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Master Thesis

Contract resolution: German influences on the 2016 Reform of the French Civil Code

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by

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Sous- Section 4

La resolution

Art. 1224
La résolution résulte soit de l'application d'une clause résolutoire soit, en cas d'inexécution suffisamment grave, d'une notification du créancier au débiteur ou d'une décision de justice.

Art. 1225
La clause résolutoire précise les engagements dont l'inexécution entraînera la résolution du contrat.
La résolution est subordonnée à une mise en demeure infructueuse, s'il n'a pas été convenu que celle-ci résulterait du seul fait de l'inexécution. La mise en demeure ne produit effet que si elle mentionne expressément la clause résolutoire.

Art. 1226
Le créancier peut, à ses risques et périls, résoudre le contrat par voie de notification. Sauf urgence, il doit préalablement mettre en demeure le débiteur défaillant de satisfaire à son engagement dans un délai raisonnable.
La mise en demeure mentionne expressément qu'à défaut pour le débiteur de satisfaire à son obligation, le créancier sera en droit de résoudre le contrat.
Lorsque l'inexécution persiste, le créancier notifie au débiteur la résolution du contrat et les raisons qui la motivent.
Le débiteur peut à tout moment saisir le juge pour contester la résolution. Le créancier doit alors prouver la gravité de l'inexécution.

Art. 1227
La résolution peut, en toute hypothèse, être demandée en justice.

Art. 1228
Le juge peut, selon les circonstances, constater ou prononcer la résolution ou ordonner l'exécution du contrat, en accordant éventuellement un délai au débiteur, ou allouer seulement des dommages et intérêts.

Art. 1229
La résolution met fin au contrat.
La résolution prend effet, selon les cas, soit dans les conditions prévues par la clause résolutoire, soit à la date de la réception par le débiteur de la notification faite par le créancier, soit à la date fixée par le juge ou, à défaut, au jour de l'assignation en justice.
Lorsque les prestations échangées ne pouvaient trouver leur utilité que par l'exécution complète du contrat résolu, les parties doivent restituer l'intégralité de ce qu'elles se sont procuré l'une à l'autre. Lorsque les prestations échangées ont trouvé leur utilité au fur et à mesure de l'exécution réciproque du contrat, il n'y a pas lieu à restitution pour la période antérieure à la dernière prestation n'ayant pas reçu sa contrepartie ; dans ce cas, la résolution est qualifiée de résiliation.
Les restitutions ont lieu dans les conditions prévues aux articles 1352 à 1352-9.

Art. 1230
La résolution n'affecte ni les clauses relatives au règlement des différends, ni celles destinées à produire effet même en cas de résolution, telles les clauses de confidentialité et de non-concurrence.

NB: This is the official English translation of the Reform.

Termination

Art. 1224
Termination results either from the application of a termination clause, or, where the non-performance is sufficiently serious, from notice by the creditor to the debtor or from a judicial decision.

Art. 1225.
A termination clause must specify the undertakings whose nonperformance will lead to the termination of the contract.
Termination may take place only after service of a notice to perform which has not been complied with, unless it was agreed that termination may arise from the mere act of non-performance. The notice to perform takes effect only if it refers expressly to the termination clause.

Art. 1226.
A creditor may, at his own risk, terminate the contract by notice. Unless there is urgency, he must previously have put the debtor in default on notice to perform his undertaking within a reasonable time. The notice to perform must state expressly that if the debtor fails to fulfil his obligation, the creditor will have a right to terminate the contract.
Where the non-performance persists, the creditor notifies the debtor of the termination of the contract and the reasons on which it is based. The debtor may at any time bring proceedings to challenge such a termination. The creditor must then establish the seriousness of the non-performance.

Art. 1227.
Termination may in any event be claimed in court proceedings.

Art. 1228.
A court may, according to the circumstances, recognise or declare the termination of the contract or order its performance with the possibility of allowing the debtor further time to do so, or award only damages.

Art. 1229.
Termination puts an end to the contract.
Termination takes effect, according to the situation, on the conditions provided by any termination clause, at the date of receipt by the debtor of a notice given by the creditor, or on the date set by the court or, in its absence, the day on which proceedings were brought. Where the acts of performance exchanged were useful only on the full performance of the contract which has been terminated, the parties must restore the whole of what they have obtained from each other.
Where the acts of performance which were exchanged were useful to both parties from time to time during the reciprocal performance of the contract, there is no place for restitution in respect of the period before the last act of performance which was not reflected in something received in return; in this case, termination is termed resiling from the contract
Restitution takes place under the conditions provided by articles 1352 to 1352

Art. 1230.
Termination does not affect contract terms relating to dispute resolution, nor those intended to take effect even in the case of termination, such as confidentiality or non competition clauses**.**

Introduction

Melius est enim non promittere quam promittere et non facere; it is better to not promise than to promise and to not perform. This adage makes up all its sense once being put in the context of a request of a contractual resolution.[1]

Under French law, the resolution of contracts is defined as a sanction, consisting of the retroactive extinction of the obligations, which arose from a synallagmatic contract, once one party does not properly perform its contractual obligation.[2] The *Code Civil* deals with the resolution under its Art. 1184.[3]

After a closer analysis of this provision, a general rule seems to come out : the forced performance appears as the first principle, while the contractual resolution appears to be more accessory or even an exception to the aforementioned principle.[4] This way, the contractual resolution is a warranty against an eventual insolvability of the party which can't perform.[5] This can be explained in the first place by the history of the contractual resolution which is, according to D. Tallon "marked by a certain complexity".[6] This statement makes sense if one takes into consideration the diversified sources, which may lead to contradictory results.[7]

The resolution by the *lex commissoria* under Roman law

Under Roman law, there was a strict refusal of admitting the resolution of the contract in case of unilateral non-performance.[8] However, the characteristic engagement of the buyer was - and still is - the payment of the price.[9] Roman

[1] Notice that since the French term is *résolution*, the English translation will consist in the wording of "contract resolution". However, the vocabulary varies from source to source, which is why "termination", "avoidance" or "dissolution" will be used as well, having the same meaning.
Please notice further that the referencing style adopted is not the South African *TSAR*- style, but the German referencing style.
[2] Guinchard/ Debard, *Lexique des termes juridiques*, p. 801.
[3] See Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 80: It was unclear if the resolution under Art. 1184 was an autonomous, general right of resolution. To underline the importance of the resolution in general, *cf.* Jamin, *in* Mazeaud/ Jamin, *L'unilatéralisme et le droit des obligations*, p. 79: the author sees in it the crux which determines whether France has a solitary or liberal approach to society.
[4] Gridel/ Laithier, *Les sanctions civiles de l'inexécution du contrat imputable au débiteur*, n° 6.
[5] Malinvaud/ Fenouillet/ Mekki, *Droit des obligations*, p. 398.
[6] Tallon, *L'article 1184 du Code Civil- Un texte à rénover*, n° 281.
[7] Boyer, *Recherches historiques sur la résolution du contrat*, p. 55.
[8] Muthers, *Der Rücktritt vom Vertrag*, p. 23.
[9] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 75.

law distinguished between two legal acts in terms of sales contracts: the formation of the contract and the transfer of the right *in rem*.[10]

The resolution could only be demanded by an application of an express clause in the contract,[11] called *lex commissoria*,[12] which nowadays has become more a stylistic clause.[13]

Since the contract consisted of two legal acts, the clause, in order to be valid, had to affect both legal acts.[14] Conclusively, the resolution in its proper sense did not exist, but had an indirect manifestation via the use of that clause.

Exceptionally, the use of similar mechanisms, giving a resolutive effect, where allowed: for instance, the right to cancel a contract for a hidden fault.[15] Nevertheless, this mechanism did not have a contractual, but rather a penal ground.[16]

The canonical period: the birth of consensualism

The canonical era in the 12th century lead to an abandonment of the strict refusal of a dissolution in case of non-performance,[17] by applying the principle of *melius est enim non promittere quam promittere et non facere*.

Under the influence of Huguccio de Pisa in the 13th century, the foundation of the resolution *fragmenti fidem non est fides servanda*, was perceived as having a penalty characteristic, introducing punitive damages.[18] The justification of this penal dimension was based on religious believes, since God expected every individual to respect its promise.[19]

But by this time, the judge did not intervene. If the counter performance had not been performed, the debtor simply could refuse to execute his performance in return, making a judicial intervention useless.[20] But sources on this point are contradictory.[21]

[10] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 2.
[11] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 2.
[12] Boyer, *Recherches historiques sur la résolution du contrat*, p. 108.
[13] Buffelan-Lanore/ Larribau-Terneyre, *Droit civil. Les obligations*, n° 1226.
[14] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 2.
[15] Boyer, *Recherches historiques sur la résolution du contrat*, p. 149.
[16] Boyer, *Recherches historiques sur la résolution du contrat*, p. 151.
[17] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 24.
[18] Muthers, *Der Rücktritt vom Vertrag*, p. 25.
[19] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 25.
[20] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 2.
[21] See Boyer, *Recherches historiques sur la résolution du contrat*, p. 238. According to George Boyers, the judge only intervened when it came to the punitive damages. Contradictory, René Cassin estimates that the

It needs to be highlighted that during the canonical period, the dissolution of a contract in an autonomous way was not possible yet. In order to dissolve a contract, the parties had to set up an autonomous or accessory dissolution contract.[22] The reason being of refusing a general possibility to dissolve the contract is the idea that there is a synallagmatic basis for the contract, which is why there needs to be an extrinsic act to dissolve the contract.[23]

By the 16th century, Dumoulin, French jurist of noble origins, introduced the idea according to which the theory of contract resolution should apply to all types of contract.[24] Even though this has been adapted in the regions where custom law reigned, the middle and eastern part of France did not follow this approach, maintaining the mechanism of an expressly stipulated clause from Roman law.[25]

But from the codification era on, Pothier - inspired by the ideas of Domat[26] - retook the idea according to which "even though not expressly stipulated in the convention, the non-performance of your engagement as a dissolutive condition of what was agreed upon,[…] might induce the dissolution of the business and consequently the extinction of my obligation."[27] Consequently, there has been inserted in the version of the Civil Code from 1804 the idea of a resolution clause, not being necessarily express, but rather implied.[28] This clause is found in Art. 1184, which remains until today, unchanged.[29]

The conception of the resolution nowadays

To quote Jean-Jacques Régis de Cambacérès, duke of Parma, second consul and then arch-chancellor of the Empire: "The Codes make themselves, but they are

judge was already in charge of dissolving the contracts. See Cassin, *Réflexions sur la résultion judiciare*, p. 162. For a clarification on this point see Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 28: the divergence is explained by the different point of view the authors take: while Boyers refers to general studies of canon law, Cassin rather takes into consideration the practice of canonical jurisprudence.

[22] Muthers, *Der Rücktritt vom Vertrag*, p. 25.
[23] Muthers, *Der Rücktritt vom Vertrag*, p. 27.
[24] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 24.
[25] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 2.
[26] Meder, *Rechtsgeschichte*, p. 227.
[27] Pothier, *Du traité des Obligations*, n° 672.
[28] Tallon, *L'article 1184 du Code Civil- Un texte à rénover*, n° 281.
[29] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 2.

not being made."[30] This means that the Codes are object to constant modification. Certainly, one of the most important modifications of our times is the *projet d'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations depuis la loi n°2015-177 du 16 février 2015*, the draft which later became the Reform of the law of contracts of 11th of February 2016.

Some scholars consider this as the most important modification of the Civil Code since 1804, being a "fundamental step of French civil law".[31] This reform contains in its sub-section for a "veritable menu for a creditor, who, if he is a gourmand, might taste multiple remedies to quench his thirst of performance".[32]

Already at first glance, one does recognize an important difference between the Reform and the law as it was anteriorly: before, the resolution of contracts was governed solely by one provision, Art. 1184 of the Civil Code, a fact which has been criticized by scholars.[33] However, under the Reform not less than six provisions, Arts. 1224-1230, deal with the resolution of contracts. Consequently, the dissolution has obtained a much larger wingspread under the Reform. This gain of importance implies without a doubt numerous changes.[34]

But the experience of an in-depth reform of civil law has been made by Germany thirteen years before done in France. The German *Schuldrechtsreform* of the 1st of January 2002 induced a true carination of German law of obligation; in fact, this change is considered to be the most important reform of the *Bürgerliches Gesetzbuch* (BGB) since its codification in 1900.[35] Therefore, one should take a closer look to the German approach of the Reform of the resolution of contracts. This will allow to analyze common grounds and differences to a similar problem.

[30] Meder, *Rechtsgeschichte*, p. 227.
[31] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, p. 48.
[32] Dupichot, *Regards (bienveillants) sur le projet de réforme du droit français des contrats*, p. 47.
[33] Tallon, *L'article 1184 du Code Civil- Un texte à rénover*, n° 290.
[34] Dupichot, *Regards (bienveillants) sur le projet de réforme du droit français des contrats*, p. 47.
[35] Witz, *Le droit Allemand*, p. 11.

Delimitation of the subject

For this purpose, the present study does not aim to treat neighboring mechanisms, that may appear similar to the resolution, but in the end cause very different legal effects.

This is in particular the case of the nullity, which punishes the condition under which the contract has been formed, while the resolution inflicts a penalty for a bad performance.[36]

Another case is the cancellation, the *résiliation*, which does, unlike the resolution of contracts, not have a retroactive effect.[37]

Also, the *action rédhibitoire*, the right to cancel the contract is different from the resolution, since it requires a material or hidden defect of the sold good.[38]

Finally, the dissolution is different from the *exception d'inexécution*, the object to unfulfilled contracts, since this remedy does not need any judicial intervention and accomplishes more a redemptive than a resolutive impact. [39]

The French reform - does history repeat itself?

Even though a scholastic movement considers that, since the era of codification there is "a general aversion against the culture of the neighboring country",[40] simply the fact that there are two important reforms in such a short period of time is reason enough to analyze the mechanism of the resolution under the BGB, the "very young cousin of the Code Civil".[41]

But what are common grounds and differences between the two Reforms? What are their origins? Did the drafters of the French Reform inspire themselves from the "*Gründlichkeit*, which is characteristic to Germans"?[42] Finally and most importantly, what are the changes brought by the Reform compared to the anterior situation?

In order to analyze the two reforms and to see what influence the French reform has on the anterior legal situation, one has to take a closer look to the recent

[36] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 9.
[37] Cour de Cassation, Commerciale, 3rd of Mai 2012, n° 11-17779.
[38] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht*, p. 213.
[39] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 9.
[40] Neumayer, *Deutsche und französische Zivilrechtswissenschaft*, p. 166.
[41] Catala, *Présentation générale de l'avant-projet*, p. 11.
[42] Witz, *Le droit Allemand*, p. 12.

history and the requirements to dissolve a contract (I). With this in mind, one can explain the implementation and effects in a second part (II).

I. The resolution as a final and risky contractual tool

The resolution of contract provokes the end of a contract with a retroactive *ex tunc* effect, which withholds the possibility for the debtor to perform.[43] This mechanism is therefore the most drastic way of ending a contractual relation, giving it an ultimate and dangerous character for the debtor (A). The dissolution has consequently to be subdued to requirements before being exercised (B).

A. The risk as an answer to recent needs and experiences

The dissolution is a mechanism modified by the latest experiences (1), and is not to be used easily due to its dangerous characteristics (2).

1. A changing mechanism

a. The need of a reform in two countries

i. Under German Law

The *Schuldrechtsreform* was a reaction to Directive 1999/44/EG of the European Parliament and of the European council from the 25th of May 1999. This directive was not easy to transpose, in particular for Germany, since scholars do recognize that the German legislator in particular has difficulties with reforms.[44]

However, this reform has particularly affected the dissolution of contracts, named *Rücktrittsrecht*.[45]

Before the transposition of the directive, the *Rücktrittsrecht* was dealt with by the provisions of §§ 327 following of the BGB. However, these provisions were considered to contain an impenetrable mass of doctrinal debates, making a coherent application, be it by the doctrine or by practice, impossible.[46] Starting

[43] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht*, p. 193.
[44] Witz, *Le droit Allemand*, p. 13.
[45] Fleck, *Wörterbuch Recht*, p. 520.
[46] Lorenz, *Schuldrechtsmodernisierung*, p. 89.

point was the breach of duty, the so-called *Pflichtverletzung*,[47] from which the dissolution of contracts was an eventual consequence.[48]

One cannot say that this fact has not been criticized by scholars.[49] Hence in 1911 already, Ernst Rabel, jurist and founder of the modern German *Rechtsvergleichung*, revealed incoherencies related to the structure and systematics of the BGB.[50] Nevertheless, the first attempt of a reform was only taken in the 80s, and even then, the idea of a reform has been abandoned.

Finally, with the occasion to transpose the directive 199/44/EG dealing with consumer- related contracts,[51] the German legislator took the initiative to reform at the same time as the transposition, the entire law of obligations. The legislator had the choice of either opting for a so-called big solution or a small solution.[52] Its choice, criticized by the federal constitution court, [53] was the big solution, meaning an in-depth reform of the BGB, including its accessory provisions such as the *AGB-Gesetz*.

As a result, the dissolution of contracts is dealt with by the provisions of §§ 323 following BGB for ordinary contracts and in §§ 355 following BGB for consumer contracts. One has to add that this solution is not self-acting to be considered as equivalent to the German *Rücktritt*, meaning the revocation of the contract, but more to the resolution of the contract.[54]

[47] Fleck, *Wörterbuch Recht*, p. 493.
[48] Muthers, *Der Rücktritt vom Vertrag*, p. 37.
[49] Caemmerer *"Mortuus redhibetur". Bemerkungen zu den Urteilen BGHZ 53, 144 und 57, 137*, in *Festschrift Larenz*, p. 623.
[50] Muthers, *Der Rücktritt vom Vertrag*, p. 40.
[51] Dörner/ Staudinger, *Schuldrechtsmodernisierung*, p. 9.
[52] Schimmel/ Buhlmann, *Frankfurter Handbuch zum neuen Schuldrecht*, p. 3.
[53] Schimmel/ Buhlmann, *Frankfurter Handbuch zum neuen Schuldrecht*, p. 3.
[54] Muthers, *Der Rücktritt vom Vertrag*, p. 49.

ii. Under French law

The dissolution of contracts under French law before the reform followed a very different and more complex approach than under German law. Scholars rightfully consider that "the reform of the sanctions of the non-performance of contracts is a long-winded construction side".[55]

The necessity of a reform nowadays can be explained by the sole fact that under its current form, the dissolution of contract was largely outdated.[56] This can be stated not only by a comparison to Germany, but also by comparing instruments such as the CISG or the UNIDROIT Principles; it becomes clear that this is mostly due to the active role of the judge.[57]

Before the actual reform, there were three projects, the so-called *avant-projets* each proposing a fundamental reform but with a different approach: these projects are named after their leaders: Pierre Catala, François Terre and the one of the chancellery. But since the consultation of these projects is already over[58] and the reform has reached its final form, it is sufficient to present two results of these groups, which have been integrated into the final version.

Concerning the possibility of a unilateral resolution: The group around Pierre Catala (Art. 1158),[59] François Terré (Art. 109) as well as the one of the chancellery (Art. 168) anticipate this possibility.[60] This mechanism has finally been integrated into the reform with the provisions of Art. 1125 via a resolutive clause or in Art. 1126 by the possibility to dissolve the contract by notification.

Concerning the necessity of a preceding warning, the *mise en démeure*, all the projects demand its use as a requirement to a unilateral dissolution. The wording is the same in the projects and in the final draft of the reform. The project of Catala treated it in its Art. 1159, the Chancellery in its Art. 167 and Art. 112 of the Terré- group.[61]

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[55] Stoffel-Munck, *Exécution et inexécution du contrat*, n° 1.
[56] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 125.
[57] Genicon, *La Résolution du contrat pour inexécution*, n° 601.
[58] Official presence of the ministry of justice: http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/reforme-du-regime-des-obligations-et-des-quasi-contrats-22199.html.
[59] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 142.
[60] Stoffel-Munck, *Exécution et inexécution du contrat*, n° 21.
[61] Stoffel-Munck, *La résolution par notification*, p. 67.

However, the reform is not only the result of internal developments in France. It is crucial to observe how the problem has been dealt with by international instruments, such as the CISG.

b. Exterior influences

The reform grants various possibilities of unilateral dissolution in its Arts. 1224, 1225 and 1226. This can be explained by the fact that every international instrument and major reform has opted for a unilateral dissolution.[62] A step to conformity is therefore very welcomed.

For instance, the Convention for the international sale of goods (CISG) treats the unilateral resolution in its Art. 49(1), but requires a failure of the seller to perform his obligation, or if there is a "fundamental breach of contract", Art. 49(1)(a). The fundamental breach is considered to be so if "it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract", Art. 25.[63] It seems apparent that the French reform has adapted this thought in its Art. 1224, which grants a unilateral dissolution in case of a non-performance with "sufficient gravity".

However, an influence of international instruments is not always welcomed by French scholars. For instance, there is a refusal of admitting the possibility of a resolution in case of an anticipatory non-performance. Even though present in Art. 7.3.3 of the UNIDROIT Principles and Art. 72 of the CISG, this possibility is seen as a menace for the other party and should therefore not be introduced into the reform.[64] Accordingly, an eventual risk of non-performance could not justify on its own an extinction of the contract.[65]

2. A tool which is not to be used easily

As we've seen, the dissolution is considered by the CISG as *ultima ratio*- and this for a good reason. The dissolution puts a definite end to a contract, being

[62] Genicon, *La Résolution du contrat pour inexécution*, n° 603.
[63] See Müller-Chen *in* Schlechtriem/ Schwenzer, *Kommentar zum einheitlichen UN-Kaufrecht*, p. 745: The requirement of fundamentality is explained by the *ultima ratio* character of the dissolution for the creditor.
[64] Mekki, *Les remèdes à l'inexécution dans le projet d'ordonnance*, n° 18.
[65] Mekki, *Les remèdes à l'inexécution dans le projet d'ordonnance*, n° 18.

therefore an exception to the principle of *pacta sunt servanda*,[66] which governs the law of obligations.[67] Consequently, the *bona fide* performance should always be preferred.[68]

Under French law anterior to and under the reform, the legislator has recognized the necessity to submit the dissolution to certain requirements in order to avoid a resolution "for the least misdemeanor."[69]

a. The *cause*: non-performance based on a fault of the debtor

Before the Reform, Art. 1184 CC didn't mention this requirement, making it a result of practice and doctrine. The non-performance must only be based on a contractual obligation[70] of a synallagmatic contract,[71] which excludes by principle all failures having a delict ground.[72]

The term of fault is the historical result of a canonic approach, since the dissolution of contract used to be the penalty for the violation of a sacred promise.[73] However, the need for a fault as a requirement is criticized by a minority of scholars, [74] but also partly by case law.[75]

As a reaction, under the Reform, the term of fault is abandoned. Arts. 1224, 1225 and 1226 only use the term of non-performance to characterize the violation of a contractual promise.

[66] "The conventions need to be respected".
[67] Canaris in *Festschrift Kropholler*, *Teleologie und Systematik der Rücktrittsrechte nach dem BGB*, p. 8.
[68] Carbonnier, *Droit civil. Les obligations*, n° 187.
[69] Malinvaud/ Fenouillet/ Mekki, *Droit des obligations*, p. 402.
[70] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 33.
[71] Buffelan-Lanore/ Larribeau-Terneyre, *Droit civil. Les obligations*, n° 1228.
[72] Cour de Cassation, Commerciale, 11th of June 1965, n° 63-10240. Besides, a scholastic group around Henri Capitant was opting for the presence of non-performance only in case of non-payment of the price, see Capitant, *De la cause des obligations*, n° 153. See also Ghestin/ Jamin/ Billiau, *Traité de droit civil. Les effets du contrat*, n° 455: This would mean defining the non-performance as the failure of the other party to perform whatever he has engaged himself to perform and would therefore make an indirect link to the gravity of non-performance, a requirement which is further explained under para I.A.2.b.
[73] Buffelan-Lanore/ Larribeau-Terneyre, *Droit civil. Les obligations*, n° 1226.
[74] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht*, p. 211.
[75] Malinvaud/ Fenouillet/ Mekki, *Droit des obligations*, p. 402.

b. The *gravité*: an obstacle to an arbitrary use of the resolution

The judge has only a limited discretion in absolute absence of performance,[76] opposed to cases of a belated or partial non-performance.[77] Here, the judge appreciates the gravity (*gravité*) of the *faute*, using indicators such as the good or bad faith of the debtor. [78] This degree of discretion was not foreseen by Art. 1184. Yet, the French Supreme Court kept upholding this principle,[79] failing unfortunately to fix the degree of gravity in a precise and abstract way.[80] Accordingly, the wording varied between "sufficiently grave",[81] a "sufficient gravity"[82] or a "character of sufficient gravity".[83]

The Legislator has recognized the need to clarify this point and integrated the wording of the 1997 case law into the Reform. The degree of gravity is being fixed to being "sufficiently grave" and became a requirement to a resolution, Art. 1224.[84]

c. The requirements to a resolution under German law

German law anticipates the *Rücktritt* of a synallgmatic contract under its § 323 BGB, with the requirements of the first paragraph. Accordingly, the dissolution of contracts requires first of all a so-called *Vertragsverletzung,*[85] a contractual breach. The latter consists either of a non-performance (*Nichterfüllung)*[86] or a defective performance (*Schlechterfüllung*),[87] but the point of departure is in its essence linked to the *Leistungsstörungsrecht*, which some scholars consider to be the most fundamental difference to French law.[88]

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[76] Ghestin/ Jamin/ Billiau, *Traité de droit civil. Les effets du contrat*, n° 456.
[77] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 68. See further Malinvaud/ Fenouillet/ Mekki, *Droit des obligations*, p. 398: the doctrine agrees to use the term of gravity, regardless whether the non-performance is partial or total.
[78] Carbonnier, *Droit civil. Les obligations*, n° 186.
[79] Cour de Cassation, Commerciale, 2nd of July 1996, n° 93-14130: "*Une telle résolution peut être prononcée par le juge en cas d'inexécution partielle dès lors qu'elle porte sur une obligation déterminante de la conclusion du contrat.*"
[80] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 67.
[81] Cour de Cassation, Civile 3ème, 10th of December 1997, n° 95-21072 : "[…]*si le non-paiement du loyer, à le supposer établi, était un manquement suffisamment grave pour justifier* […]"
[82] Cour de Cassation, Civile 1ère, 15th of July 1999 n° 97-16001.
[83] Cour de Cassation, Civile 3ème, 11th of July 2012, n° 10-28.535, 10-28.616, 11-10.995.
[84] *"La résolution résulte soit de l'application d'une clause résolutoire, soit, en cas d'inexécution suffisamment grave, d'une notification du créancier au débiteur*[...]."
[85] Grüneberg *in* Palandt, *BGB mit Nebengesetzen*, §323 n° 10.
[86] Fleck, *Dictionnaire juridique*, p. 411.
[87] Grüneberg *in* Palandt, *BGB mit Nebengesetzen*, §323 n° 10.
[88] Ranieri *in* Fontanie/Viney, *Les sanctions de l'inexécution des obligations contractuelles*, p. 812.

Like the French case law and the Reform, the German legislator has anticipated in its 2002 reform the gravity (*Erheblichkeit)*, as an essential requirement to the dissolution of contract in the provisions of §§ 437 n°2, 323(5) BGB.[89]

By *argumentum e contrario*, the dissolution is excluded in case of an *Unerheblichkeit*, meaning a negligible non-performance. For instance, this is the case for bad performances or the non-performance of accessory obligations,[90] which do not meet the requirement of gravity.[91] Accordingly, case law shows for instance that the reparation of a car is negligible if it consists of 1% of the selling price,[92] the current quote of gravity being fixed at 5%,[93] with the declaration of dissolution as determining point in time.[94]

In contrast to the French legislator, the BGB has therefore well-defined the gravity with a strict quote and a precise moment.

In addition to the requirement of gravity, the party wanting to dissolve the contract needs to give a written warning, the so-called *Fristsetzung*, which may however be dispensed in the cases of §§ 440, 323(2) and 323(5) BGB.

Finally, the German legislator requires a fault of the debtor, the *Verschulden*, § 323(6) BGB. But contrary to French law, this notion is used in order to exclude the contractual resolution.[95]
Eventually, this might be the case if the buyer damages the good after conclusion of the contract, but before transfer of property,[96] or if the buyer does not, due to his own negligence, recognize the default performance.[97]

[89] Medicus/ Lorenz, *Schuldrecht II*, n° 152.
[90] Grüneberg *in* Palandt, *BGB mit Nebengesetzen*, § 323 n° 32.
[91] Brox/Walker, *Besonderes Schuldrecht*, p. 71.
[92] Bundesgerichtshof, 14th of September 2005 – VIII ZR 363/04 –NJW 2005, 3490.
[93] Looschelders, *Schuldrecht Besonderer Teil*, n° 108.
[94] Höpfner, *Der Rücktrittsausschluss wegen „unerheblicher" Pflichtverletzung*, NJW, p. 3693.
[95] Medicus/ Lorenz, *Schuldrecht II*, n° 161.
[96] Brox/ Walker, *Besonderes Schuldrecht*, p. 74.
[97] Ernst in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, §323 n° 258.

In conclusion, the two legal systems have established mechanisms in order to prevent a premature resolution. This is an advantage for debtor, who gets a second chance to perform.

B. A risk which the debtor has to support

The debtor has different remedies in order to evade the resolution, for instance the right of subsequent performance (1) and the grace period (2).

1. The *privilege d'exécution ultérieure*

a. Absent under French law

The right of subsequent performance (*privilege d'exécution ultérieure*) was not mentioned in Art. 1184 CC, which is the main reason why it is a mechanism considered to be unfamiliar to French law.[98] This right appears more like a choice given to the debtor:[99] if he is insolvent, he would generally tend to dissolve the contract and if not, he has a second chance to perform.

Also, French case law underlines the facultative character as being preferable over a resolution.[100] case law therefore creates a hierarchy between the options of the party, which has to suffer the consequences of non-performance according to Art. 1184(2), without nevertheless making the subsequent performance a necessary requirement for the dissolution.

b. Obligatory under German law

The solution in the BGB is different. The provisions of §§ 439(1), 323(1) BGB require that the buyer must give a second chance to perform (*Recht zur zweiten Andienung*).[101] The reason of the privilege of subsequent performance (*Vorrang der Nacherfüllung*)[102] is to give the seller the possibility to evade the disadvantages that come with the dissolution.[103] The *Nacherfüllung* is a modification of the obligation to deliver the good as agreed upon in the contract, § 433(1) BGB.[104]

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[98] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht*, p. 225.
[99] Flour/ Aubert/ Savaux, *Droit civil. Les obligations*, n° 251.
[100] Cour de Cassation, Civile 1ère, 9th of July 2003, n° 00-22202 : "*le créancier d'une obligation contractuelle de somme d'argent demeurée inexécutée est toujours en droit de préférer le paiement du prix* […] *à la résolution de la convention*."
[101] Brox/ Walker, *Besonderes Schuldrecht*, p. 66.
[102] Höffman, *Die Nachfrist im Leistungsstörungsrecht*, p. 60.
[103] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht*, p. 218.
[104] Looschelders, *Schuldrecht Besonderer Teil*, n° 84.

However, the subsequent performance does not constitute a relative right for the creditor, but rather a second chance for the debtor to perform.[105]

2. The declaration of the performance being default- a German inspiration

The *mise en demeure*, the declaration of the performance being default or reminder, is one of the most important innovations of the Reform and should therefore be analyzed in all its aspects. For this purpose, it is convenient to see how the situation before the Reform was (a), in order to compare it to neighboring law systems such as German law or the CISG (b) and see an eventual influence on the reform, since these neighboring systems use the grace period for a long time already.

a. Under French law before the Reform

The French term *demeure* comes from the Latin word *mora* meaning delay.[106] The reminder in French law is defined as an act by which the creditor demands the debtor to perform his obligation,[107] since it has not been performed voluntarily by the time it was due.[108] This term was used in several parts of the *Code Civil* before the Reform, for instance the provisions of Art. 1146 treating the granting of punitive damages or for the form of the reminder in Art. 1139.

However, Art. 1184 does not mention the necessity of a reminder in order to dissolve the contract.

As a consequence, the institute of the reminder is being subject to long doctrinal debates concerning its applicability for the dissolution.

[105] Höffman, *Die Nachfrist im Leistungsstörungsrecht*, p. 60.
[106] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 868.
[107] Guinchard/ Debard, *Lexique des termes juridiques*, p. 597.
[108] Larroumet, *Droit civil*, n° 663.

On the one hand, neither case law[109] nor the doctrinal majority[110, 111] consider it to be an essential requirement. This can be explained by the fact that the subpoena of Art. 1139 is already enough of a warning for the debtor,[112] so that the latter can perform.[113] From that point of view, the reminder seems without practical relevance,[114] which leads some authors to assimilate the subpoena to the reminder.[115] The French Supreme Court however seems to evade this problem,[116] by judging that the statement of claim is equal to a reminder.[117]

Therefore, under French law, the reminder is considered to be a simple notification to the debtor, indicating his delay.[118]

However, the minority doctrine sees the reminder not just as an action to the benefit of the creditor, but as a necessity.[119]
This vision of the declaration of the performance being default relies on the assumption that French law is based on a subsidiary conception of the dissolution; it would consequently not be convincing to have the reminder as a faculty.[120]

In addition, its practical use consists in *evading* a premature claim of justice, making a summons of court paradoxical:[121] the party risks a procedure, which should be avoided in the first place by the reminder.

Finally, case law partly admits that in rare occasions the reminder is obligatory, for instance when using resolutive clauses.[122]

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[109] Cour de Cassation, Civile 3ème, 11th of July 1992, n° 90-14648: "*attendu que les juges du fond pouvant prononcer la résolution judiciaire d'une vente, pour défaut d'exécution des obligations de l'acquéreur, sans avoir à constater que celui-ci ait été, préalablement à l'assignation, sommé d'avoir à s'exécuter* […]"
[110] Larroumet, *Droit civil*, n° 670.
[111] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 38.
[112] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 38.
[113] Cour de Cassation, Civile 1ère, 23rd of May 2000, n° 97-22547. See further Cour de Cassation, Civile 1ère, 23rd of January 2001, n° 98-22760.
[114] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 73.
[115] Ghestin/ Jamin/ Billiau, *Traité de droit civil. Les effets du contrat*, n° 452.
[116] Jamin *in* Fontaine/Viney, *Les sanctions de l'inexécution des obligations contractuelles*, p. 461.
[117] Cour de Cassation, Civile 1ère, 23rd of May 2000, n° 97-22547.
[118] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 868.
[119] Ferid/ Sonnenberger, *Französisches Zivilrecht*, n° 2, G 533.
[120] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 866.
[121] Ghestin/ Jamin/ Billiau, *Traité de droit civil. Les effets du contrat*, n° 452.
[122] Cour de Cassation, Commerciale, 3rd of June 1997, n° 95-12402.

When being used *voluntarily* by the creditor, it offers several advantages.
First of all, it grants the right to punitive damages, Art. 1146. Therefore, the judge would grant a dissolution of the contract with punitive damages without preceding summons.[123] Only rarely, for instance in case of an *obligation de ne pas faire* as for instance in Art. 1145, this does not apply. In those cases, the French Supreme Court has ruled by analogical application that it is not necessary to have summons, given that a performance is incontestable,[124] and in cases where there has been a preceding contract.[125]

Also, an unfruitful reminder can reveal the bad faith of the debtor, based on which a judge might refuse to grant a grace period.[126]

In terms of conclusion there are on the one hand good reasons to integrate the reminder into the domain of contractual dissolution. However, on the other hand it seems that French law got used to its absence and found other remedies instead. To resolve the conflict, it is convenient to take a look how German law dealt with the issue.

[123] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 38.
[124] Cour de Cassation, Commerciale, 14th of February 1967, Bulletin civile 1967, III, n° 73: "*attendu qu'en constatant que* […] *malgré l'insistance de son acheteuse pour obtenir livraison, avait notifie à la société* [...] *qu'elle considérait le marche comme résilie, la cour d'appel a implicitement mais nécessairement écarté la nécessite d'une mise en demeure* […]"
[125] Cour de Cassation, Civile 1ère, 3rd of February 2004, n° 01-02020: "*une clause résolutoire de plein droit ne peut être déclarée acquise au créancier, sauf dispense expresse et non équivoque, sans la délivrance préalable d'une mise en demeure restée sans effet* […]."
[126] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 38.

b. Under German law

The declaration of defective performance is a purely German creation,[127] codified for the first time in the *Allgemeine deutsches Handelsgesetzbuch* ADHGB,[128] Art. 356. Canaris, famous German Jurist and editor of the *Schuldrechtsreform* characterized it as being an "excellent, remarkable specificity of German law".[129]

This being said, the *German Nachfrist* has already inspired the editors of the CISG,[130] who have integrated this mechanism in its Art. 47, making the reminder maybe the most important contribution of German law in terms of international sales law.[131]

The notification, the *angemessene Nachfrist*, the reminder in a narrow sense, does not require a special form, as mentioned in § 323(1) BGB. It still needs to be reasonable in its content, meaning the delay must be appropriate. Also, the notification needs to be precise.[132]

First, the reasonability is appreciated in terms of what the parties agreed upon in the first place[133] (§ 311(1) BGB) and only then based on objective criteria,[134] meaning that the notified may recognize that he only has a limited time to perform.[135] However, a precise time is not required.[136]

Second, the term "precise" is not linked to the date, but defined by case law as a "concrete summon to perform".[137] The essential requirement is that the reminder needs to be more than a polite notification of the delay,[138] meaning that the reminder needs to have a serious character.[139]

The requirement of a reminder is dispensable in cases of § 323(2) or § 440 BGB.

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[127] Höffman, *Die Nachfrist im Leistungsstörungsrecht*, p. 1.
[128] Schwarze, *Recht der Schuldverhältnisse §§315-326 (Leistungsstörungsrecht 2),in* Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, § 323, A, n° 9.
[129] Canaris *in* FS Kropholler, *Teleologie und Systematik der Rücktrittsrechte nach dem BGB*, p. 8.
[130] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 868.
[131] Magnus, *Wiener UN-Kaufrecht (CISG), in* Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Art. 47, n° 3.
[132] Grüneberg *in* Palandt, *BGB mit Nebengesetzen*, §323 n° 13.
[133] Ernst in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, §323 n° 69.
[134] Ernst in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, §323 n° 70.
[135] Medicus/ Lorenz, *Schuldrecht II*, n° 101.
[136] Bundesgerichtshof, 12th of August 2009- VIII ZR 254/08- NJW 2009, 3153.
[137] Bundesgerichtshof, Beschluss, 5th of October 2010- IV ZR 30/10- NJW 2011, 224.
[138] Grüneberg *in* Palandt, *BGB mit Nebengesetzen*, § 323, n° 13.
[139] Grüneberg *in* Palandt, *BGB mit Nebengesetzen*, § 323, n° 13.

In contrast to the French summons to court, the meaning of the reminder under German law is different. While in France, the *mise en demeure* aims to remind a non-performing debtor to perform but on a non-mandatory basis,[140] under German law it is a mandatory obligation for the creditor to prevent the debtor. Furthermore, it is a chance for the debtor to perform a second time (*Recht zum zweiten Andienen*),[141] opening the doors to the right of subsequent performance; the non-performing debtor gets a last chance to avoid the consequences of the *Rücktritt.*[142]

This stabilizes the contractual relationship[143] and takes into account the German principle of the privilege of performance *in natura*.[144]

In addition, it is, together with the requirement of a *Pflichtverletzung*,[145] a veritable obstacle to a premature dissolution of the contract.[146]

c. An inspiration for the Reform

Every *avant-projet* has recognized the necessity of a reminder as a prerequisite of a dissolution. For instance, Art. 167 of the chancelleries project, Art. 1159 of the Catala and Art. 112 of the Terré group.[147] Also the doctrine seems to impatiently wait for it.[148]

The reform responded to that need and constructed a three-embled structure of the reminder: it is to be found in Art. 1225(2) for the dissolution by contractual clause, Art. 1226(1) and in paragraph 2 of the same provision, the resolution by notification.

i. The placement

The choice of placement of these provisions has a particular reason for the reminder: it is always placed where the creditor has the option to dissolve the

[140] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 38.
[141] Brox/ Walker, *Besonderes Schuldrecht*, p. 66.
[142] Schwarze, *Recht der Schuldverhältnisse §§315-326 (Leistungsstörungsrecht 2),in* Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, § 323, A, n° 9.
[143] Schlechtriem, *Rechtsvereinheitlichung und Schuldrechtsreform*, p. 233.
[144] Schwarze, *Recht der Schuldverhältnisse §§315-326 (Leistungsstörungsrecht 2),in* Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, § 323, A, n° 9.
[145] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 868.
[146] Lammich, *Gläubiger-und Schuldnerverzug*, n° 138.
[147] Stoffel-Munck, *La résolution par notification*, p. 67.
[148] Mekki, *Les remèdes à l'inexécution dans le projet d'ordonnance*, n° 16.

contract unilaterally, meaning without a judicial intervention. This explains the case law cited previously linked to the requirement of a reminder before the use of a resolutive clause.[149]

This aspect is undermined by the absence of the requirement of a reminder for cases involving a judicial intervention, for instance Art. 1227, following a logical approach: the protection of the debtor is assured by the judge in cases of a judicial dissolution, if the judge grants an eventual grace period to the debtor,[150] a protection absent in cases of a unilateral dissolution.

ii. A similarity up to the details…

The mechanism of the German resolution, the "German *Gründlichkeit*"[151] has not failed to impress the French legislator.

First of all, the right of subsequent performance: even though considered to be a foreign mechanism to French law,[152] the reform however integrated it in its Art. 1226(3).[153] This provision is very comparable to the institution of the *Recht zum zweiten Andienen*[154] of § 323(1) BGB. Consequently, the German *Rechtsgedanke* of the reminder has been taken over; a stabilization of contractual relationships[155] by the privilege of a performance *in natura*.

But further than that, concerning the reasonable delay, it seems like the legislator has taken the exact wording of § 323(1) BGB. This provision uses the term of an *angemessene Nachfrist*, while the Reform uses the wording of a *delai raisonnable* in its Art. 1226(1).

Consequently, there has been a substantial change of the function of the reminder: if, before the Reform, the reminder was a simple notification,[156] with a facultative character,[157] the reminder now is obligatory, just like in the BGB.

[149] Cour de Cassation, Commerciale, 3rd of June 1997, n° 95-12402.
[150] Laithier, *Étude comparative des sanctions de l'inexécution du contrat*, n° 230.
[151] Witz, *Le droit Allemand*, p. 12.
[152] Cour de Cassation, Civile 3ème, 11th of June 1992, n° 90-14648.
[153] "*Lorsque l'inexécution persiste, le créancier notifie* [...]."
[154] Brox/ Walker, *Besonderes Schuldrecht*, p. 66.
[155] Schlechtriem, *Rechtsvereinheitlichung und Schuldrechtsreform*, p. 233.
[156] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du Contrat*, n° 868.
[157] Larroumet, *Droit civil*, n° 670. See further Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 38.

ii. … and even further.

With the mechanism of the dissolution by clause, Art. 1225(2) of the Reform, grants a protection which is - if not identic - at least strongly comparable to the German wording of § 323(1) BGB. While § 323(1) BGB requires the reminder to be precise[158] if it is a concrete summon to perform,[159] the Reform requires that the resolution needs to be mentioned in an apparent way, *de manière apparente*.

However, the wording of the Reform seems to go even further than German law. Without any doubt one can create a link between the two formulations, yet the wording of *de manière apparente* seems to be stricter after a second lecture; this is due to the fact that "in an apparent way" signifies that the reason for the dissolution must be comprehensible as such even by a third party, while the German wording of a "concrete summon to perform" aims to be comprehensible only by the debtor, allowing a less apparent formulation.[160]

The doctrine however would like to go a step further and would like to expose within the reminder the consequences of the delay.[161] This would lead to an exact replication of the German *Bestimmtheit*.[162]

The wording of *de manière apparente* takes away from the non-performing debtor the possibility to refuse a performance of the contract, since he knows which grounds support the reminder of the creditor, leading to a double effect. On the one hand, the debtor is protected from an arbitrary use of the reminder and on the other hand, it helps to reveal the bad faith of the debtor if the latter questions the grounds on which the reminder is issued.

Conclusively, the Reform in France has been strongly inspired by the §§ 323 following BGB, as well as by the provisions of the CISG, especially in terms of

[158] Grüneberg *in* Palandt, *BGB mit Nebengesetzen*, § 323 n° 13.
[159] Bundesgerichtshof, Beschluss, 5th of October 2010- IV ZR 30/10- NJW 2011, 224.
[160] See Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, p. 54: The wording of the Reform is also a consequence of an influence from consumer protection.
[161] Mekki, *Les remèdes à l'inexécution dans le projet d'ordonnance*, n° 16.
[162] Grüneberg *in* Palandt, *BGB mit Nebengesetzen*, §323 n° 13.

the reminder as an obstacle to a premature resolution. For this purpose, it is convenient to treat another mechanism, which prevents a premature resolution under French law.

II. The danger relativized by the realisation

And besides the *mise en demeure*, the second important mechanism that's being remarkably changed under the Reform is the judicial intervention. According to Henri Capitant "The tradition of our customary countries gives the judge, in charge of pronouncing the dissolution of contracts, a sovereign discretion."[163] Therefore, one needs to know the current *raison d'être* of this principle (A) before treating its exceptions (B).

A. The judicial intervention - an *isolation à la française*?

A common point of every country is to fix a minimum threshold to the resolution of contracts.[164] However, the Cour de Cassation is alone to transfer this duty to the judge, which might lead to what scholars refer to as an isolation of France:[165] no other legislation grants such an important role to the judge.[166] But, most importantly, the recourse to the judge is not only a formal validity issue, but a substantive condition.[167]

Consequently, the participation of the judge in the resolution of contracts is unique in France (1), but does not lead to isolation, since this principle knows several exceptions (2).

1. The obligatory intervention of the judge

a. An implication due to a practical approach

The implication of a judge in the resolution of contracts is a particularity which is the result of a practical approach.[168] It is a consequence of the *condictio tacita*,[169] which was used in order to interpret a consensus of the parties.[170] This interpretation must be transmitted to a neutral instance: the judge. Under the

[163] Capitant, *De la cause des obligations*, n° 153.
[164] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, n° 219.
[165] Genicon, *La résolution du contrat pour inexécution*, n° 601.
[166] Pagnerre, *L'extinction unilatérale des engagements*, n° 511.
[167] Genicon, *La résolution du contrat pour inexécution*, n° 548.
[168] Genicon, *La résolution du contrat pour inexécution*, n° 544.
[169] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 41.
[170] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 44.

influence of canonic law,[171] another role was transferred to the judge. Since the dissolution of contracts was considered as a penalty,[172] it needed to be pronounced by an instance superior to the parties.[173]

The large discretion of the judge today, codified in Art. 1184(2) and Art. 5 of the *Code de la procédure civile,*[174] is the result of case law dating from the 17th and 18th century.[175] At that time, the dissolution stayed an exception, which often even in cases of grave failures to perform, was not applied.[176]

Another source of the discretion is the important legislative power of the regional parliaments;[177] the regional parliaments were entitled to create laws, which were effective until disapproval of the king. In order to assure the greatest independence to interpret these regional laws, a large discretion of the judge was indispensable.[178]

Later, in the 19th century the judge was referred to as the "minister of equity",[179] which accurately reflects the attitude by the time of the codification and the reason why the judge has such an important place nowadays. This status manifests the will to preserve the social order:[180] if Art. 1134 imposes a *bona fide* performance the co-contract must logically obtain an authorization of a public authority in order to dissolve the contract.[181] Also, the role granted to the judge, inspired by Jansenism, is the ideal of a biblical, almighty judge.[182]

[171] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 314.
[172] Pagnerre, *L'extinction unilatérale des engagements*, n° 514.
[173] Genicon, *La résolution du contrat pour inexécution*, n° 543.
[174] Art. 5 of the CPC:"*Le juge doit se prononcer sur tout ce qui est demandé et seulement sur ce qui est demandé*."
[175] Boyer, *Recherches historiques sur la résolution du contrat*, p. 400.
[176] Boyer, *Recherches historiques sur la résolution du contrat*, p. 400.
[177] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 44.
[178] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 44.
[179] Laurent, *Principes de droit civil*, n° 130.
[180] Genicon, *La résolution du contrat pour inexécution*, n° 539.
[181] Pagnerre, *L'extinction unilatérale des engagements*, n° 515.
[182] Carbonnier, *Droit civil, les obligations*, n° 77.

b. Judicial interference as a procedural and material law requirement- a debated necessity today

Nowadays, the judge is considered to be a *véritable maître du sort du contrat* when seized for a resolution.[183] He has a large discretion,[184] especially when it comes to the appreciation of the gravity and good or bad faith of the parties.[185]

Art. 5 of the French *Code de la procédure civile*, together with Art. 1184(2) Code Civil made the involvement of a judge not only a procedural matter, since in case of a contractual resolution clause, "the contract is not avoided as of right." Furthermore, the third paragraph requires that "avoidance must be applied for in court" which makes the involvement of a judge even a material requirement, without which the resolution in France could formerly not take place.

The judge may grant a grace period to the debtor (Arts. 1184(3), 1655(2) of the Code Civil), condemn the debtor to pay punitive damages without pronouncing the resolution of the contract, or, in case of reciprocal failure, pronounce the resolution of the contract without punitive damages, or finally, pronounce the resolution of the contract with punitive damages (Art. 1184(2)), in case of a faulted non-performance. [186] The Cour de Cassation interprets Art. 1184 in a very extensive way: the judge needs to consider all the circumstances and elements that might cause the resolution until the day of judgement.[187]

This large discretion of the judge of the circumstances dates from a decision of 15th of April 1845, which introduced "in a spectacular way"[188] an enlargement of the judicial power. *In casu*, goods needed to be delivered at a fixed date, but were only delivered with one-day delay. The buyer demanded a resolution of the contract, but this demand was refused by the Cour de Cassation for absence of prejudice on the one hand, and by the consideration on the other hand, that "courts must examine and appreciate the facts and constitutive acts of the non-

[183] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, n° 223.
[184] Buffelan-Lanore /Larribau-Terneyre, *Droit civil, les obligations*, n° 1236.
[185] Ghestin/Jamin/ Billiau, *Traité de droit civil. Les effets du contrat*, n° 458.
[186] Carbonnier, *Droit civil, les obligations*, n° 187.
[187] Buffelan-Lanore /Larribau-Terneyre, *Droit civil, les obligations*, n° 1236.
[188] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, n° 223.

performance as well as the consequences it has". It is a constant position of the jurisprudence. This case has been followed in later jurisprudence.[189]

In exceptional cases,[190] a party may use its proper authority in order to unilaterally dissolve the contract. Without a doubt, this is the case when the debtor declares to not perform or in cases of a particular urgency.[191] However, this is not the case for a definite impossibility of the debtor to perform.[192] The latter case remains an uncertain ground, as the commercial chamber of the Supreme court did not develop this point since the famous *Beltoise*-case.[193]

i. The humanistic point of view…

The most important aspect for the presence of the judge in the dissolution of contracts is legal security.[194] First, the debtor is considered to be the weak party and third parties needs to be protected.[195] This is the result of an approach which worries about a lack of humanity in the resolution of contracts.[196] But also, third parties' interests can be extended to a general interest, since a contract "does generally not evolve in a closed vase." [197]

For instance, the judge needs to consider all the circumstance when pronouncing the resolution, which includes the "inconveniences which the resolution presents for the creditor (*in casu* a third party), who has to engage a new pursuit",[198] or the prejudices that a resolution could cause to "buyers of a flat (*in casu* a third party)."[199]

This explains at the same time the fact that the judicial intervention takes place *a priori* and not *a posteriori:* once the damage is done, there is a risk that it is

[189] Cour de Cassation, Civile 1ère, 10th of October 1995 n° 93-20701. See further Cour de Cassation, Commerciale, 8th of June 1979, Bulletin Civil 1979, IV n°186.
[190] For the details concerning the exceptions to a judicial intervention see II. A. 2.
[191] Carbonnier, *Droit civil, les obligations*, n° 187.
[192] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 346.
[193] Cour de Cassation, Commerciale, 28th of April 1982, n° 80-16.678: "[…] *une demande de résolution judiciaire en cas d'impossibilité d'exécution n'est pas necessaire* […]."
[194] Pagnerre, *L'extinction unilatérale des engagements*, n° 521.
[195] Pagnerre, *L'extinction unilatérale des engagements*, n° 522.
[196] Genicon, *La résolution du contrat pour inexécution*, n° 540.
[197] Genicon, *La résolution du contrat pour inexécution*, n° 516.
[198] Cour de Cassation, Civile 3ème, 22nd of March 1983, n° 81-13508.
[199] Cour de Cassation, Civile 1ère, 15th of April 1985, *inédit*.

too late for the third parties, which should be protected by the judicial intervention.[200]

But in the first place, the protection is debtor-focused. The debtor can benefit from another possibility to perform, which is the reason being for the 1845 case;[201] it could be sufficient from the creditors' point of view, to simply give a notification to the debtor so that the latter can perform. But by implying the judge, there is a guarantee that a superior instance maintains the balance between the creditor's prejudice and the utility for the debtor.[202]

Here, it is convenient to mention the theory of risks, a particularity of the French law of obligations. The theory of risks describes the constellation where either the debtor of an obligation has an impossibility to perform due to an extrinsic element to the parties or in presence of *force majeure*.[203] A judicial intervention is desirable for the debtor, to evade a dissolution of the contract, even if the gravity and not the *causa* is at the origin of the judicial resolution.[204]

In addition, the necessity of the judge can be illustrated by adhesion or membership contracts, where after some time a frequent practice of resolution clauses has been established,[205] which allows the resolution of the contract for the smallest failure of the debtor.[206]

Finally, another argument in favor of the judicial intervention is the adage *en France nul ne peut se faire justice à soi-même*,[207] originating from the interdiction to dissolve unilaterally the contract (Art. 1134)[208] as well as the judicial intention to exercise a certain control of the dissolution.[209]

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[200] Genicon, *La résolution du contrat pour inexécution*, n° 540.
[201] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, n° 223.
[202] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, n° 228.
[203] Carbonnier, *Droit civil, les obligations*, n° 191.
[204] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, n° 223.
[205] For details regarding the resolutive clause *cf.* II. A. 2.
[206] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 333.
[207] "In France, nobody can create justice by himself", see Ferid/ Sonnenberger, *Das französische Zivilrecht*, p. 148.
[208] Art. 1134 Code Civil: "*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise.*"
[209] Genicon, *La résolution du contrat pour inexécution*, n° 547.

This point of view takes into consideration the protective mechanism of the judicial intervention, which is justified by the legal security and the equity of which the debtor benefits.[210] However, this point does not remain without critics; members of the so-called individual approach emphasize on the negative points of a judicial intervention.

ii. … against the economic and individualistic approach

The doctrine seems undivided about the economic threshold that the judge presents in its current state.[211]

This argument presents itself under a dualistic form; first, it is more economic on a procedural cost level, but also in terms of economizing time. Most importantly, this argument means a passage from a protection of the debtor to a protection of the creditor. This is rightful, since the creditor is the scorned party in case of a non-performance.[212]

Further, Pagnerre sees "nothing decisive" in the arguments that are in favor of a judicial intervention.[213] To support his point of view, he makes reference to other instruments such as the CISG, where "the entire philosophy aims avoiding by any means that the dissolution takes place",[214] underlining the character of *ultima subsidium*[215] of the resolution, however without any judicial intervention, which would be desirable in France too.[216]

Also, the doctrine disapproves that the entire appreciation is left to the judge. The scholastic group surrounding Ghestin sees in this fact "one of the two grave inconvenients of the judicial resolution".[217] The other inconvenience resides in

[210] Pagnerre, *L'extinction unilatérale des engagements*, n° 524.
[211] See for instance Tallon, *L'article 1184 du Code Civil- Un texte à rénover*, n° 281: The author is of the opinion that "the resolution *à la française*" is mostly critised in other countries due to its judicial character, forming an opposition to the German and English legislation and used by the CISG, of a dissolution by unilateral declaration to the debtor, being more simple, more supple, less expensive, faster." See further Genicon, *La résolution du contrat pour inexécution*, n° 547: Genicon notices that "the main argument against a judicial intervention is the less moral but more economic, more indivudalistic perspective, making the interests of the creditor the point of reference."
[212] Genicon, *La résolution du contrat pour inexécution*, n° 547.
[213] Pagnerre, *L'extinction unilatérale des engagements*, n° 523.
[214] Heuzé, *La vente internationale de marchandises*, n° 425.
[215] Magnus, *Wiener UN-Kaufrecht (CISG)*, *in* Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Art. 49, n° 4.
[216] Pagnerre, *L'extinction unilatérale des engagements*, n° 523.
[217] Ghestin/ Jamin/ Billiau, *Traité de droit civil. Les effets du contrat*, n° 461.

the temporary costs that an intervention *a priori* presents.[218] In this aspect, he joins the economic opinion of Génicon.[219]

Besides, Ghestin also makes reference to Arts. 49 and 64 of the CISG in order to prove that the intervention of a judge is not obligatory, from where emerges that the CISG is an important source of inspiration for the partisans of the individualistic approach.[220] Moreover, Ghestin sees a source of inspiration in German law with its *Nachfrist,* making a judicial intervention unnecessary.[221]

From that point of view, the inconveniences appear clear: Under French law, the judge might guarantee the legal security and maintain the *ultima ratio* character of the dissolution, but to a disproportional price. Also, other instruments such as the CISG, but also the example of Germany shows that an important place to the judge is not granted in the dissolution of contracts, which does however not allow a premature resolution.
It is therefore convenient to analyze the role of the judge under German law.

c. Seperation between the material and procedural situation in Germany

The judge, as an essential element in procedure of contract avoidance, was foreseen in the initial *Allgemeines Deutsches Handelsgesetzbuch* from 1861, but it was swiftly abolished in the promulgated first § 325 BGB.[222] Today, the requirements to be met in order to dissolve the contract, by clause or unilaterally, are the §§ 323-326 BGB with the legal consequences of §§ 346-354 BGB.

For some scholars, the judges today take the exact opposite function as they do in the French Civil Code;[223] while Art. 1184 CC grants the judges the largest possible appreciation, § 349 of the German Civil Code of Procedure *Zivilprozessordnung* explicitly forbids this.[224] Consequently, the lawsuit does

[218] Ghestin/ Jamin/ Billiau, *Traité de droit civil. Les effets du contrat,* n° 461.
[219] Genicon, *La résolution du contrat pour inexécution,* n° 547.
[220] Ghestin/ Jamin/ Billiau, *Traité de droit civil. Les effets du contrat,* n° 463.
[221] Ghestin/ Jamin/ Billiau, *Traité de droit civil. Les effets du contrat,* n° 463.
[222] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung,* p. 24.
[223] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht,* p. 193.
[224] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht,* p. 193.

not affect the situation of material law,[225] while the judicial intervention in the *Code Civil* is a material law requirement.[226]

However, not only is the intervention of a judge not required in order to give effect to the resolution, the BGB takes the position that even the contractual party does not need to be implied in case of a resolution via notification.[227] Therefore, the use of negotiated resolution clauses as they are being used in France is possible, but not necessary, even though the clauses are considered as a rapprochement from French law to German law.[228]

d. A disappearing function under the Reform?

The judge occupied an essential place before the Reform, a key role which could – in principle- not be avoided to an extend that some scholars consider it to be *bien balisée en droit positif*.[229]

However, the Reform seems to change this fact. First of all, from a visual point of view, only two out of six articles treat an eventual judicial intervention. Moreover, the judicial intervention is only appearing in the last place, only after the resolution by clause and by notification, which seems to give it- structure wise- the least importance.[230]

Another important change is to be found in Art. 1184 of the Civil Code, who stated that the resolution must (*doit*) always be requested from the judge. Under the Reform, Art. 1227 introduces that the resolution may (*peut*) always be requested from the judge. This means the passage from an obligation to a faculty.

Consequently, opposing to the reminder, the French legislator did not take the precise wording of the CISG or German law. Even though European codes have

[225] Schwarze, *Recht der Schuldverhältnisse §§315-326 (Leistungsstörungsrecht 2), in* Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, § 323 F9.
[226] See para II. A. 1.
[227] Kaiser *in* Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, § 349 n° 1.
[228] Carbonnier, *Droit civil. Les obligations*, n° 189.
[229] Stoffel- Munck, *Exécution et inexécution du contrat,* n° 28.
[230] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, p. 54.

widely completely removed the judicial intervention, leaving only the resolution by notification,[231] the Reform did not completely follow this direction to the end by maintaining this originality, which is unique to the Code Civil.

For instance, the discretion of the judge has been limited in Art. 1228, by codifying the possibilities of the judge which are: pronunciation, assentation of the resolution, forced performance or a grace period. This is significantly different from Art. 1184(3) which stated that "the Court may give the defendant time if it thinks he circumstances warrant it": the margin of appreciation has therefore limited, but not in a strict way like for instance under German law.

Consequently, the Reform does introduce a certain declination from the judicial intervention, but does not lead to its disappearance.[232] It is a desirable evolution since "abandoning a particularity only because it is particular" doesn't seem convincing.[233]

In conclusion, even though the judicial importance has been limited on a visual and functional level, the practice is already further and has developed mechanisms, which are recognized by case law and create an exception to the participation of the judge.

2. The implication of a judge being partially dispensable

The contractual resolution, a mechanism which is foreign to French law, has been looked at with distrust for a long time.[234] This opinion seems to change though.

However, the supposition according to which the judicial resolution is an *isolation à la française* is a wrong one. On the one hand because this mechanism also exists in Luxembourg,[235] Belgium[236], in Italy[237] or in Russia.[238]

[231] Mekki, *Les remèdes à l'inexécution dans le projet d'ordonnance*, n° 21.
[232] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, p. 54.
[233] Genicon, *La résolution du contrat pour inexécution*, n° 601.
[234] Jamin *in* Fontaine/ Viney, *Les sanctions de l'inexécution des obligations contractuelles*, p. 483.
[235] Art. 1184 Luxembourgish Civil Code.
[236] Art. 1184 Belgian Civil Code.
[237] Art. 1453 Italian Civil Code.
[238] Art. 450 Russian Civil Code.

This assumption is wrong on the other hand because the legislator (c) as well as case law (b) accept and even command exceptions to the judicial intervention. These exceptions can also be conventional (a).

a. The resolutive clause- a contractual exception

i. A mechanism not foreseen by the Code Civil

A resolutive clause or *clause commissoire* (making reference to the l*ex commisoria*)[239] foresees that the non-performance of an obligation results in the *ipso facto* resolution of the contract,[240] and this without a judicial intervention.[241] Under English law, this clause is the fruit of contractual liberty[242] and the advantage seems obvious: escape of the hazardous,[243] expensive and economic disadvantages of the judicial resolution.[244] The beneficiary creditor could choose between a forced performance and resolution.[245]

This might appear on a first sight like a brutal rupture with the French judicial tradition,[246] in particular upon second reading of Art. 1184(2). Loyal to this restrictive interpretation, a scholastic movement classifies the contractual clause as being a dangerous act of private justice[247] or even an "irritating phenomenon".[248]

But despite this, the French Supreme court approves the use of this clause since July 1860,[249] which most importantly means that the judicial participation is not French *ordre public*.[250] This can be explained by the fact that the clause is not the result of an arbitrary decision, but, as part of the contract, the result of a negotiation between the parties,[251] granting the legal security.

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[239] Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 80.
[240] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, n° 158.
[241] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 108.
[242] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 110.
[243] Malinvaud/ Fenouillet/ Mekki, *Droit des obligations*, n° 529.
[244] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, n° 159.
[245] Malinvaud/ Fenouillet/ Mekki, *Droit des obligations*, n° 529.
[246] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, n° 158.
[247] Terré/ Simler/ Lequette, *Droit civil, les obligations*, n° 664.
[248] Aynès *in* Mazeaud/ Jamin, *L'unilatéralisme et le droit des obligations*, p. 3.
[249] "*Il n'est pas défendu aux parties, par une convention expresse* [...] *d'attacher les effets d'une condition résolutoire précise, absolue et opérant de plein droit*."
[250] Delobel, *Clause de renonciation anticipée et obligation essentielle*, p. 1272.
[251] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 125.

The legal security is moreover guaranteed by a very restrictive interpretation of the clauses by the Supreme court.[252] For instance, the clause has to be expressed "in a non-equivocal way"[253] and it has to mention the resolution *de plein droit* of the contract,[254] meaning that the refusal of a judicial intervention by the debtor must be apparent.[255] Also, the clause must precise which non-performance will be sanctioned.[256] In order to limit a disturbing judicial interference, the control of the Judges is hereby limited to control the good faith of the beneficiary creditor (Art. 1134).[257]

A last threshold to an arbitrary use of the clause lies within the obligatory use of a reminder.[258] However, this mechanism has already been sufficiently treated previously.

The clause requires, just like the judicial resolution, a non-performance of the debtor.[259] If the classical resolution is considered to be a judicial sanction, the clause fulfills the same purpose, with the sole difference that it is a *contractual* sanction, also referred to as private sanction.[260]

Nevertheless, the exceptional character to the judicial intervention needs to be limited. First of all, the recourse to the judge stays available.[261] Second, if the debtor demands the grant of a grace period, (Art. 1244-1 Code Civil), the judge maintains his discretionary role.[262]

ii. … with a German philosophy…

Under German law, the unilateral resolution is the general rule. Therefore, the negotiation of a clause is unnecessary, opposed to French law. However, the philosophy of such a clause is comparable: if the resolutive clause is a reflection of contractual liberty,[263] it is an equivalent to the German *Privatautonomie*.

[252] Cour de Cassation, Civile 1ère, 16th of July 1992, n° 90-17760.
[253] Cour de Cassation, Civile 1ère, 25th of November 1986, n° 84-15705.
[254] Cour de Cassation, Civile 3ème, 12th of October 1994, n° 92-13211.
[255] Pagnerre, *L'extinction unilatérale des engagements*, n° 537.
[256] Cour de Cassation, Civile 1ère, 25th of November 1986, n° 84-15705.
[257] Cour de Cassation, Civile 3ème, 17th of July 1992, n° 90-18810.
[258] Cour de Cassation, Civile 3ème, 29th of June 1977, n° 76-11024.
[259] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 120.
[260] Pagnerre, *L'extinction unilatérale des engagements*, n° 531.
[261] Malinvaud/ Fenouillet/ Mekki, *Droit des obligations*, n° 529.
[262] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, n° 160.
[263] Popineau- Dehaullon, *Les remèdes de justice privée à l'inexécution du contrat*, n° 103.

Scholars therefore see the clause as a connecting factor between the French and German law, bringing them closer together.[264]

iii. … codified in the Reform.

Every *avant- projet* has recognized the necessity of a resolutive clause.[265]
If the clause under the Reform is compared to Art. 1184 Code Civil, one can see a remarkable transformation: there has been a passage from an implied (*sous-entendue*) clause to an expressly codified clause under Art. 1224 and 1225 of the Reform. One can hereby clearly see the influence of the internal jurisprudential and doctrinal evolution.[266]

For instance, according to Art. 1225(1), the resolutive clause must "determine the engagements of which the non-performance causes the resolution". This is an explicit adaptation of the criterion of "in a non-equivocal way" by case law.
Moreover, Art. 1225(2) has adapted the jurisprudential criterion of a precedent reminder to the debtor.[267]
Finally, to maximize the legal security and the protection of the debtor, Art. 1225(3) contains an innovation: the clause only produces its effect by the date of receipt of the reminder.

[264] Carbonnier, *Droit civil. Les obligations*, n° 189.
[265] See Malinvaud/ Fenouillet /Mekki, *Droit des obligations*, n° 530: For instance, the Catala-project in its Art. 1159, the Terré-project in its Art.112 and the Chancellery in its Art. 133.
[266] See above para II. A. 2. a. i.
[267] See Art. 1225(2): "*La résolution est subordonnée à une mise en demeure infructueuse*."

b. Derogations provided by case law

The exception to the law by the use of a clause is the most remarkable and most important exception at the same time. It should therefore be sufficient to show, as an example, that case law has deviated multiple times to the principle of the judicial intervention, which has therefore lost its practical relevance.

Hereby, it is convenient to mention the famous *Tocqueville* case, where the French Supreme court defined for the first time the unilateral resolution, by stating "that the gravity of the behavior of a contractual party may justify that the other party ends the contract unilaterally on his own risk and peril".[268] Consequently, since this time the unilateral resolution is accepted, if the character of gravity is present.

In 2001, the Supreme court confirmed its point of view by stating that the court of appeal "by not verifying if the behavior of Mr. X consisted in a sufficient gravity to justify the termination of the contract […] has not given a ground to its decision". [269]

c. Exceptions provided by the Code Civil

The provisions that allow a party to unilaterally dissolve a contract are rare, but exist in the Code Civil.

This is the case for the sale of food, Art. 1657 Code Civil,[270] because here the legal security is sufficiently granted by the deadline which has been negotiated between the parties.[271]

Furthermore, Art. 1794 Code Civil[272] grants a unilateral resolution of fixed-price contracts, since the legal security is taken care of by the indemnification which the debtor needs to pay in case of a resolution.

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[268] Cour de Cassation, Civile 1ère, 13th of October 1998, n° 96-21485.
[269] Cour de Cassation, Civile 1ère, 20th of February 2001, n° 99-15170.
[270] "*En matière de vente de denrées et effets mobiliers, la résolution de la vente aura lieu de plein droit et sans sommation, au profit du vendeur, après l'expiration du terme convenu pour le retirement.*"
[271] See Konukiewitz, *Die richterliche und die einseitige Vertragsauflösung*, p. 81: a logical reason justifies that the resolution of the sale of food does not take place with a judicial intervention: the food risks for instance to foul before a process is over, making the aspect of speed exceptionally more important than legal security.
[272] "*Le maître peut résilier, par sa seule volonté, le marché à forfait, quoique l'ouvrage soit déjà commencé, en dédommageant l'entrepreneur de toutes ses dépenses, de tous ses travaux, et de tout ce qu'il aurait pu gagner dans cette entreprise.*"

The provisions of Art. 1224 and 1226 of the Reform establish a new legal instrument of resolution, namely the resolution by notification. Here, the legislator has been inspired by the *Tocqueville* case, since the exact wording of a resolution "on his own risk and peril" has been adapted in Art. 1226(1). This provision introduces an extraordinary novelty: for the first time there is an autonomous possibility for the parties to dissolve the contract, without recourse to a judge. This is not a substitute to the judicial resolution, which is why it strongly resembles the German *Rücktritt.*

The doctrine however is divided when it comes to the necessity of a new way of dissolution. On the one hand, the resolution by notification is classified as an unnecessary inspiration of Art. 79 CISG, since it favors the forced performance instead of performance and remains uncalled for in case of impossibility of the debtor to perform.[273] But on the other hand, the notification is seen as "one of the most opportune innovations",[274] it respects "even the smallest" interests of the creditor and even the ones of the debtor, since, by a quick resolution of the contract, an aggravation of the damage is avoided.[275]

Conclusively, if before, the resolution has been judicial by principle, there are not less than three autonomous possibilities under the Reform: by clause, Art. 1225, by way of notification, Art. 1226, and finally by judicial intervention, Art. 1227.

It seems therefore reasonable that Mekki considers that the Reform does not "substitute the resolution by notification to the judicial resolution, but in contrary aims to superpose it, granting to the creditor remedies *à la carte*".[276] This is at the same time a contrast to the hierarchy of the options for the creditor mentioned in the former Art. 1184.

In our opinion, the insertion of a resolutive clause seems opportune as well. On the one hand, German law shows that the unilateral resolution is in favor of the

[273] Tallon, *L'article 1184 du Code civil. Un texte à rénover*, n° 290.
[274] Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, p. 54.
[275] This opinion does however not take into account that these "small interests" of the creditor are in contradiction with Art. 1224(1), which requires a sufficient gravity of the non-performance.
[276] Mekki, *Les remèdes à l'inexécution dans le projet d'ordonnance*, n° 12.

creditors interest, while on the hand, the interests of the debtor stay protected by the imperative use of the reminder (Art. 1226(1)), the second chance to perform (Art. 1226(2)) and most importantly the faculty to consult a judge (Art. 1226(3)).

B. The legal consequence: restitution of the goods or refund of the value

In case a resolution took place, one has to look at the legal effects (1), in order to make a general conclusion (2).

1. The principle of a restitution *in natura*

a. Retroactivity under French law

The resolution of a contract produces identical effects to the annulation of a contract;[277] meaning a retroactive annihilation *ab initio* of the contract,[278] followed by the restitution of the goods.[279]

The grounds of this effect were to be found in Arts. 1179 and 1183 CC,[280] and this principle is also followed in case law nowadays.[281]

Consequently, the buyer has to restore the integrity of the good *in natura*,[282] even if it has been deteriorated.[283] Exceptionally, this does not apply to resales or when the goods have been destructed.[284] In case of an impossibility to restitute, the buyer must pay the value of the good,[285] taking however into consideration an eventual depreciation of the goods' value.[286]

[277] Malinvaud/ Fenouillet/ Mekki, *Droit des obligations*, n° 532.
[278] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 73.
[279] Malinvaud/ Fenouillet/ Mekki, *Droit des obligations*, n° 532.
[280] *"La condition résolutoire est celle qui, lorsqu'elle s'accomplit, opère la révocation de l'obligation, et qui remet les choses au même état que si l'obligation n'avait pas existé."*
[281] Cour de Cassation, Civile 1ère, 20th of March 2014, n° 12-21974. The retroactivity is however not applied by case law where the contract has been properly performed for a certain time and the non-performance only appeared after a laps of time. In these cases, the retroactivity only applies from the day of non-performance, see Cour de Cassation, Civile 3ème, 28th of January 1975 n° 73-13420: *"Attendu qu'au cas de résolution judiciaire d'un contrat synallagmatique à exécution successive,* […] *le contrat ne se trouve résolu que pour la période a partir de laquelle l'un des cocontractants n'a plus rempli ses obligations* […]."
[282] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 73.
[283] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht*, p. 258.
[284] Ghestin/ Jamin/ Billiau, *Traité de droit civil. Les effets du contrat*, n° 520.
[285] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht*, p. 258.
[286] Cour de Cassation, Civile 1ère, 4th of October 1988, n° 87-12534.

The resolution comes to full effect when the pronunciation of the judgement obtains authority of res judicata.[287] The effect does not only apply *inter partes*, but is also opposable *erga omnes* to third parties.[288]

b. Limited retroactivity under German law

German law creates in its § 346, entitled *Wirkungen des Rücktritts*, a situation comparable to French law; § 346(1) BGB requires a restitution *in natura* of the goods.

It is further comparable, because § 346(2) BGB grants an indemnity to the amount of the goods value in case of impossibility to restitute the goods.

However, the BGB also has three exceptions to this principle in its § 346(3), exceptions which are unknown to French law.[289]

But, opposed to French law, under German law the starting point for the indemnity is the moment of deterioration, § 346(2) n°2 BGB, whereas French law only grants this indemnity in case of impossibility.[290]

c. An intermediary way under the Reform

Again, the Reform introduces a remarkable modification. If before, the Code Civil did not treat the effects of the restitution itself, the legislator introduced these effects in Art. 1229 of the Reform.[291] The *stricto sensu* effects are enumerated in Art. 1229(3) and (4). This seems like an influence from internal case law.

But the internal case law approach is only partially respected. For instance, the retroactive effect is not mentioned. This deserves to be criticized, since for the purpose of legal security, it would have been desirable to have a reliable source. An inspiration from German law can be hardly seen on this point. For instance, one characteristic effect, the restitution of the value, has not been overtaken. It

[287] Storck, *JCl. Civil Code*, Art. 1184, fasc. 10, n° 73.
[288] Ghestin/ Jamin/ Billiau, *Traité de droit civil. Les effets du contrat*, n° 506.
[289] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht*, p. 258.
[290] Giesecke, *Interessengerechte Rechtswahl im Kaufrecht*, p. 258.
[291] Previously, the draft of the Reform called *projet d'ordonnance* presented a confusion in its Arts. 1225, 1229. See Laithier, *Les règles relatives à l'inexécution des obligations contractuelles*, p. 54: Under the draft, according to Art. 1225, the effect only occurred when the debtor received the notification mentioning the resolution of the contract. However, Art. 1229 stated that the resolution took place under the conditions negotiated in the contract. This issue has been fixed in the final form.

seems more likely that internal case law has been the source of inspiration, even though it is only being partially respected.

2. Conclusion and evaluation

"The fact that we can all learn from each other does not mean that we have to systematically copy each other"[292] - this is the opinion of Ewan McKendrick, professor at Oxford University.

If one considers the Reform to be the result of a German law inspiration, the words of McKendrick are only partially true.

They are true on the on the one hand because the Reform has integrated principles which are classic German law principles. For instance, the reminder or the privilege of second performance. This integration looks like an exact copy of the German provisions, just like the resolution by notification was equally integrated by the CISG.

But his words are wrong, on the other hand, because the two legal systems are so divergent, that a real inspiration is sometimes not possible. This is for instance the case for the judicial intervention, the resolution by clause or, in general, the principle of a superior power watching over the enforcement of the contract- it is a question of legal certainty against the principle of *Privatautonomie*. Here, the Reform used the reflections and advances of the French doctrine and internal case law.

Inspired by German law or not, one needs to keep in mind that the Reform introduces a spectacular change of the contractual resolution as it was known before. It presents more facets than before, occupies a more important space; a result which is due to an enlargement of the field of application of the resolution, for instance by the passage from a single to six articles.

Consequently, the final result is a symbiosis with the acquirements of case law and French doctrine, keeping however certain classic mechanisms like the

[292] McKendrick *in* Mazzamuto, *Il contratto e le tutele*, p. 101.

possibility to have recourse to a judge. The French Legislator is clearly seeking to adapt to the needs of the 21st century, by a Reform, which has been long awaited for, to change a mechanism which has such an important practical value but remained however unchanged in its content since its codification.

In our opinion, the transformation is a success, since the Reform faces and accepts the needs of the 21st century, for instance the protection of the creditors interests by introducing two extra-judicial mechanisms. However, the French resolution maintains its unique character, by granting the judge a wide discretion when being consulted.

All in all, the Reform of the resolution seems an important and most importantly necessary step to a margination of law in Europe. The BGB, which has been qualified as the Code Civil's "young cousin" by Pierre Catala, could eventually turn around the roles, by serving as a model for the new Code Civil. In this way, the Reform has allowed the BGB to be more of an older brother than a younger cousin.

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