted the Civil Procedure Code in the 1870s, made a conscious choice between the proposals before them – in favour of either individual freedom or an essential kind of societal obedience. Personal arrest and monetary fines are to be used as modes of coercion only when all other measures are inadequate.¹¹³

5.1 The Coercive Tool of Common Law: Criminal and Civil Contempt of Court

- 61 It must be emphasised, however, that the application of coercive measures in common law systems is not limited to these hypotheses alone, ie, to those where the party is ordered to perform or to refrain from doing a specific act. Although, these will be the most relevant constellations, the concept of contempt of court is a completely general institution, an expression of the inherent powers of the Courts in the common law world.¹¹⁴
- 62 Contempt of court is behaviour that undermines or prejudices court proceedings and interferes with the administration of justice or creates a real risk of that happening. A person who disobeys a court order is thus in contempt. Contempt is penalised by a bundle of sanctions (imprisonment, sequestration, fine) intended to safeguard the authority of the jurisdiction. In practice, contempt proceedings are rarely used with respect to a failure to comply with monetary orders. But it is used in relation to orders that impose positive action (both fungible and non-fungible) as well as duties of abstention and also obligations with investigative content.¹¹⁵ The judge's order, addressed to one of the parties or even to a third party, not to perform a specific act or to stop a given behaviour is a prohibitive injunction. An order to perform a certain act may take the form of a mandatory injunction or an order

¹¹² O Wiklund, *Judicial Discretion in European Perspective* (Kluwer Law International 2003) 43.

¹¹³ J P Dawson, 'Specific Performance in France and Germany' (1959) 57(4) *Michigan Law Review*, 495.

¹¹⁴ N Kyriakides, *Judicial discretion and contempt power: two elements of equity that would benefit the EAPO and future EU-wide provisional and protective measures* (Ph D, Oxford, 2016) 253-263; M Livingston, 'Disobedience and Contempt' (2000) 75 *Washington Law Review*, 345-360; A Arlidge, D Eady and A Smith, *On Contempt* (London, 2011).

¹¹⁵ See in England Rule 70.2A (2) UKCPR: 'If a mandatory order, an injunction or a judgment or order for the specific performance of a contract is not complied with, [the court may direct that the act required to be done may, so far as practicable, be done by the party by whom the order or judgment was obtained or some other person appointed by the court, at the cost of the disobedient party'. And in addition (4b) by third subrogation: 'without prejudice to its powers to punish the disobedient party for contempt'. In the US, Art 70 Federal Rules of Civil Procedure (Enforcing a Judgment of Specific Act): 'If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done – at the disobedient party's expense – by another person appointed by the court. When done, the act has the same effect as if done by the party'.

for specific performance. The injunction is one of the most versatile and flexible coercive tools of common law procedural law.¹¹⁶

- 63 A contempt order only acts *in personam* and not *in rem*. Consequently, these orders are not directed against the debtor's assets (*in rem*), but against his or her person. The Common Law model works with the basic idea that a judgment creditor has the right only to what can actually be obtained, and therefore only to what the debtor can be forced to do by the court in the event of non-compliance.¹¹⁷ When a debtor does not obey the orders of the court in contempt proceedings, additional sanctions may be imposed.¹¹⁸ A court that does not dispose of the power to sanction non-compliance with its orders would even be a contradiction in terms: a court lacking contempt power – states incisively an American scholar – would not be a court.¹¹⁹ Contempt sanctions are based on a lack of compliance or even disregard of the order, not on the breach of the obligation that is to be executed or respected.¹²⁰
- 64 Contempt of court may be civil or criminal. In recent decades, the institution of contempt of court, understood as a general category, has undergone a truly remarkable extension of its practical application. In this regard, it is first necessary to distinguish between criminal and civil contempt of court. But this distinction has no link with the criminal or civil nature of the process in which the wrongful conduct is being carried out or to which it is referring. Instead, the distinction refers to the purpose addressed by the sanction: (i) criminal contempt of court (or otherwise called contempt by interference) is structured as a crime with a genuinely punitive function to protect the proper performance of the administration of justice in an institutional setting; (ii) civil contempt of court (contempt by disobedience

¹¹⁶ M Schlanger, 'Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders' (2006) *New York University Law Review* 81, 550; Since the injunction is also an equitable remedy, the considerations previously made concerning specific performance apply: It will be granted only when the compensation for damage proves inadequate, leaving the judge wide discretion (which is certainly not arbitrary, although always inserted within the framework of the binding precedent) in relation to its pronouncement.

¹¹⁷ D Rendleman, 'The Triumph of Equity Revisited: The Stages of Equitable Discretion' (2015) *Nevada Law Journal* 15, 1400.

¹¹⁸ J Jacob, *General Report-Trends in Enforcement of non-money judgments and orders* 29; N Andrews, *On Civil Procedure*, Cambridge (Intersentia 2013) 507-512; O Remien, *Rechtsverwirklichung durch Zwangsgeld* (Tübingen, Mohr Siebeck 1992) 11.

¹¹⁹ M Chesterman, 'Contempt: in the Common Law, but not the Civil Law' (1997) 46(3) *International and Comparative Law Quarterly*, 521-524; J Beale, 'Contempt of Court, Civil and Criminal' (1908) *Harvard Law Review* 21, 114.

¹²⁰ L Marazia, "'Astreintes" e altre misure coercitive per l'effettività della tutela civile di condanna' (2004) *Rivista dell'Esecuzione Forzata*, 333.

in procedure) has a coercive and not a punitive purpose. Its immediate purpose is in fact to force the debtor to comply with what was established by the court.¹²¹

- 65 Civil contempt of court guarantees substantive compliance, though with some exercise of discretion, such as reluctance to condemn a party to the specific performance of contractual obligations of a personal nature.¹²² In the latter case, however, judges soon realised that the same coercive effect could be obtained indirectly if they issued an injunction that prevented the defendant from undertaking other alternative work assignments and in this way, it would mean no more or less than forcing him to fulfil the original obligation.¹²³ Furthermore, regarding the mental element for civil contempt, what was traditionally required was to establish that the contemnor's conduct was intentional, but in the sense that what he did, or omitted to do, was not accidental; and, secondly, that he knew the facts that rendered it a breach of the relevant order.¹²⁴
- 66 Civil contempt of court is in large part equity's equivalent to the post-judgment enforcement mechanisms available at law.¹⁴⁸ If a judgment creditor of a money judgment is entitled to effective enforcement of his judgment, even though the debtor cannot be held in contempt, similarly, a successful applicant for an injunction should have the same ability to obtain relatively swift and certain enforcement of the court order in his favour.¹⁴⁹ The plaintiff's interests must not be neglected since his need for an injunction may be urgent. At the same time, in addition to the enforcement of judicial orders, civil contempt is also concerned with upholding the rule of law.¹²⁵
- 67 Moreover, as in criminal contempt, in civil contempt the fact that the order was breached must be proven beyond reasonable doubt and requires serious disobedience to or ignoring of a court order.¹²⁶ Remarkably, several penalties may be imposed cumulatively for the breach of a civil contempt. These include imprisonment, a monetary fine, and the sequestration of property. Fines for contempt may be ordered for an unlimited amount. To

¹²¹ N Andrews, *On Civil Procedure* (Cambridge, Intersentia 2013) 268-270. The coercion inherent in the conviction for civil contempt of court see both the judge's command carried out in favour of one party, but also pursued the good administration and the good performance of justice.

¹²² See the leading case *Lumley v Wagner* (Lord Chancellor's Court, UK) [1852] 1 De GM & G 604.

¹²³ M Chesterman, 'Contempt: in the Common Law, but not the Civil Law' (1997) 46(3) *International and Comparative Law Quarterly*, 521-560.

¹²⁴ M Schlanger, 'Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders' (2006) *New York University Law Rev* 81, 552—556.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹²⁵ *VDU Installations Ltd v Integrated Computer Systems and Cybernetics Ltd* (UK) [1989] 1 FSR 378 (Ch) 394 (J Knox); A Arlidge, D Eady and A Smith, *On Contempt* (London, 2011) 12-84.

¹²⁶ J Moskovitz, 'Contempt of Injunctions, Civil and Criminal' (1943) 43 *Columbia Law Review*, 780; J Jacob, *The Fabric of English Civil Justice* (Stevens 1987) 191.

enforce compliance, a fine may be imposed for each day of disobedience. In criminal contempt cases, the imposition of a fine is also possible. Fines are payable to the state and are enforceable as money judgments. Although fines are usually imposed in the case of the disobedience of the debtor to a court order, in some serious cases imprisonment may be ordered and imposed.¹²⁷

5.2 Astreintes

- 68 The *astreinte* (penalty payment) is a very original mechanism of psychological and pecuniary constraint of French origin. From the Latin *astringere*, which means ‘to squeeze’, the *astreinte* is a pecuniary condemnation, accessory to a principal condemnation. Its purpose is to compel the debtor to comply with the order of a judge by threatening a progressive increase in his debt to the creditor. Its field of application is large, because it can be pronounced for non-monetary obligations (to do or not to do an act), but also for the performance of monetary obligations. Unlike interest on arrears, which is determined by a legal or contractual rate,¹²⁸ the *astreinte* is generally set per day of delay. For civil judgments, it is now included in Art L 131-1 ff and R 131-1 ff of the Code of Civil Enforcement Procedures. There are also penalty payments specific to the decisions of criminal courts in the event of an adjournment with an injunction¹²⁹ and of administrative courts in the event of a conviction of a public person.¹³⁰ The mechanism itself is an ancient one. As early as the thirteenth century, some customs authorized the judge to condemn a debtor in advance for possible future non-performance and the practice became widespread under the *Ancien Régime* (old regime) before the *Parlements* and with the support of famous authors such as Pothier.¹³¹
- 69 The mechanism was not taken up by the Civil Code of 1804, which left practitioners without resources to ensure the performance in kind of certain obligations to do or not to do. The *Cour de cassation* (Court of Cassation) gradually revived the institution during the nineteenth century.¹³² In order to regulate these practices, the legislator intervened with Law no 49-972 of 21 July 1949, Law no 72-626 of 5 July 1972 and, finally, Law no 91-650 of 9 July 1991, now codified. The *astreinte* has long been the subject of doctrinal debate as to its true nature. For a long time, most of the doctrine considered that it was a matter of

¹²⁷ A Arlidge, D Eady and A Smith, *On Contempt* (London, 2011) 14-1.

¹²⁸ Art 1231-6 FCCP.

¹²⁹ Art 132-66 s *Code pénal* (Criminal Code) (France).

¹³⁰ Art L 911-1 s *Code de justice administrative* (Administrative Justice Code) (France).

¹³¹ R J Pothier, *Traité des obligations* (1821, republished Dalloz 2011) 146.

¹³² (Court of Cassation, France), Judgment 28 December 1824; (Court of Cassation, France), Judgment 29 January 1834; (Court of Cassation, France), Judgment 26 July 1854.

damages.¹³³ Such an analysis is no longer tenable insofar as the law establishes in principle that the *astreinte* is 'independent of any damage'.¹³⁴ The *astreinte* is now considered a 'private penalty'.¹³⁵ It is a penalty, because its purpose is not to repair the creditor's prejudice but to punish the creditor's non-compliance with the court order.¹³⁶ Nevertheless, it is a 'private' penalty, because the sum liquidated is fully paid to the creditor. This position is now widely accepted in the French doctrine.¹³⁷ The fact that after its liquidation the amount of the *astreinte* is attributed to the creditor alone is, however, still criticized by some authors for its inequity. Thus, they propose that the amount of the *astreinte* should be paid to the Public Treasury in the manner of a 'civil fine'.¹³⁸ It seems strange indeed that an offence against justice should result in a gain, sometimes considerable, for a party to the proceedings. To prevent the *astreinte* from leading to unjustified enrichment, most judges tend to moderate the amount when they can.

- 70 Technically, the *astreinte* operates in two stages. The *astreinte* must first be pronounced; it is then a threat, a means of pressure. It can only be pronounced by a judge: the judge who pronounced the main sentence or the enforcement judge who can impose an *astreinte* on a decision rendered by another judge if the circumstances make it necessary. The judge is free to determine the amount. If enforcement has been delayed or the obligation remains unfulfilled, the creditor must then apply for the liquidation of the *astreinte*; it is then a sanction that realizes the threat. The application must be addressed to the enforcement judge. By exception, the judge who ordered it may liquidate it if he remains seized of the case. A distinction must then be made according to whether the *astreinte* ordered is provisional or definitive. In the first case, the judge is free to moderate the amount. In the second case, the judge is in principle bound by the rules of calculation fixed in the decision of condemnation. A definitive *astreinte* can only be pronounced if a provisional *astreinte* has been pronounced and the non-performance persists. It should be noted, however, that the provisional or definitive *astreinte* is cancelled in whole or in part if it is established that the inexecution or the delay in the execution of the judge's injunction is due, in whole or in part, to an 'extraneous cause'.¹³⁹ In other words, an unfortunate debtor who is confronted with an unforeseeable, irresistible and external event that has prevented him from fulfilling

¹³³ C Auvry and C Rau, *Cours de droit civil français* (vol IV, 5th edn, Paris, 1902) 63; A Colin, H Capitant, *Cours élémentaire de droit civil français* (vol II, 6th edn, Paris, 1931) 35.

¹³⁴ Art L 131-2 *Code des procédures civiles d'exécution* (Code of Civil Enforcement Procedures) (France).

¹³⁵ A Esmein, 'L'origine et la logique de la jurisprudence en matière d'astreinte' (1903) *Revue trimestrielle de droit civil*, 5 s.

¹³⁶ R Perrot, 'L'astreinte à la française' in J van Compernelle (ed), *Mélanges Jacques Van Compernelle* (Bruxelles, Bruylant 2004) 287 s.

¹³⁷ See a different opinion M Donnier and J B Donnier, *Vois d'exécution et procédures de distribution* (10th edn, Paris, LexisNexis 2020) 441.

¹³⁸ R Perrot and P Théry, *Procédures civiles d'exécution* (3rd edn, Paris, Dalloz 2013) 92.

¹³⁹ Art L 131-4 *Code des procédures civiles d'exécution* (Code of Civil Enforcement Procedures) (France).

his obligations – such as the act of a third party, a fault of the creditor, a fortuitous event or force majeure – may hope to have the *astreinte* totally or partially cancelled.

- 71 The *astreinte* is a French invention which has been exported relatively little, even to countries with a Romano-Germanic tradition. It can nevertheless be found in Belgium, Luxembourg and the Netherlands, whose national legislation on this issue is merely a literal transcription of the *Convention Benelux portant loi uniforme relative à l'astreinte* (Benelux Convention providing a uniform law relating to periodic penalty payments) of 26 November 1973. While this text does refer to the distinction between an *astreinte* and damages, it does not include the distinction between a definitive and provisional *astreinte*. Article 4 only provides that the judge who ordered the *astreinte* may order its cancellation, suspend its course or reduce it if the offender is 'permanently or temporarily, totally or partially unable to comply with the principal sentence'.¹⁴⁰
- 72 From other judicial systems the possibility, however, that the plaintiff may be unjustly enriched because the amount awarded significantly exceeds the loss caused by the delay in compliance, has caused some concern.¹⁴¹ Nevertheless, the *astreinte* has gradually been adopted in other jurisdictions that have come under the influence of French law. It is the general consensus among French jurists that the *astreinte* is successful in inducing personal compliance by the defendant.¹⁴²
- 73 More recently, Italian Law no 69 of 18 June 2009 created Article 614*bis* of the Italian Code of Civil Procedure, which is strongly inspired by the French legislation on *astreinte*. However, the Italian *astreinte* has some significant differences. It is necessarily definitive and, in the case of delay or inexecution, the creditor can initiate forced execution without prior liquidation.¹⁴³ The *astreinte* is not included in the provisions of OHADA law but it has been directly adopted by several French-speaking African States. In Algeria, for example, Article 175 of the Civil Code requires the judge to fix 'the amount of compensation that the debtor will have to pay, taking into account the prejudice suffered by the creditor and the unjustified attitude of the debtor'. The earlier confusion with damages is thus enshrined in law. The *astreinte* is also found in Latin America. In Argentina¹⁴⁴ (where the French designation 'astreinte' is also used), it has been held that judges can impose, for the benefit of the rightholder, pecuniary penalties on those who do not comply with legal duties imposed in a judicial decision. The amount of the penalty must be graduated in proportion

¹⁴⁰ G de Leval and J van Compernelle, *L'astreinte* (4th edn, Bruxelles, Larcier 2020).

¹⁴¹ K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford, 1998) 474.

¹⁴² B Hess, 'On making more efficient the enforcement of judicial decisions within the European Union' (Heidelberg, 2004) 121.

¹⁴³ C Di Mauro and C Coslin, 'Le nouveau régime de l'astreinte en droit italien, Différences et similitudes avec le régime français' (2012) 7(12) *Procédures*, 7.

¹⁴⁴ Art 804 Código Civil y Comercial (Civil and Commercial Code) (Argentina).

to the economic wealth of the person resisting compliance with the judgment, and can be left unenforced or readjusted if that person desists from resisting the performance of his duties or fully or partially justifies his actions. In Uruguay, for example, if the performance cannot be carried out by a third party, the creditor may request performance in kind of the obligation with the imposition of an *astreinte*.¹⁴⁵ This is a financial penalty, for a maximum period of 45 days, which is paid to the enforcement creditor and is distinct from the damages that non-performance could cause him/her.

5.3 Fines and Other Coercive Measures

- 74 German law provides for remedies called *Geldstrafen* (fines), which concern the enforcement of non-money judgments. These apply when the judgment debtor does not perform an action that depends exclusively on him and cannot be taken by a third party (*unvertretbare Handlung* (non-fungible act): Section 888 GCCP) or when the judgment debtor violates his obligation to refrain from doing an action (*Unterlassung*, omission) or to tolerate (*Duldung*, tolerance) an action.¹⁴⁶ Upon an application by the judgment creditor, the court can order the payment of a *Zwangsgeld* (coercive fine),¹⁴⁷ or in the case of Section 890 GCCP, an *Ordnungsgeld* (administrative fine),¹⁴⁸ and, in either case, *Zwangshaft*, *Ordnungshaft* (coercive detention), or both fine and detention. The fine is paid to the state. This legal situation created major difficulties under the Brussels *Ibis* Regulation.¹⁴⁹ This is a main difference to the French *astreintes*.¹⁵⁰
- 75 However, both the German and the French Civil Procedure Code eliminated imprisonment for debt in the course of the nineteenth and twentieth centuries (although it still appears as a fall-back provision).¹⁵¹
- 76 In Japan, in consideration of due process, Articles 115-117 of the Code of Civil Procedure (JCCP) establish the procedural conditions for the use of fines and detentions. Under these provisions, the detention period should not be longer than 15 days. In addition, according

¹⁴⁵ Art 398.3 *Código de Procedimiento Civil* (Code of Civil Procedure) (Uruguay).

¹⁴⁶ M Schörnig, 'Corona-Pandemie: Zwangsgeld wegen Nichtwahrnehmung eines Notartermins' (2021) 75 *Monatsschrift für Deutsches Recht* 75, 19-21.

¹⁴⁷ O Remien, *Rechtsverwirklichung durch Zwangsgeld* (Tübingen, Siebeck 1992) 50-150.

¹⁴⁸ A Kleinand M Burianski, 'Ordnungsgeld statt Zwangsgeld für effektivere Durchsetzung von Belieferungsansprüchen' (2010) *NJW* 63, 2248-2250.

¹⁴⁹ *RealChemie*, Case C-406/09 (CJEU), Judgment 18 Oct 2011 [ECLI:EU:C:2011:668].

¹⁵⁰ A Bruns, 'Zwangsgeld zugunsten des Gläubigers – ein europäisches Zukunftsmodell?' (2005) 118 *ZZP*, 3; M Asprone and L Cilmi, 'L'esecuzione della sentenza del giudice amministrativo nei Paesi europei. Giudizio di ottemperanza in Italia, l'Astreinte in Francia e lo Zwangsgeld in Germania' (2013) 10 *Rivista di diritto amministrativo*, 3-9.

¹⁵¹ E Katz, 'Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws' (2019) 86(5) *The University of Chicago Law Review*, 1241-1309.

to the State Compensation Law, a party can apply for State compensation if the adoption of mandatory measures (personal coercion) violates the law. Thus, the current Civil Execution Act provides that a creditor can use execution for the delivery of a thing or the forced execution of an obligation to do (action) or not to do.¹⁵² But it has been pointed out that indirect execution is inefficient for debt collection, and therefore other possible ways to achieve the same objective have been discussed (for example, a registry of debtors). Coercion through deprivation of liberty is generally considered inhumane and, therefore, contrary to the principle of proportionality. At the same time, the publication of a list of debtors or 'blacklist' is considered a direct and serious conflict with privacy.

- 77 In Latin America many legal options exist concerning the approach to periodic penalties or fines. In Peru, there are sanctions available (Art 52 and 53 CCP), which are intended to secure appropriate procedural behaviour in the light of the importance and respect due to judicial activity, rather than as an enforcement measure that allows the specific enforcement of obligations to do and not to do. In Bolivia, Art 431 of the CCP governs the enforcement of obligations not to do. In all cases, it may request the imposition of a monetary penalty to deter the future violation of the judgment. As noted above, Uruguay and Argentina have a regulation similar to the French *astreinte*.

5.4 Imprisonment

- 78 At common law, superior courts had the power to commit a contemnor to prison for an unlimited time. It was not uncommon, for example, for a person who had disobeyed a court order or committed a contempt in the face of the court, to be kept in prison until he had *purged his contempt* by apology and an undertaking to obey the order of the court. The Contempt of Court Act 1981, however, abolished the unlimited prison sentence as a penalty for contempt in England and Wales. Section 14(1) now provides that the term of imprisonment may not exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court.
- 79 A purely illustrative example of the complex delimitation of acceptable coercive measures is provided by the Irish case of *McCann*.¹⁵³ In this case, the system of civil debt enforcement (Section 6 of the Enforcement of Court Orders Act 1926 and 1940) was considered by the High Court of Ireland to be unconstitutional because it did not ensure fundamental rights: the right to proper administration of justice (Article 34); the guarantee of fair processes (Article 40.1.3); and the right to personal liberty (Article 40.4.1). The court considered that a person deprived of his liberty for failing to pay a civil monetary debt should be treated

¹⁵² Art 172 and 173 Civil Execution Act (Japan).

¹⁵³ *McCann v Judges of Monahan District Court & Ors* (Ireland), Judgment 18 June 2009 [2009] IEHC 276.

similarly to a person facing criminal proceedings in the terms of the guarantees that must be applied in his judicial process.

- 80 The case contains important declarations regarding some fundamental rights: (i) the person (the debtor) must be in court and be able to defend himself against the order for deprivation of liberty; (ii) the judge must inform the debtor of his power of legal representation and he must be provided with it if he cannot obtain it by other means. The Irish civil enforcement system appeared to violate these fundamental rights. The right to liberty was violated by legislation that allowed a disproportionate coercive measure compared to the fine, for example. In generating both coercive options, it is necessary to choose between the least burdensome for the person affected by the measure.
- 81 The Court also referred to the proportionality test, which includes an evaluation of whether the detention was necessary to achieve the stated objective. The detention of an individual is a serious measure that is only justified as a last alternative when other, less severe measures have been considered and found to be insufficient to protect the individual and public interest, which may require that the person concerned be detained. The principle of proportionality also imposes the requirement that when the detention is to ensure compliance with an obligation provided for by law, a balance must be made between the importance in a democratic society of guaranteeing immediate compliance with the obligation in question and the right to freedom.¹⁵⁴
- 82 In China, the imposition of personal coercion is envisaged, since the court is empowered to impose a fine or detention on a debtor who refuses to execute any effective judgment or resolution. Meanwhile, the court must impose a fine or detention on the debtor who maliciously, in collusion with other persons, evades compliance with the obligation determined in a legal instrument.
- 83 The civil fines for contempt of court are allowed throughout the Australian jurisdictions. Contempt in Australia is a criminal offence and anyone in contempt will be fined or face a fixed period of imprisonment. Contempt can arise in two ways. First, when a person is rude or disrespectful to a judge or causes a disturbance in a courtroom. Second, a party fails to obey (without legal justification) a court order.¹⁵⁵ Failure to comply with a court order relating to enforcement proceedings, whether by the creditor or the debtor, may justify the court in imposing appropriate sanctions for contempt. This can include an order to seize

¹⁵⁴ Ibid.

¹⁵⁵ For general approach in Australia, see N Adams and B Baker, 'Sentencing for Contempt of Court' (National Judicial College of Australia and the Australian national university sentencing conference, 29 February 2020) <https://www.njca.com.au/wp-content/uploads/2023/03/Sentencing-for-Contempt-of-Court-Adams-N-and-Baker-B.pdf> accessed 11 December 2024.

assets of the non-compliant party.¹⁵⁶ The contemnor will be deprived of the possession of the property until he has complied with the order or purged the contempt.¹⁵⁷

6 A BRIEF COMMENT ON FAMILY ENFORCEMENT LAW

- 84 In the field of parental responsibility, there are three main subjects linked to enforcement proceedings, although they appear to constitute a special area of law:¹⁵⁸ (i) maintenance for the child, where there is no problem of the debtor's ability to pay; (ii) return of the child in the case of abduction; and (iii) visits and contact with the child. The two last cases involve an obligation to do a specific act or to refrain from it. Here, enforcement is a big challenge within the framework of the United Nations Convention on the Rights of the Child (UNCRC), the Hague Convention on the Civil Aspects of International Child Abduction and each local substantive and procedural regulation.¹⁵⁹ The noteworthy issue in this field is the connection between criminal sanctions and many coercive measures providing for penalties. The enforcement tasks in this field need interdisciplinary and professionalized assistance.¹⁶⁰
- 85 In the twentieth century, lawmakers in some jurisdictions criminalised the failure to provide family support, applied probation supervision to offenders, and dealt with non-support cases in specialised domestic relations courts. Together, these developments allowed the state to intervene more directly and coercively in securing family financial support than had previously been possible.¹⁹⁴ But criminal enforcement also brought downsides including costs and stigma that some reformers wished to reduce.¹⁶¹ Family courts have worked with both types of contempt – criminal and civil – with the distinction turning on the reason for the sanction. Criminal contempt imposes a fine or imprisonment as a *punitive measure* 'to vindicate the authority of the law'. By contrast, in civil contempt the incarceration is for a

¹⁵⁶ See *National Australia Bank Ltd v Satchithanantham (No 2)* (Federal Court, Australia), Judgment 21 May 2010, [2009] FMCA 229.

¹⁵⁷ *Australian Consolidated Press Ltd v Morgan* (High Court, Australia), Judgment 30 April 1965, [1965] 112 CLR 483.

¹⁵⁸ In the international field, The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (1980 Hague Convention) and the Inter-American Convention on the International Return of Children (15 July 1989) rule proceedings for the prompt return of children who have been wrongfully removed or kept away from their home country.

¹⁵⁹ Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, 2019/1111 of 25 June 2019 (EU).

¹⁶⁰ M Cirullies, 'Die Vollstreckung von Zwangs- und Ordnungsmitteln, insbesondere in Familiensachen' (2011) RPfeger, 553.

¹⁹⁴ E Katz, 'Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws' (2019) 86(5) University of Chicago Law Review, 1241-1309.

¹⁶¹ N Zatz, 'A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond' (2016) 39 Seattle University Law Review, 927.

remedial purpose—to coerce the offender into complying with a court order for the benefit of the complainant. In civil contempt, therefore, the person is released upon compliance; in the common phrasing, the contemnor ‘carries the keys of his prison in his own pockets’.¹⁶² There are virtually no specific civil enforcement procedures for non-presentation of children. In practice, enforcement agents are called upon to show restraint, as this is a sensitive area: A child is not a piece of property that can be seized and returned to its rightful owner! However, fear of criminal or civil contempt may not be enough. If enforcement must take place, it may do so in ways that will often have to be adapted on a case-by-case basis.

- 86 The jurisprudence of the International Human Rights Courts has focused on the execution of sentences in such cases. In particular, regarding the effectiveness of the family sentence, *Fornerón and daughter v Argentina*¹⁶³, *Saleck Bardi v Spain*¹⁶⁴ and *Kopf and Liberda v Austria*¹⁶⁵, among others, are examples of the concern that exists about the way that the lapse of time produces effects in institutionalising a state of affairs, condemning the States in which the judiciary has not always responded effectively and appropriately.¹⁶⁶ Some decisions also deal with international child abduction and the application of the Hague Convention, the aim of which is to prevent the abducting parent from obtaining legal recognition simply by virtue of a situation he or she has unilaterally created, and not to allow the abducting parent to benefit from his or her fault (for instance, *G.K. v Cyprus*¹⁶⁷). Actually, the question of international enforcement is very sensitive, and the effectiveness of enforcement can vary from one country to another. In France, for example, in the absence of voluntary enforcement of a decision to return a child, the public prosecutor is empowered, under article 34-1 of the law of January 8, 1995, to directly request the police to enforce the decision. In Japan, on the other hand, things are much more complicated and the issue is a growing problem as the number of international marriages increases. Japan is a signatory to the UNCRC and is supposed to recognize the right of a child to obtain non-custodial parent visitation. However, this country does not recognize joint parental authority or shared ‘residence’ after divorce. Consequently, Japanese courts rarely order

¹⁶² E Katz, ‘Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws’ (2019) 86(5) University of Chicago Law Review, 1241-1309.

¹⁶³ *Fornerón and daughter v Argentina* (IACHR), Judgment 27 April 2012.

¹⁶⁴ *Saleck Bardi v Spain* (ECtHR), Judgment 24 May 2011 [ECLI:CE:ECHR:2011:0524JUD006616709].

¹⁶⁵ *Kopf and Liberda v Austria* (ECtHR), Judgment 17 January 2012 [ECLI:CE:ECHR:2012:0117JUD000159806].

¹⁶⁶ A E Anton, ‘The Hague Convention on International Child Abduction’ (1981) 30(3) International and Comparative Law Quarterly 30, 537–567.

¹⁶⁷ *G.K. v Cyprus* (ECtHR), Judgment 21 February 2023 [ECLI:CE:ECHR:2023:0221JUD001620521].

the return of a child to the country of its foreign parent to exercise visitation rights and there often can be no enforcement.¹⁹⁸

- 87 The principles of the child's right to be heard and the primacy of his or her best interests give special particularity to enforcement in family matters. In effect, if the superior interest of the person in a vulnerable condition requires a judgment to be issued based on circumstances that have changed over time. Enforcement cannot rely on efficiency at the expense of effectiveness. Consequently, the stability of *res judicata* cannot be invoked when the circumstances taken into account at the time of the initial judgment have changed.

7 CONCLUDING REMARKS

- 88 This contribution has discussed the historical background of the law. This is a requirement for a methodological comparison of different 'enforcement cultures'. As already mentioned, the two main remedies in Equity, used by the courts to enforce obligations to perform or to refrain from doing something are, on the one hand, an order for specific performance and, on the other hand, an injunction, while there is always the possibility of compensatory payment as the main substitutive relief.
- 89 Specific performance is an equitable remedy whereby the court orders the breaching party to fulfil its obligations under the terms of the contract. This could include requiring the defendant to deliver the goods or services promised in the agreement. The plaintiff must prove that the breaching party can perform under the contract but has failed to do so. Finally, the plaintiff must show that there is no other adequate remedy at law. Specific performance is typically awarded when money cannot adequately compensate the injured party and when the contractual obligation is unique or difficult to value.
- 90 Some procedures pursue the restitution of movable or immovable property. Here there are special regulations: (i) summary or simplified proceedings to obtain a judgment including the order of restitution; (ii) direct access to enforcement proceeding.
- 91 To achieve specific performance (of an obligation to pursue a certain course of conduct, undertake an action or refrain from action) both systems, Civil and Common Law, use coercive measures to different degrees of intensity and supporting arguments. In the Common Law, the preservation of judicial authority is the main argument for imposing sanctions for contempt of court (civil and criminal). These take the form of a fine payable to

¹⁹⁸ Y Okuda, 'The United Nations Convention on the Rights of the Child and Japan's International Family Law including Nationality Law' (2003) *Zeitschrift für Japanisches Recht/Journal Japan Law*, 87—110.

the State or, in extreme cases and with due regard for the debtor's rights, imprisonment. Civil Law coercive measures encourage specific performance with a fine payable to the State or a pecuniary payment to the creditor.

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ACHPR	African Court on Human and Peoples' Rights
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) (Germany)
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
ch	chapter
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
Dig	Digest (Roman Law)
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
FCCP	Code of Civil Procedure (France)
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GCCP	Code of Civil Procedure (Germany)
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
IIDP	<i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law)
ITCCP	Code of Civil Procedure (Italy)
JCCP	Code of Civil Procedure (Japan)
LEC	<i>Ley de Enjuiciamiento Civil</i> (Code of Civil Procedure) (Spain)
n	footnote (internal, ie, within the same chapter)
no	number/numbers

OHADA	<i>Organisation pour l'harmonisation en Afrique du droit des affaires</i> (The Organization for the Harmonization of Business Law in Africa)
para	paragraph/paragraphs
pt	part
Sec	Section/Sections
supp	supplement/supplements
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNCRC	UN Convention on the Rights of the Child
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
v	versus
vol	volume/volumes

LEGISLATION

International/Supranational

Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution (OHADA).

Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, 2019/1111 of 25 June 2019 (EU).

Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980.

Inter-American Convention on the International Return of Children, 15 July 1989.

National

Civil Execution Act, No 95 of 2007 (Japan).

Civil Procedure Rules (UK).

Code civil (Civil Code) (France).

Code de justice administrative (Administrative Justice Code) (France).

Code de procédure civile (Code of Civil Procedure) (France).

Code des procédures civiles d'exécution (Code of Civil Enforcement Procedures) (France).

Code Judiciaire (Judicial Code) (Belgium).

Code pénal (France).

Codice di procedura civile (Code of Civil Procedure) (Italy).

Código Civil y Comercial (Civil and Commercial Code) (Argentina).

Codigo de Procedimiento Civil (Code of Civil Procedure) (Chile).

Codigo de Processo Civil (Code of Civil Procedure) (Brazil).

Codigo Procesal Civil (Code of Civil Procedure) (Bolivia).

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National

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Alfred McAlpine Construction Ltd v Panatown Ltd (House of Lords, UK), Judgment 18 June 2019 [2001] 1 AC 518.

McCann v Judges of Monahan District Court & Ors (Ireland), Judgment 18 June 2009 [2009] IEHC 276.

Australian Consolidated Press Ltd v Morgan (High Court, Australia), Judgment 30 April 1965, [1965] 112 CLR 483.

National Australia Bank Ltd v Satchithanatham (No 2) (Federal Court, Australia), Judgment 21 May 2010, [2009] FMCA 229.

Case 03-21.136 (Court of Cassation, France), Judgement 11 May 2005.

(Court of Cassation, France), Judgement 28 December 1824.

(Court of Cassation, France), Judgment 29 January 1834.

(Court of Cassation, France), Judgement 26 July 1854.

Case 14-14.612 (Court of Cassation, France), Judgement 16 June 2015.

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