

Parce que un chien n'est pas un chat et que l'argent n'égal pas tout [Because a dog is not a cat and money is not equal to everything], he who undertakes to accomplish a service should not be able to free himself by providing something else, even if it were to consist of a payment of a sum of money. In truth, if this were possible, all undertakings would be somewhat fungible, being reducible to the payment of a sum of money at the discretion of the obligor. Likewise, to a certain extent, all undertakings would create alternative obligations for the obligor, who could then discharge them by performing his promise or by paying an amount of money. Thus the primacy of execution in natura (exécution en nature) that is present both in private law and public law is not simply a formulaic principle of French law and, more generally, of the laws of countries of the civil law tradition. To keep one's promise and to receive one's due: these are the considerations that have led the French law of contracts to maintain the primacy execution in kind.

The remaining question is whether the right of the obligee to seek forced execution from the court is not susceptible to abuse. Thus should the principle apply when enforcement is requested solely in view of harming the obligor, or if its imposition were to cause unreasonable costs for such obligor - and we here have in mind the judgment of the Cour de cassation of 11 May 2005? In French law, the response is positive. But because a principle is not a dogma, change on this point would perhaps merit being considered, and the expected reforms to the Law of Contract would be an excellent time to discuss it.

De lege lata, the primacy of enforcement should not be overestimated.

Firstly, from a theoretical standpoint, it is not a sine qua non condition for the binding force of the contract. A contract is binding from the moment its non-performance can be sanctioned, irrespective of the sanction: in kind or by equivalent. Conversely, forced execution is undeniably a guarantor of the binding force of the obligation itself. Because nobody can deny that an obligation the obligor can unilaterally refuse to perform by executing another, in particular by paying over an amount, is not quite "as" binding as one the obligor can be constrained to perform.

Second, from a practical standpoint, specific performance does not fully resolve everything. Indeed, the recalcitrant obligor may well not comply with the judicial award. In this case, the law of enforcement is completely powerless in that it allows, in the end, only remedies that operate on the obligor's patrimony and not against his person, except in exceptional cases (essentially eviction). Hence the advantages of the astreinte, which will induce the obligor to keep his word and fulfill the expectations of the obligee.