Document généré le 22 août 2024 06:29

Les Cahiers de droit

Specific performance of contracts in comparative law : some preliminary observations

Louis J. Romero

Volume 27, numéro 4, 1986

URI : https://id.erudit.org/iderudit/042771ar
DOI : https://doi.org/10.7202/042771ar

Aller au sommaire du numéro

Éditeur(s)

Faculté de droit de l’Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

Découvrir la revue

Citer cet article

Romero, L. J. (1986). Specific performance of contracts in comparative law : some preliminary observations. *Les Cahiers de droit*, *27*(4), 785–811. https://doi.org/10.7202/042771ar

Résumé de l'article

On dit souvent que l'exécution en nature (*specific performance*) est la sanction normale *(primary remedy)* de l'inexécution des obligations contractuelles *(breach of contract,)* dans le système de droit civil, alors que dans le système de common law cette sanction prend la forme de dommages-intérêts. Cet article s'interroge sur l’exactitude de cette assertion.

L'auteur constate, d'abord, que même là où l'on fait du droit civil en anglais, comme au Québec et en Louisiane, l'expression *specific performance* n'a pas le même sens et la même portée qu'en common law. Il souligne, de plus, que l'expression *primary remedy* peut se définir de plusieurs façons, susceptibles d'engendrer l'équivoque. Il démontre, enfin, que *l'expressionbreach of contract* couvre tellement de situations de fait différentes qu'il est impossible de dire quelle sanction l'un et l'autre systèmes juridiques préfèrent vraiment. Les expressions *specific performance* et *primary remedy* ne peuvent en fait se comprendre sans prendre en considération l'évolution historique de la notion d'exécution en nature dans chaque système de droit.

La seconde moitié de l'article procède à cette étude historique ; elle conclut qu'au-delà de différences de forme les deux systèmes, face à la mise en œuvre de politiques semblables, pratiquent des moyens de sanction à toute fin pratique équivalents.

Tous droits réservés © Faculté de droit de l’Université Laval, 1986

Ce document est protégé par la loi sur le droit d’auteur. L’utilisation des services d’Érudit (y compris la reproduction) est assujettie à sa politique d’utilisation que vous pouvez consulter en ligne.

https://apropos.erudit.org/fr/usagers/politique-dutilisation/

Cet article est diffusé et préservé par Érudit.

Érudit est un consortium interuniversitaire sans but lucratif composé de l’Université de Montréal, l’Université Laval et l’Université du Québec à Montréal. Il a pour mission la promotion et la valorisation de la recherche.

https://www.erudit.org/fr/

Specific performance of contracts in comparative law: some preliminary observations

Louis J. ROMERO *

*On dit souvent que l'exécution en nature (*specific performance*) est la sanction normale (*primary remedy*) de l'inexécution des obligations contractuelles (*breach of contract*) dans le système de droit civil, alors que dans le système de common law cette sanction prend la forme de dommages-intérêts. Cet article s'interroge sur l'exactitude de cette assertion.*

L'auteur constate, d'abord, que même là où l'on fait du droit civil en anglais, comme au Québec et en Louisiane, l'expression specific performance *n'a pas le même sens et la même portée qu'en common law. Il souligne, de plus, que l'expression* primary remedy *peut se définir de plusieurs façons, susceptibles d'engendrer l'équivoque. Il démontre, enfin, que l'expression* breach of contract *couvre tellement de situations de fait différentes qu'il est impossible de dire quelle sanction l'un et l'autre systèmes juridiques préfèrent vraiment. Les expressions* specific performance *et* primary remedy *ne peuvent en fait se comprendre sans prendre en considération l'évolution historique de la notion d'exécution en nature dans chaque système de droit.*

La seconde moitié de l'article procède à cette étude historique; elle conclut qu'au-delà de différences de forme les deux systèmes, face à la mise en œuvre de politiques semblables, pratiquent des moyens de sanction à toute fin pratique équivalents.

Pages

Introduction 786

1. Some Terminological Clarifications 787
- 1.1. The meanings of the expression "specific performance" 787
- 1.2. The meanings of the expression "primary remedy" 792
- 1.3. The meanings of the expression "breach of contract" 795

* Professor of Law, University of Saskatchewan. This article deals mainly with the clarification of terminological problems. A second article will analyse the relationship between the rules of specific performance and those dealing with mitigation, quantification of damages and the date of their assessment. The author is tankful to Monica Schubert, M.A. LL.B. for her editorial suggestions on our early draft of this article.

***Les Cahiers de Droit*, vol. 27, nº 4, décembre 1986, p. 785-811**
(1986) 27 *Les Cahiers de Droit* 785

Pages

2. **Historical Explanation of the Different Approaches** 797
   2.1. Specific Performance 797
   2.2. *Exécution en nature* 803

Conclusion 808

Introduction

Books and articles on the law of contracts often contrast the relative importance of specific performance and damages in common law and civil law legal systems. The following two statements are typical:

> In civilian theory, specific performance is the primary remedy for the non-performance of an obligation. [...] It is different at common law, where the primary remedy is damages.[1]
>
> In some systems of law specific enforcement is the primary remedy for breach of contract. In English law, however, and in systems derived from it, these remedies have long been regarded as secondary.[2]

---

1. LITVINOFF, S., *Louisiana Civil Law Treatise*, vol. 7, St. Paul, West Publishing Co., 1969, para. 170, p. 317. See also para. 170 at page 319 where the author states: "Specific performance is regarded as ordinary relief at civil law; at common law, it is exceptional and extraordinary." See also LAWSON, F.H., *Remedies of English Law*, 2nd ed., London, Butterworths, 1980, p. 173. The statements of Quebec authors on this issue are more carefully qualified than those quoted in the text; see TANCELIN, M., *Des Obligations — Contrat et Responsabilité*, Montréal, Wilson & Lafleur, édition revue et corrigée, 1986, at pages 376-377, para. 708; BAUDOUIN, J.L., *Les Obligations*, Cowansville, Éditions Yvon Blais, 1983, p. 222, para. 355; p. 390, para. 700; p. 398, para. 711; LAROUCHE, A., *Les Obligations*, tome 1, Théorie générale des contrats, quasi-contrats, Ottawa, Univ. Ottawa, 1982, p. 312, para. 251; PINEAU, J., *Théorie des obligations*, Montréal, Éditions Thémis, 1979, p. 245. See generally, BAUDOUIN, J.L., "L'exécution spécifique des contrats en droit québécois», (1958) 5 *McGill L.J.* 108.
2. WADDAMS, S.M., *The Law of Contracts*, 2nd ed., Toronto, Canada Law Book Inc., 1984, at p. 508. It should be noted that the quoted text uses the expression "specific *enforcement*" rather than "specific *performance*". It will be shown below that the former expression reflects more accurately the meaning of *exécution en nature* than the latter. A footnote in the quoted text refers to *Stewart v. Kennedy* (1890), 15 App. Cas. 75 (H.L.), an appeal to the House of Lords of a Scottish case, in which Lord Watson made the following statement at page 102: "I do not think that upon this matter any assistance can be derived from English decisions, because the laws of the two countries regard the right to specific performance from different standpoints. In England the only legal right arising from a breach of contract is a claim of damages; specific performance is not matter of legal right, but a purely

It is a major thesis of this article that statements such as those quoted above, although not completely inaccurate, oversimplify a complex reality. The first part of this article analyses the different scopes and meanings of the expression "specific performance" in the law of Québec and of the Canadian common law provinces. It will show that, as the "specific performance" of Quebec has a wider meaning than that of the Canadian common law provinces, any unqualified general statements about its relative importance in both systems are misleading. The first part of this article will also analyse the different meanings of the expressions "primary remedy" and "breach of contract", contained in statements such as those quoted above, which may also lead to confusion when a writer uses them in one sense and a reader interprets them in another. Statements about the relative importance of remedies for breach of contract in civil law and common law systems can be understood in the context of the historical evolution of such remedies. The second part of this article analyses such evolution, which explains the meanings of such statements, but questions whether they reflect present day reality.

1. Some terminological clarifications

1.1. The meanings of the expression "specific performance"

It has often been noted that a source of confusion in comparative law is the different meanings given to the same or similar-sounding words and expressions used in different legal systems[3]. These remarks are particularly

---

equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it. But in Scotland the breach of a contract for the sale of a specific subject such as landed estate, gives the party aggrieved the right to sue for implement, and, although he may elect to do so, he cannot be compelled to resort to the alternative of an action of damages unless implement is shewn to be impossible." In Scottish law, "specific implement", also called "a decree *ad factum praestandum*", is a judicial decree issued to enforce a contractual positive provision. A negative provision is enforced by a "decree of interdict". See WALKER, D.M., *Principles of Scottish Private Law*, 3rd ed., Oxford, Clarendon Press, 1983, p. 157; see also JOHNSTON, A.M. and HOPE, J.A.D. (ed.), *Gloag and Henderson's Introduction to the Law of Scotland*, 7th ed., Edinburgh, W. Green & Sons, 1968, p. 123.

3. For example, René David has stated: "Ne correspondant à aucune notion connue de nous, les termes du droit anglais sont intraduisibles dans nos langues, comme sont les termes de la faune ou de la flore d'un autre climat. On en dénature le sens, le plus souvent quand on veut, coûte que coûte les traduire, et la difficulté n'est pas moindre lorsque la chose paraît aller de soi: le *contract* du droit anglais n'est pas plus l'équivalent du contrat du droit français que l'*equity* anglaise n'est l'équité française; *administrative law* ne veut pas dire droit administratif, *civil law* ne veut pas dire droit civil, et *common law* ne veut pas dire droit commun.": *Les Grands Systèmes de Droit Contemporains*, 8e éd. par JAFFRET-SPINOSI, C.,

applicable to the expression "specific performance", which has been applied to both the specific performance of common law systems and what is called *exécution en nature* in Québec, French and Louisiana law [4].

In common law jurisdictions the expression "specific performance" has a well understood meaning. A good description was given by Maitland in his lectures on Equity:

> In granting a decree for specific performance — or a judgment for specific performance — the Court in effect says to the defendant, You must perform specifically the contract into which you entered — that is to say you must do the very thing that you promised to do on pain of going to prison.[5]

In common law systems specific performance is a judicial remedy consisting of an order which commands the defendant to perform his contractual promise. Disobedience of this order may bring about contempt proceedings.

By way of contrast, the expression *exécution en nature* refers to the plaintiff receiving in kind performance of the contractual promise; this performance may be rendered by the defendant, but also by a sheriff, by a third party, or even by the plaintiff himself at the defendant's expense. As a French author has stated, *exécution en nature* refers to what the plaintiff receives, not to what the defendant furnishes [6].

Consequently, a first and major difference between *exécution en nature* of civil law systems and specific performance of common law systems is that when a civil law court awards *exécution en nature* it is merely stating that the

---

Dalloz, Paris, 1982, p. 342, para. 290. See also DAVID, R. and BRIERLEY, J.E.C., *Major Legal Systems in the World*, London, Stevens, 1978, p. 308, para. 291. For another statement to the same effect, see BRIDGE, M.G., "Contractual Damages for Intangible Loss: A Comparative Analysis", (1984) 62 *Can. B. Rev.* 323, p. 325.

4. The English expression "specific performance" is used in article 1065 of the *Québec Civil Code* to refer to *exécution en nature*. The English version of article 1065 states in part: "The creditor may, in cases which admit of it, demand also a specific performance of the obligation..." Both the English and the French version of the Québec Civil Code have binding force: see J. BRIERLEY, "Quebec's Civil Law Codification Viewed and Reviewed", (1968), 14 *McGill L.J.* 521 and WALTON, F.P., *Le domaine et l'interprétation du code civil du Bas Canada*, Toronto, Butterworths, 1980 (translated and with an Introduction by Tancelin M.).
5. MAITLAND, F.W., *Equity — A Course of Lectures*, Cambridge, Cambridge Univ. Press., 1936, p. 301.
6. MEYNIAL, E., "De la sanction civile des obligations de faire ou de ne pas faire", (1884) 56 *Revue pratique de droit français*, 385, p. 434-436. The *Dictionnaire de droit privé*, Montréal, Centre de recherche en droit privé et comparé du Québec, 1985, p. 88 defines *exécution en nature* as "Exécution par laquelle le créancier reçoit la prestation même qui lui était due". See also LITVINOFF, *supra*, footnote 1, p. 304.

plaintiff is entitled to a form of specific relief[7] rather than to damages. The different forms that *exécution en nature* may take will vary depending on who will render the performance; it may include, but is not limited to, performance by the defendant[8]. On the other hand, when a common law court grants a decree of specific performance it orders the defendant to perform the contract and at the time of granting the remedy the court contemplates only performance of the obligation by the defendant[9].

A second distinction between *exécution en nature* and specific performance is that *exécution en nature* refers to the enforcement of both positive and

7. The distinction between specific and substitutional forms of relief is explained by FARNSWORTH, E.A. in the following terms: "Relief is said to be specific when it is intended to give the injured party the very performance that was promised, as when the court orders a defaulting seller of goods to deliver them to the buyer. Relief is said to be 'substitutional' when it is intended to give the promisee something in substitution for the promised performance, as when the court awards a buyer of goods money damages instead of the goods." FARNSWORTH, E.A., *Contracts*, Boston, Little, Brown & Co., 1982, p. 815; see also *id.*, p. 819–823; FARNSWORTH, E.A., "Legal Remedies for Breach of Contract", (1970), 70 *Col. L. Rev.* 1145, p. 1149–1160; see also LAWSON, *supra*, footnote 1, p. 14. Some authors use the expression "specific *enforcement*" as equivalent to "specific relief": see generally WADDAMS, *supra*, footnote 2.
8. Unfortunately civil law authors themselves do not use the same terminology to refer to the different remmedies available for breach of contract. Different meanings are given to the expressions *exécution forcée, exécution en nature* and *exécution par équivalent*. First, *exécution forcée* may have a wide meaning, as referring to any kind of non-voluntary or enforced performance, (including damages and performance by a third party) (see TANCELIN, *supra*, footnote 1, p. 337, para. 632); *exécution forcée* has also a narrow meaning, as referring only to an order addressed to the defendant commanding him to perform his contractual obligations (see BAUDOUIN, *supra*, footnote 1, p. 30, 31, 32, 393, paras. 20, 21, 23, 703). Secondly, *exécution en nature* may have a wide meaning, as referring both to a judgment which orders the defendant to perform the contract and to a judgment which allows the plaintiff to have the performance rendered by a third party (see BAUDOUIN, *supra*, footnote 1, p. 31, 222, 396, paras. 22, 355, 707); *exécution en nature* may also have a narrow meaning as referring only to an order addressed to the defendant to perform the contract (see TANCELIN, *supra*, footnote 1, p. 337, 365, paras. 634, 687). Thirdly, the expressions *exécution par équivalence* or *exécution par équivalent* may be used to refer to an award of damages, (*exécution par équivalence pécuniaire*) (see BAUDOUIN, *supra*, footnote 1, p. 222, 351, 400, paras. 355, 620, 713, and TANCELIN, *supra*, footnote 1, p. 337, para. 633) or to a judgment authorizing the plaintiff to have the performance rendered by a third party, (*exécution en nature par équivalent*) (see BAUDOUIN, *supra*, footnote 1, p. 396, para. 707). See generally, *Dictionnaire de droit privé*, *supra*, footnote 6, p. 88.
9. In common law systems, if the defendant refuses to obey a decree of specific performance a court may enforce it by ordering a sheriff or an officer of the court to perform a simple act, such as delivering specific goods or signing a deed of transfer. (See *infra*, text accompanying footnotes 45 to 48). These are methods of enforcement of the judgment used in cases of disobedience by the defendants; the judgment itself contemplates and assumes performance by the defendant itself.

negative contractual obligations i.e. obligations to do, to give, *or not to do* something [10], while the "specific performance" of the common law is a remedy used only to enforce positive contractual covenants; the enforcement of negative contractual covenants is achieved in common law jurisdictions through the use of prohibitory injunctions.

A third distinction between *exécution en nature* in Québec and specific performance of the Canadian common law provinces is that *exécution en nature* does not really fit the concept of a "remedy" in the sense given to that word in common law systems. When a Quebec court concludes that a plaintiff is entitled to *exécution en nature* it merely recognizes that he is entitled to performance in kind rather than to damages. The dispositive part of the judgment may adopt different forms of achieving such a result, as for example a mandatory injunction ordering the defendant to fulfill his contractual promise [11]. It is arguable that in such a case the remedy is the injunction and that the expression *exécution en nature* is used merely to

---

10. The distinction between obligations to give, to do and not to do is essential to understanding the analysis by civil law authors of *exécution en nature*. The distinction was of minimal importance in Roman Law but in the middle ages it was resurrected and put to a different use by Bartolus: see *infra*, text accompanying footnotes 56 to 58. Article 1058 of the *Québec Civil Code* refers to the distinction when it states: "Every obligation must have for its object something which a party is obliged to give, or to do or not to do". F.H. Lawson uses the distinction in his discussion of remedies. He states: "Coercive remedies [which do not include declaratory judgments] may now be subdivided, first into positive and negative remedies. The former call for positive conduct on the part of the defendant, the latter for mere abstention from a particular course of conduct [...] By a further subdivision, positive remedies can be distinguished as orders to give, to do or to undo. The terms 'give' and 'do' need some explanation, for they are not used according to their ordinary popular meaning. They are in fact the most convenient translations of the Latin *dare* and *facere*, of the French *donner* and *faire*. *Donner* is not confined to 'giving' but includes any transfer of ownership or possession by way of gift or sale or loan or for any other reason. *Faire* denotes any act other than transfer. Obvious examples are services of various kinds, by a servant to his master, by a carrier to a passenger. No doubt logically to 'undo' is a species of 'doing' in this sense, but it is convenient to make of it a separate category." LAWSON, *supra*, footnote 1, p. 13. See also BAUDOUIN, *supra*, footnote 1, p. 30-31, paras. 20-22; PLANIOL & RIPERT, *Treatise on the Civil Law*, (Part 2), Louisiana, State Law Institute Translation, 1959, at p. 104. JACKSON, "Specific Performance of Contracts in Louisiana", (1950), 24 *Tul. L. Rev.* 401, p. 412.
11. See *Québec Code of Civil Procedure*, art. 751 which states in part as follows: "An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his officers, agents or employees [...] in cases which admit of it, to perform a particular act or operation." In Louisiana, specific performance may also be enforced by injunction, see La. C.C.P., art. 2504 and "Comment: Louisiana Law of Specific Performance: Code Provisions and Methods of Enforcement", (1966) 40 *Tul. L. Rev.* 340, p. 352. See also LITVINOFF, *supra*, footnote 1, p. 313, para. 168, n. 77.

indicate that the plaintiff is entitled to a specific rather than to a substitutionary remedy [12].

In spite of these differences between the specific performance of common law systems and *exécution en nature*, the civil codes of Québec [13] and Louisiana [14] use the expression "specific performance" to refer to

12. For the distinction between specific and substitutionary remedies, see *supra*, footnote 7. It could not be seriously contended that when an injunction is used in Quebec or Louisiana to achieve the *exécution en nature* of a contract, such an injunction is only the method of enforcing the remedy of *exécution en nature*. Both common law and civil law systems contrast *remedies* on the one hand with *substantive rights* and *methods of enforcement* on the other. For example an award of damages is a remedy which can be awarded in both legal systems to a buyer because of the breach by the seller of the buyer's *substantive right* to receive goods of a certain quality. The *method of enforcement* of this judgment may be the attachment of a debt owed to the seller or the seizure of chattels owned by him. In both legal systems courts assume compliance with their judgment and the choice and pursuit of methods of enforcement are left to the discretion of the plaintiffs in those cases in which the defendants do not comply voluntarily with the judgments. Moreover, injunctions have their own method of enforcement, contempt proceedings, regulated in Quebec by article 761 of the *Code of Civil Procedure*. For a criticism of the use of the injunction, a common law remedy, in a civil law jurisdiction, see MASSÉ, G., "L'exécution des obligations via l'astreinte française et l'injonction québécoise", (1984), 44 *R. du B.* 659.
13. See articles 1065, 1610 and 1628. Article 1065 states: "Every obligation renders the debtor liable in damages in case of a breach of it on his part. *The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense*, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages." (Emphasis added). The French version of article 1065 states as follows: "Toute obligation rend le débiteur passible de dommages en cas de contravention de sa part; *dans les cas qui le permettent, le créancier peut aussi demander l'exécution de l'obligation même, et l'autorisation de la faire exécuter aux dépens du débiteur*, ou la résolution du contrat d'où naît l'obligation; sauf les exceptions contenues dans ce Code et sans préjudice à son recours pour les dommages-intérêts dans tous les cas." (Italics added). It should be noted that while the French version of article 1065 uses the definite article when it refers to "*l'*exécution de l'obligation même", the English version uses the indefinite article when it mentions "*a* specific performance of the obligation". The wording of the English version of article 1065 would appear to recognize the fact that there are different kinds of "specific performance" available under Quebec law i.e. specific performance of the contract by the defendant, by the sheriff, by a person other than the defendant at his expense, etc.
14. Article 1926 of the *Louisiana Civil Code* states as follows: "On the breach of any obligation to do, or not to do, the obligee is entitled either to damages, or, *in cases which permit it, to a specific performance of the contract*, at his option, or he may require the dissolution of the contract [...]" (Emphasis added). Article 1927 of the *Louisiana Civil Code* states: "In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts."

exécution en nature. A great deal of confusion is generated when it is forgotten that when legal writers or the Québec and Louisiana codes use the English expression "specific performance" to refer to *exécution en nature*, they mean something very different from the specific performance of common law systems. It is probably to avoid this confusion that the English version of the proposed new *Québec Civil Code* uses the expression "execution in kind" when it refer to *exécution en nature* [15].

A subsequent section will show that the fact that *exécution en nature* covers performance by persons other than the defendant is closely related to the perceived difficulties in the enforcement of obligations "to do" and to the history of the doctrinal controversies surrounding such enforcement. It will also show that the narrow meaning of the expression "specific performance" is closely related to the history of the courts of equity which enforced contracts by ordering defendants to perform them personally.

Even if we conclude that any statements which purport to contrast the relative importance of specific performance in civil law and common law jurisdictions is inaccurate, we may still wonder whether it is still correct to say that *exécution en nature* is the primary remedy in civil law systems and damages in common law ones. The following sections will show that the expression "primary remedy" can be interpreted in a number of ways, and the expression "breach of contract" covers such a variety of fact situations that it is not possible to say that any legal system favours the award of a particular remedy in all types of breach.

1.2. The meanings of the expression "primary remedy"

The expression "primary remedy" in statements such as those quoted at the beginning of this article may be understood in at least three ways, i.e. it may be used in a doctrinal sense, as a "policy preference" or in a statistical sense.

First, in a purely doctrinal sense, the expression "primary remedy" may be taken to mean that the initial rule in a particular legal system is for the general availability [16], of a particular remedy; this remedy is taken to

15. See the *Draft Civil Code and Commentaries*, Québec, Éditeur officiel du Québec, 1978, articles 267 to 287 of Book V. For a description and evaluation of the Quebec Draft Civil Code, see MACDONALD, R.A., "Comments", (1980) 58 *Can. B. Rev.* 185; see also HAANAPPEL, P.P.C., "Contract Law Reform in Quebec", (1982) 60 *Can. B. Rev.* 393.

16. In common law systems the expression "as of right" has been applied to the remedy of damages to mean that a plaintiff is always entitled to it upon breach. Equitable remedies have traditionally been considered as discretionary even though they are always granted in certain fact situations in the absence of good reasons to the contrary. In *Redland Bricks Ltd.*

represent the general rule, and the cases in which it is not granted are considered the exceptions.

Even if it were true that civil law systems start with a *prima facie* rule entitling plaintiffs to *exécution en nature* and common law systems with one entitling them to damages this would not necessarily mean that each system favours the award of those remedies or that such remedies are the ones most often awarded by the courts. Both in common law and civil law systems changes often take place by virtue of an increase in the number of exceptions to a general rule, until the exceptions become more important than the initial rule. At this point the legal system favours the policy embodied in the exceptions rather than that embodied in the rule. Later the system may be simplified by reversing the rule and the exceptions: the previous exceptions become the rule and the old rule now becomes the new exception [17]. The scope of application of a *prima facie* substantive rule may be substantially reduced not only by the exceptions to it, but also by other rules within the legal system such as those dealing with procedure, remedies or enforcement of judgements.

In a subsequent section it will be argued that, subject to some qualifications, it is in this doctrinal sense that it can be said that damages have historically been the primary remedy in common law systems and *exécution en nature* the primary remedy in civil law systems.

The above discussion already touches upon the second meaning of "primary remedy" or "primary rule" i.e. "policy preference". A remedy may be the primary one in the doctrinal sense, because it is the one that the initial rule says is generally available, but it may not be the primary one in the policy preference sense, because it is undermined by its numerous exceptions and by the other rules in the system to such extent that it can no longer be said to be the one favoured by the rules of a legal system. For example, there are many judicial statements in Québec to the effect that *exécution en nature* is the primary remedy in Québec law, but for a long period of the history of

---

v. Morris, [1970] A.C. 652, Lord Upjohn said at p. 664: "[The plaintiff] may not be entitled as of right to such an injunction, for the granting of an injunction is in its nature a discretionary remedy, but he is entitled 'as of course' which comes to much the same thing."

17. An typical example of a common law *prima facie* rule that has been almost abolished by its exceptions is the parol evidence rule. A well known English textbook on the law of contract discusses the parol evidence rule under two major headings, one that outlines the general rule and another one that deals with exceptions. While the statement of the rule takes only one paragraph, the discussion of thirteen exceptions to it take four pages. In a final heading entitled "Criticism" the author concludes: "In the present state of the law the 'exceptions' have become for practical purposes more important than the rule." See TREITEL, G.H., *The Law of Contract*, 6th ed., London, Stevens, 1983, p. 151-158.

Québec law courts have been unable to enforce directely obligations to do and not to do. Only in 1922 was it settled that prohibitive injunctions could be used in Québec to enforce obligations not to do [18] while it was not until the *Code of Civil Procedure* introduced into Québec law mandatory injunctions in 1966 [19] that courts have been able to order defendants to perform their contractual obligations. The discussion in this article will show that although the laws of Québec and of the other Canadian provinces start with different *prima facie* rules as to preferable remedies, both systems qualify them to such an extent that it will be a judgment call to determine which remedy is favoured by each system.

The participants in a legal system may recognize and articulate the shifts in policy preferences, or they may continue to assert the importance of the policies embodied in the old initial rule even when it is no longer the one favoured by the overall impact of all the rules in the system.

The expression "primary remedy" may be taken in a third statistical sense to mean that, in cases of litigation for breach of contract, a certain remedy is the one most frequently requested by plaintiffs or awarded by the courts. Even if we conclude that all the substantive, remedial, procedural and enforcement rules of a legal system taken as a whole favour a certain result, it may be that such result is not the one most frequently achieved in practice, because of disincentives, costs, externalities or practical considerations which lead the parties to a form of behaviour different from that favoured by the legal system [20].

The different meanings of the expression "primary remedy" may be a source of confusion when a writer uses it in one sense and a reader takes it in another. For example a writer may state that a remedy is the primary one, meaning that the *prima facie* rule is for its general availability, subject to exceptions, and a reader may think that he means that it is the one most often awarded in practice.

---

18. See *Canada Paper Co. v. Brown*, (1921) 63 S.C.R. 243; see generally MASSÉ, *supra*, footnote 12.
19. See *supra*, footnote 11.
20. See generally, MACAULAY, S., "Noncontractual Relations in Business: A Preliminary Study", (1963) 28 *Am. Soc. Rev.* 55; BEALE, H. and DUGDALE, T., "Contracts Between Businessmen: Planning and the Use of Contractual Remedies", (1975) 2 *Brit. J. of Law and Soc.* 45; MACNEIL, I., *The New Social Contract*, New Haven, Yale U.P., 1980. For the importance of empirical evidence of transaction costs in the study of the efficiency of legal rules see MACNEIL, I. R., "Efficient Breach of Contract: Circles in the Sky", (1982) 68 *Virg. L. Rev.* 947.

1.3. The meanings of the expression "breach of contract"

A wide variety of fact situations are included under the expression "breach of contract" in common law systems. As Treitel has stated,

> A breach of contract is committed when a party without lawful excuse fails or refuses to perform, performs defectively or incapacitates himself from performing the contract.[21]

In Québec law the closest equivalent to breach of contract is *inexécution du contrat*[22]. The word *inexécution* may be used in a narrow and in a wide sense. In its narrow sense it refers exclusively to cases of non performance, e.g. when a seller of land refuses to transfer it to the buyer, or when a landlord refuses to perform the repairs agreed to in the leases. In its wide sense *inexécution* covers both non performance and defective performance[23]. *Inexécution* has this wide meaning because all cases of defective performance may be characterized as cases of non performance ; for example, late delivery by a seller may be seen as non performance at the agreed time ; a sale of defective goods may be seen as non performance of the duty to deliver goods of the right quality[24].

The use of blanket expressions such as "breach of contract" or "*inexécution du contrat*" should not hide the fact that both cover a wide variety of situations in which innocent parties suffer very different types of loss[25]. For example, if a seller's breach is his failure to deliver the goods, the

21. TREITEL, *supra*, footnote 17, p. 627.
22. Sometimes lawyers and judges use the expression *bris de contrat*, but this is merely a translation of the common law expression and it is not used by Quebec authors or even defined in the *Dictionnaire du droit privé*, *supra*, footnote 6.
23. The *Dictionnaire du droit privé*, *supra*, footnote 6, p. 107 defines *inexécution* as "Fait de mal exécuter ou de ne pas exécuter, totalement ou partiellement, une obligation." DAVID, R. states in *Les contrats en droit anglais*, 2e édition, par PUGSLEY, D., Paris, Librairie générale de droit, 1985, p. 407 : "Il y a inexécution lorsqu'une partie n'exécute pas, à la date prévue, les obligations qui lui incombent en vertu du contrat. Nous noterons seulement, à ce propos, la variété possible des types d'inexécution, de l'inexécution totale, qui est le cas le plus simple, mais non le plus fréquent, à la simple exécution défectueuse ou irrégulière : prestation non effectuée au jour dû, ou différant en quantité ou qualité de ce que prévoyait le contrat."
24. "... une obligation mal exécutée est une obligation non exécutée" : BAUDOUIN, *supra*, footnote 1, p. 405, para. 723. Common law judges used the same argument when they held that if the goods delivered did not conform in every respect with the description under which they were sold there was a total failure of the seller's obligation to deliver the described goods. See *Bowes v. Shand*, [1877] 2 A.C. 455 (H.L.); this approach has been disapproved in recent cases ; see *Ashington Piggeries Ltd. v. Christopher Hill*, [1972] A.C. 441 (H.L.) ; *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570.
25. In their discussion of the options available to the innocent party in cases of *inexécution*, civil law authors draw a distinction between *refus d'exécution, inexécution totale, inexécution*

buyer suffers a total loss of his bargain, i.e. he loses the whole of his expectation interest[26]. However, if the seller's breach is making late delivery, or delivering goods with a minor defect, a buyer who does not reject the goods suffers only a partial loss of his expectation interest. If the seller's breach consist in delivering defective goods which cause personal injuries or damage to property, the buyer suffers consequential losses[27], which are often quite different in nature and size from his loss of bargain[28]. It cannot be seriously contended that *exécution en nature* is the ideal or preferred remedy to compensate the plaintiffs in all of these cases because its indiscriminate award would be contrary to the basic principle of contract law that remedies are designed to compensate plaintiffs for their losses[29]. To award specific performance in cases of late delivery, or of a minor breach of the seller's obligations, after the contract has been performed, would overcompensate

---

partielle, inexécution d'une obligation accessoire, exécution tardive, and *exécution défectueuse* : see BAUDOUIN, *supra*, footnote 1, p. 267, para. 459 and p. 403-405, paras. 715-723 ; TANCELIN, *supra*, footnote 1, p. 128, para. 252.

26. A description of the expectation interest is contained in section 347 of the *Restatement of the Law — Contracts*, 2d, American Law Institute, which states : "[...] the injured party has a right to damages based on his expectation interest as measured by [...] the loss in the value to him of the other party's performance caused by its failure or deficiency." See generally, FULLER and PERDUE, "The Reliance Interest in Contract Damages", (1936) 46 *Yale L. Rev.* 52 (Part 1) and 373 (Part 2).

27. A description of consequential losses is contained in section 2-715 (2) of the *Uniform Commercial Code* which states : "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty."

28. This point can be illustrated by a consideration of the facts of a well known English case. In *Godley v. Perry*, [1960] 1 W.L.R. 9, a buyer lost an eye in an accident caused by a defective slingshot which broke when he was using it. He successfully sued the seller for breach of the implied condition of merchantable quality and recovered damages, calculated to compensate him for the loss of his eye, which were several thousand times the value of the slingshot. His loss of bargain was merely the difference between the value of a nondefective slingshot and a defective one ; such a loss in the value of the performance could be compensated, if it was otherwise possible, by an action for rescission of the contract sale to the slingshot (*action redhibitoire*), an action for the diminution of its price, or an action for specific performance of the contract to delivery of a nondefective slingshot. But neither of these remedies would compensate the plaintiff for the loss of his eye.

29. "La responsabilité civile a pour but la réparation du dommage ou préjudice subi par la victime. Elle est compensatoire et non répressive. Elle joue uniquement à titre curatif." TANCELIN, *supra*, footnote 1, p. 204, para. 398 ; see also para. 748, p. 398. Article 1073 of the *Québec Civil Code* states : "The damages due to the creditor are in general the amount of the loss that he has sustained and of the profit of which he has been deprived [...]". Article 289 of the Project of the Civil Code states : "Les dommages-intérêts sont accordés en réparation du préjudice subi par le créancier." For a general discussion of the compensation principle in common law systems see TREITEL, *supra*, footnote 21, p. 701-705.

the plaintiffs. To award only specific performance in cases in which the plaintiffs have suffered consequential losses would undercompensate them [30].

Thus, general statements to the effect that specific performance is the primary remedy for breach of contract in civil law systems [31], must be qualified further: such statements can only refer to a subcategory of cases of breach of contract, i.e. to cases of non performance, or of *inexécution du contrat* in its narrow sense, and they are not intended to apply to all cases of *inexécution.*

Moreover, general statements to the effect that the preferred remedy for breach of contracts in common law systems is damages has to be qualified in at least two ways. First, when the breach of contract is the failure to convey an interest in land the preferred remedy is specific performance and not damages [32]. Secondly, when there is a threatened breach of a promise not to do something, the preferred remedy is a prohibitory injunction [33].

2. Historical explanations of the different approaches

The lack of equivalence between specific performance and *exécution en nature* outlined above does not merely represent a difference in terminology; it reflects divergent approaches to the enforcement of contracts. To appreciate these differences, as well as the meaning of statements as to primary remedies, will require a brief historical survey.

2.1. Specific performance

Specific performance is a remedy created and developed in a pragmatic manner by the English Courts of Chancery. It shares some of the characteristics of the law developed by those courts.

---

30. Both in common law and civil law systems specific performance can be combined with an award of damages or compensation, but the point being made here is that in many cases of defective performance specific performance, by itself, is not the most adequate or preferable remedy.
31. See *supra*, text accompanying footnotes 1 and 2.
32. See *infra*, text accompanying footnote 40.
33. In the last few decades common law courts have made prohibitory injunctions readily available for the enforcement of negative contractual covenants. F.H. Lawson states: "Although according to their equitable origin they are in principle discretionary, once the injurious character of the conduct complained of is established, injunctions are issued 'as of course', that is to say, a court will refuse to issue an injunction only in quite exceptional cases." He also gives the reasons for this development: "[A] negative judgment is easier to perform [than a positive one], [...] the performance of it is easier to supervise and enforce, and it gives the most complete and convenient result": LAWSON, *supra*, footnote 1, p. 179 and 13.

One of the characteristics of specific performance is that it orders the defendant to do something, while *exécution en nature* encompasses a number of remedies aimed at giving the plaintiff performance in kind rather than a monetary award[34]. This characteristic of specific performance is closely related to a policy adopted by the Courts of Chancery from an early date which is embodied in the maxim "Equity acts *in personam*".

The court of equity originated in the activity of the Lord Chancellors who were concerned with the enforcement of behaviour consistent with the dictates of conscience[35], and who, as a consequence, were mainly preoccupied with motivating defendants to change their conduct. As Simpson states,

> [A]s a judge of conscience [... the Chancellor's] primary function and concern was not with the petitioner but with the respondent and of [sic] the good of his soul [...] a remedy is given to a petitioner not primarily to look after his interests, but rather to look after the losing party who has done wrong or proposes to do wrong. Indirectly, of course, this does look after the petitioner, for the avoidance of sin usually does benefit others, but this effect is incidental: hence arises the principle that equity acts *in personam*. This too is the explanation for the insistence upon specific performance, which compels the sinner to put matters right, which he must do if his soul is to be saved.[36]

---

34. See *supra*, text accompanying footnote 6. The form of judgment available to the courts of Chancery before 1875 was "*the defendant* do pay", while judgments of the courts of common law used the form "*the plaintiff* do recover". Both forms of judgments were made available to the Supreme Court in 1875: see *Miliangos v. George Frank (Textiles) Ltd.*, [1976] A.C. 443 (H.L.), p. 497, per Lord Cross of Chelsea.
35. "If one had inquired of a late-fifteenth-century lawyer the appropriate title for a book on what went on before the court of Chancery, he would without doubt have said 'Conscience', *not* 'Equity'. Now it is at first sight a curious fact, which has frequently been noted, that references to any early connection between the Chancery and 'Equity' are extremely uncommon. It is also very significant." SIMPSON, A.W.B., *A History of the Common Law of Contract*, The Rise of the Action of Assumpsit, Oxford, Clarendon Press, 1975, p. 398.
36. *Id.*, p. 398. MILSOM, S.F.C., states in *Historical Foundations of the Common Law*, 2nd ed., Toronto, Butterworths, 1981, p. 89-90: "Discussion has normally turned upon the fact that most medieval chancellors were clerics, and that canonist ideas may for that chance reason have played a large part in early equity. But there is probably more to it than that. How could divine justive manifest itself? [...] [The Chancellor] had no special access either to absolute justice or to the minds of men; and he could not simply declare a result for himself. All he could do was to work upon the conscience of the party, where the rights of the matter were in some sense uniquely known. This necessity, rather than the coincidence of clerical chancellors, seems to explain procedural resemblances between chancery and courts Christian [...]. But most of all it seems to explain the nature of equitable decrees: results were not declared to be so; instead parties were told to make them so. When a seller of land refuses to convey it, chancery did not declare that it belonged to the buyer notwithstanding this: it compelled the conveyance. Property in the land passed to the buyer because the seller after all conveyed it to him: the seller conveyed it because chancery told him to, and would punish disobedience. [...] Equity acts *in personam* because conscience does." See also KEETON, G.W. and SHERIDAN, L.A., *Equity*, 2nd ed., London, Pitman, 1969, p. 455; René DAVID, *supra*, footnote 3, p. 350, para. 300.

> [A]ll early Chancery jurisdiction involved the coercion of the person who declined to act in accordance with good conscience, and the function of the subpoena in all instances was to compel conscientious behaviour, whatever that might involve, for the avoidance of sin [...]. Hence the specific performance of contracts was only an illustration of the general mode of proceeding adopted in all instances by the Chancellor, an aspect of the principle that equity acts *in personam*.[37]

A second historical development which has influenced the remedy of specific performance was the adoption by the Chancellors of a policy embodied in the maxim "Equity follows the law".

The Lord Chancellors did not develop a self-contained system of rules separate from or opposed to those of the common law, but merely a collection of disparate rules designed to supplement it in those areas in which it was defective. This point has been eloquently made by Maitland:

> Equity had come not to destroy the law, but to fulfill it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needful, something that equity would require.
>
> [...]
>
> [W]e ought to think of equity as supplementary law, a sort of appendix added on to our code, or as a sort of gloss written round our code, an appendix, a gloss, which used to be administered by courts specially designed for that purpose [...].
>
> [...] I do not think that any one has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connexion.[38]

In accordance with the above approach, when the common law courts developed a theory of contract and several forms of action for their enforcement, the Courts of Chancery refused to provide relief in all contractual disputes, limiting their intervention to cases in which they considered it necessary because of the serious imperfections of the common law[39]. This is the origin of the *prima facie* rule that damages, the remedy awarded by common law courts, constituted the primary remedy for breach of contract.

One of the most important cases of imperfection of the common law, which justified the intervention of the Courts of Chancery in contractual disputes, was the situation in which an award of damages would not fully

---

37. SIMPSON, *supra*, footnote 35, p. 596.
38. MAITLAND, *supra*, footnote 5, p. 17–19. See also DAVID, *supra*, footnote 3, p. 347 and 349, paras. 298, 299.
39. See HOLDSWORTH, W., *A History of English Law*, London, Methuen, 1936, vol. I, p. 456, vol. IV, p. 322.

compensate the plaintiff for his loss[40]. This was considered to be the situation in cases of a seller's breach of contract to sell land or to transfer some interest in it. The reason why damages were thought to constitute an inadequate remedy in such cases has been explained as follows:

> There are many cases in which if a contract be broken no amount of damages that a jury will give will be a sufficient remedy to him who suffers by the breach. A man for example agrees to buy land, and he agrees perhaps to give for it more than any one else would have given. The seller refuses to perform his part of the agreement, it may be that no damages that could be given to the buyer would be a just compensation to him for his loss. What damages can you give? Even if land can be said to have a market value, still a man may well have consented to pay more than its market value and yet be very anxious that the agreement should be performed; to him the land has a fancy value.[41]

A third characteristic of the remedy of specific performance is related to the Chancellors' attitude towards coercion and imprisonment. At an early date unconscionable conduct of a defendant justified in the eyes of the Chancellors the use of coercion to induce him to change his behaviour under threat of imprisonment for contempt. Subsequent changes in public opinion in England, which led to the abolition of imprisonment for debt[42], were contrary to the enforcement policies of the Courts of Chancery[43]. The rule which limited the availability of equitable remedies to those cases in which damages were an inadequate remedy was then seen as promoting the

40. *Id.*, vol. I, p. 457; see also BERRYMAN, J., "The Specific Performance Damages Continuum: An Historical Perspective", (1985) 17 *Ottawa L. Rev.* 295, p. 298-306.
41. MAITLAND, *supra*, footnote 5, p. 301; see also BERRYMAN, *supra*, footnote 40, p. 306-311. It has been convincingly argued that the subjective interest of the buyer in each unique piece of land does not justify the award of specific performance to a purchaser who is merely speculating and has no particular interest in obtaining the parcel of land he agreed to buy. See SHARPE, R.J., *Injunctions and Specific Performance*, Toronto, Canada Law Book Inc., 1983, p. 314-319, paras. 613-620. However common law courts continue to award automatically specific performance to enforce contracts for the sale of land irrespective of whether the buyer has a special interest in performance: see *Bashir v. Koper*, (1983) 40 O.R. (2d) 758 (C.A.). For the argument that sales of land were enforced through specific performance because of the social and political values associated in England with ownership of land see COHEN, D., "The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry", (1982) 32 *U. of Tor. L.J.* 31.
42. To a great extent imprisonment for debt had been used because of the imperfection of the laws relating to execution of money judgments, which did not permit the seizure of money, shares, bonds, or the attachment of debts. The importance of imprisonment for debt was considerably diminished when Acts passed in 1838 and 1840 allowed choses in action to be taken in execution and garnishee proceedings. Arrest on mesme process was abolished in 1838 and on final process in 1869: see HOLDSWORTH, *supra*, footnote 39, vol. XI, p. 524, 600, vol. XV, p. 144; see also ATIYAH, P.S., *The Rise and Fall of Freedom of Contract*, Oxford, Clarendon Press, 1979, p. 190, 331, 677.
43. See generally ATIYAH, *supra*, footnote 42, p. 292 s.

desirable result of reducing the use of coercion and contempt proceedings in civil matters [44]. In accordance with this new philosophy a number of XIXth century amendments to procedural statutes created various ways of enforcing decrees of specific performance other than through contempt proceedings. Such legislative amendments have allowed English and Canadian courts to enforce decrees of specific performance and mandatory injunctions by permitting the act required of the defendant to be performed by another person [45], by appointing an officer to execute a deed or other instrument [46],

44. "[An explanation for the restricted availability of specific performance] may be found in the respect for individual freedom which has been such a striking feature of the development of English law. Even to the extent of declining to generalise remedies which compel the performance of the actual obligations assumed, courts of equity have normally restricted the remedy of specific performance to those contracts which involved the transfer of property, and have not so far extended it to contracts, such as contracts of service, which would have involved the application of measures of constraint, limiting personal freedom, for extended periods (e.g. a contract of apprenticeship as in *De Francesco v. Barnum*)": KEETON, G.W. and SHERIDAN, L.A., *Equity*, 2nd ed., London, Professional Books, 1976, p. 360. As Karl Renner has convincingly argued, legal rules and institutions may remain relatively unchanged over the centuries and still vary the social and economic functions they perform. See RENNER, K., *The Institution of Private Law and their Social Function*, edited with an Introduction and Notes by Kahn-Freund, O., London, Routledge & Kegan, 1949; see generally, MACDONALD, R.A., "Social and Economic Control Through Law", (1977) 25 *Chitty's L.J.* 7. Writers belonging to the group loosely referred to as "law and economics" have justified on the basis of administrative and economic considerations many common law rules which were originally the result of historical chance: see generally, MACKAY, E., *Economics of Information and Law*, Boston, Kluwer, 1982, p. 35 s.
45. See, for example, Rule 366 of the Queen's Bench Rules of Saskatchewan which states in part as follows: "If [...] a mandatory order, injunction or judgment for the specific performance of any contract be not complied with, the court besides or *instead of proceeding against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained or some other person* to be appointed by the court at the cost of the disobedient party, and upon the act being done the expenses incurred may be ascertained in such manner as the courts may direct and execution may issue for the amount so ascertained and costs." (Emphasis added). This rule is based on an English rule and it forms part of the Rules of Court of the other common law provinces, see Alberta, rule 354; British Columbia, rule 42(7), New Brunswick, rule 61.61; Nova Scotia, rule 52.03; Ontario, rule 60.11(9), (10) (old rule 579).
46. See section 143 of the *Ontario Judicature Act*, R.S.O. 1980, c. 223 as am., which states in part as follows: "(1) Where a person has been directed by a judgment or order to execute a deed or other instrument, or make a surrender or transfer, and has refused or neglected to execute the deed or instrument, or make the surrender or transfer, and has been committed to prison under process for such contempt, or, being confined in prison for any other cause, has been charged with or detained under process for such contempt, and remains in prison, the court may grant a vesting order or may order or appoint an officer of the court to execute the deed or other instrument, or to make the surrender or transfer for and in the name of such person. (2) The execution of such deed or other instrument, or the surrender or transfer in his name made by such officer, has in all respects the same force and validity as if it has been executed or made by the person himself [...]".

or by issuing vesting orders transferring property from the defendant to the plaintiff[47]. This trend toward the enforcement of equitable remedies by indirect means, which do not require the forced cooperation of the defendant, has been reinforced by recent cases. These cases have held that such indirect methods of enforcement rather than contempt proceedings should be used in civil disputes whenever they can bring about the enforcement of the order. This new approach to the enforcement of equitable remedies has been described by an Ontario judge in the following terms :

> The entire tenor of our law is to make committal and attachment of the person a last resort for the enforcement of judgments. Committal or attachment should only be granted where reasonable attempts to obtain satisfaction by alternative methods have failed.
>
> [...]
>
> Sequestration, which affects the property but not the person of a defaulter, should therefore be attempted first [...]. If, by this mean, the judgment is not satisfied within a reasonable time [the plaintiff] may renew this motion and its request for attachment or committal[48].

This change in the attitude of common law judges toward the enforcement of equitable remedies has two important consequences for the purpose of

47. See for example section 79 of the *Ontario Judicature Act* which states as follows : "Where the court has authority to direct the sale of any real or personal property or to order the execution of a deed, conveyance, transfer or assignment of any real or personal property, the court may by order vest the property in such person and in such manner and for such estates as would be done by any such deed, conveyance, assignment or transfer if executed ; and the order has the same effect as if the legal or other estate or interest in the property had been actually conveyed by the deed or otherwise, for the same estate or interest, to the person in whom the property is so ordered to be vested [...]". See also section 87 of the *Saskatchewan Land Titles Act*, R.S.S. 1978, c. L-5 which states in part as follows : "A judge of the Court of Queen's Bench may, upon such notice as he deems fit or, where in his opinion the circumstances warrant, without notice : (a) make a vesting order and may direct the registrar to cancel the certificate of title and duplicate thereof in the name of the person in whom by the order the lands are vested [...]".
48. *Leaseconcept Ltd. v. French*, (1977) 1 C.P.C. 161 (Ont. H.C.), p. 163, per Reid, J. In *Miller v. Miller*, (1977) 27 R.F.L. 139 (Ont. H.C.), Reid J. stated at p. 141 : "The law is equally clear that committal will not be ordered by this court except as a last resort. If a reasonable alternative exists it should be taken... In my opinion it does exist." See also *Danchevsky v. Danchevsky*, [1974] 3 All E.R. 934 in which Buckley L.J. stated at p. 938 : "[...] it is quite clear, I think [...] that the husband was in fact in contempt — and one might say in gross contempt — [...] But the fact remains that the objective could have been obtained by other relief which would not have involved committing the husband to prison for contempt of court [...] [I]t was open to the wife to apply for a writ of possession and to execute the writ and thereby recover possession of the house from the husband, and to carry out that sale with the assistance, if necessary, of an order of the court directing some third party to execute the conveyance in the husband's place [...] [T]his is not an appropriate case for a committal order at all, the desired objective being capable of being achieved by means which would not have affected the freedom of the husband [...]".

comparative law. First the availability of indirect ways of enforcing specific performance without the defendant's cooperation brings the modern common law of specific performance closer to the civil law of *exécution en nature*. Secondly, through the use of these indirect methods, both legal systems implement the policy of protecting the plaintiff's interest in obtaining the performance *in specie* and, at the same time, the policy of avoiding putting unnecessary pressure on the defendant, or of avoiding proceedings which might lead to his imprisonment for failure to perform a contractual undertaking.

2.2. *Exécution en nature*

In contrast to specific performance, which was a remedy created and developed in a pragmatic manner by the English Courts of Chancery, *exécution en nature* was a legal concept developed in the middle ages by commentators of Roman law texts. Consequently the present day law on *exécution en nature* has been influenced by the history of the doctrinal controversies surrounding that concept as well as by the manner in which the XIXth century codes have regulated it.

Roman law never developed any legal category equivalent to modern day *exécution en nature*. As did the common law, Roman law had several forms of judgment and methods of enforcement which changed over the centuries. At the time of the XII Tables, enforcement of judgments was against the person of the debtor, who could be reduced to slavery or killed by his creditors [49]. In the classical period of Roman law the only remedy available under pretorial procedure was money damages [50]. Even though the Roman *praetor* would issue orders "to do" or "not to do", called "interdicts",

49. For general discussions of remedies and methods of enforcement in Roman Law, see JOLOWICZ, H.F., *Historical Introduction to Roman Law*, Cambridge, University Press, 1954, p. 189–194, 223-226, 411, 463-464; DAWSON, J.P., "Specific Performance in France and Germany", (1959) 57 *Mich. L. Rev.* 495, p. 496–502; P.F. GIRARD, *Manuel élémentaire du Droit romain*, 8nd ed., (par M.F. SENN), Paris, Lib. Arthur Rousseau, 1929; GIFFARD, A.E.V., *Précis de droit romain*, Paris, Dalloz, 1938; GIFFARD, A.E.V., *Cours de droit romain approfondi*; MEYNIAL, *supra*, footnote 7, p. 388–390. See BRISSAUD, J., *Manuel d'histoire du droit privé*, Paris, Fontemoing, 1908, who states: "Dans le très ancien droit, c'est la personne du débiteur, son corps, qui répond avant tout du paiement de sa dette [...] Par comparaison, la conduite de l'usurier du moyen âge, du personnage du Pecorone, dont Shakespeare a fait [...] Shyloc, dans son Marchand de Venise, est assez humaine; il se contente d'une livre de chair ou lieu de prendre le corps tout entier du débiteur [...] L'histoire de l'exécution forcée se résume dans le renversement de ces idées. Le créancier ne s'attaque plus à la personne du débiteur, mais à ses biens; en effet, celui-ci n'est plus considéré comme un coupable dont on cherche à se venger; on lui réclame une valeur et son patrimoine doit la fournir." (p. 515, 516, 522-523).

50. See BUCKLAND, W.W. and MCNAIR, A.D., *Roman Law and Common Law — A Comparison in Outline*, 2nd ed. revised by F.H. LAWSON, Cambridge, University Press, 1965, p. 412,

the method of enforcing these orders was only a monetary award to be executed against the property of the recalcitrant defendant [51]. Only at a late stage of Roman law, under Justinian's Corpus Iuris, could a judgment for the delivery of a specific chattel be enforced *manu militari*, by authorizing a court official to seize it [51a]. However Roman law did not develop methods of coercing defendants to fulfill their contractual obligations by threats of physical violence or imprisonment [52].

In the middle ages a number of commentators, relying on Roman texts, developed what is now called the law of obligations, which encompasses duties arising from contract, tort, restitution, statute and unjust enrichment [53]. One of the general concepts developed by these commentators was *exécution en nature*, which covered a number of ways in which, plaintiffs were entitled to claim actual performance rather than money.

---

where the authors state: "The classical law, like our common law, aimed, not at making a party carry out his contract, but at making him pay for not doing so."; see BUCKLAND, W.W., *Equity in Roman Law*, London, University of London Press, p. 40 s.; Fry E. stated: "It is certain that the Roman Law gave a title to damages as the sole right resulting from default in performance, and did not enforce specific performance directly or in any other manner than by giving such right to damages." See FRY, E., *A Treatise on the Specific Performance of Contracts*, 6th ed. by NORTHCOTE, G.R., London, Stevens and Sons, 1921, p. 4; see also DAWSON, *supra*, footnote 49, p. 496.

51. BUCKLAND states: "Nothing is more remarkable than the contrast between the strenuous language of the interdict and the comparatively feeble way in which it was enforced. The words of the interdict are imperative and uncompromising [...] The proceedings under it resolved themselves into the trial of an ordinary formulary action, and under that system the condemnation was always for a sum of money.": BUCKLAND, *supra*, footnote 50, p. 28. See also BUCKLAND and MCNAIR, *supra*, footnote 50, p. 4-5, 420–423; see also DAWSON, *supra*, footnote 49, p. 501.

52. See BUCKLAND, *supra*, footnote 50, p. 28–30; DAWSON, *supra*, footnote 49, p. 501. A direct manner of enforcing judgments to deliver specific chattels seems to have been to order the delivery of the chattel, or, in the alternative, payment of its value and to permit the plaintiff to swear to an inflated value of the chattel without fear of perjury. This is a historical precedent of the French *astreinte* and of the use of fines to enforce injunctions in Quebec and the Canadian common law provinces. See BUCKLAND and MCNAIR, *supra*, footnote 50; DAWSON, *supra*, footnote 49, p. 498. BUCKLAND, W.W., *supra*, footnote 50, p. 29.

53. See BUCKLAND and MCNAIR, *supra*, footnote 50, p. 192 where the authors states: "[...] the Roman *obligationes* are far from covering the whole field of what in modern theory are called '*iura in personam*'. It was not in accordance with the casuistic methods of the Roman lawyers, any more than it would be with us (we can hardly have said to have adopted the word), to seek for an exact definition of the abstract notion of *obligatio*. The word itself does not seem to be used as a legal term till the empire." See also AMOS and WALTON'S, *Introduction to French Law*, 2nd ed. by LAWSON, F.H., ANTON, A.E. and BROWN, L.N., Oxford, Clarendon Press, 1963, p. 137; DAVID, *supra*, footnote 3, states at p. 85, para. 64: "La doctrine, partant des données du droit romain, a dans les droits de la famille romano-germanique construit un droit des obligations qui peut être regardé comme la partie centrale du droit civil, lui-même objet principal de la science juridique."

The medieval writers who developed the law of obligations saw *exécution en nature* both as the logical consequence of the binding nature of contracts, and as a way of promoting respect for promises [54]. They were influenced by ideas derived from canon law and natural law [55].

However, in spite of this initial preference for *exécution en nature* in cases of non performance of contracts, the commentators were faced with the problem of its enforceability. One of the medieval commentators of Roman texts, Bartolus, (1313–1357), mentioned the fact that in Roman law the only available remedy was damages except in the cases of seizure of specific chattels by a court official. In order to explain this approach he utilised the distinction, made in other areas of Roman law, between obligations "to give", "to do" and "not to do" [56]. Thus he concluded that only obligations "to give" were subject fo *exécution en nature* while obligations "to do" and "not to do" were not [57]. He suggested that the reason for such a difference was that "to award the *exécution en nature* of obligations other than those to give would constitute a kind of servitude" [58].

---

54. Such policy has been expressed by a present day writer in the following terms: "Sous réserve de la force majeure, le créancier n'est-il pas alors fondé à exiger l'exécution en nature? Son cocontractant s'est en effet lié, et le condamner à verser des dommages-intérêts enlèverait tout son sens au respect de la parole donnée.": JEANDIDIER, W., "L'exécution forcée des obligations contractuelles de faire", (1976) 75 *R.T.D.C.* 700, p. 701-702. Last century common law judges emphasized the importance of upholding and enforcing promises; a typical statement is the following: "[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily should be held sacred.": *Printing and Numerical Registering Co. v. Sampson*, (1875) L.R. 19 Eq. 462, p. 465, per Jessel, M.R. Statements about the importance of promoting respect of promises and of certainty and predicability in legal transactions (*la sécurité juridique*) are frequently made by present day civilians. This type of statement has become more rare in common law jurisdiction in recent years. An interesting account of possible reasons for this shift in emphasis is contained in ATIYAH, P.S., "From Principle to Pragmatism: Changes in the Function of the Judicial Process and the Law", [1980] *Iowa L. Rev.* 1249 and ATIYAH, *supra*, footnote 42, p. 649–659, 671–680; see also PARRY, D.H., *The Sanctity of Contract in English Law*, London, Stevens, 1959.
55. See generally, ATIYAH, P.S., *Promises, Morals, and Law*, Oxford, Clarendon Press, 1983, p. 9–28; FRIED, Ch., *Contract as Promise*, Cambridge, Harvard U.P., 1981.
56. See *supra*, footnote 11.
57. See generally MEYNIAL, *supra*, footnote 6, p. 392; BAUDRY-LACANTINERIE and BARDE, *Traité théorique et pratique de droit civil*, 3e éd., Paris, Sirey, 1906, vol. 11, p. 470, para. 432. JACKSON, T.H., "Specific Performance in Louisiana, Past and Future", in DAINOW, J. (ed.), *Essays on the Civil Law of Obligations*, Bâton Rouge, Louisiana State Univ. P., 1968, 195, p. 196–200.
58. "*Quandam speciem servitutis*", MEYNIAL, *supra*, footnote 7, p. 393; CARBONNIER, J., *Droit civil*, Paris, Thémis, 1967, vol. 4, p. 528. See generally, RATTIGAN, Bartolus, in *Great Jurists of the World*, MacDonnel and Manson ed., 1914.

Two centuries later, Antoine Fabre, (1557–1624) a president of the Senate of Savoy, embodied the same policy in the Latin maxim "*Nemo praecise potest cogi ad factum*" ("No one can be specifically compelled to act"), and he gave a justification for it: "because it cannot be done without violence or pressure" [59].

Both Bartolus' distinction between different types of obligations and the "nemo praecise" maxim were used by several medieval scholars. They were adopted by Pothier, who stated that the direct enforcement of a debtor's obligations to do or not to do would constitute "an attack against his person and liberty" [60].

The commissioners responsible for the French Civil Code followed Pothier closely when they drafted the portions of the Code dealing with obligation. They embodied both Bartolus' distinction and the "nemo praecise" maxim in article 1142:

> Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts en cas d'inexécution de la part du débiteur.

Article 1142 was justified by one of the French codifiers in a report addressed to the French legislature in the following terms:

> le motif (de l'article 1142) est que nul ne peut être contraint dans sa personne à faire, ou à ne pas faire une chose, et que si cela était possible, ce serait une violence qui ne peut pas être un mode d'exécution des contrats.[61]

From an early date, French authors have interpreted article 1142 restrictively. They have argued that, even after adoption of the article, *exécution en nature* was not only possible but the preferred method of enforcing contractual obligations, because it was the logical consequence of the binding force of contract (*la force obligationnelle du contrat*) and the most adequate remedy to encourage respect for promises (*le respect de la parole donnée*). These authors generally agreed that the article excluded direct methods of enforcement of contracts which would use force in order to coerce debtors to perform their obligations. They argued, further, that the article was never intended to exclude other indirect ways of giving plaintiffs contractual

---

59. See CARBONNIER, *supra*, footnote 58, p. 528, n° 145; MEYNIAL, *supra*, footnote 7, p. 393; JEANDIDIER, *supra*, footnote 54, p. 702.

60. POTHIER, *Traité du contrat de louage*, para. 66. "The chief feature of Pothier's discussion was its total lack of originality. He was in general a man of quite inferior talent, with a gift for simplification.": LAWSON, F.H., *The Roman Law Reader*, Oceana Publ. Dobby Ferry, 1969, p. 187.

61. *Exposé de motifs* by BIGOT-PREAMENEU, P. LOCRE, *La législation civile, commerciale et criminelle de la France*, 1828, vol. 12, p. 329, n° 38. See also BAUDRY-LACANTINERIE, *supra*, footnote 57, p. 472, n° 432; LITVINOFF, *supra*, footnote 1, p. 300.

performance rather than damages, such as seizure of the goods by a sheriff, performance by a third party or by the plaintiff at the defendant's expense. Such possibilities were contemplated by other articles of the Code[62]. It is these doctrinal controversies about the availability of direct or indirect ways of achieving the specific enforcement of contracts which has led to the wide scope of the concept of *exécution en nature.*

The reasons advanced for the non availability of direct specific enforcement by civil law authors and the adoption of article 1142 of the French Civil Code should not lead the reader to conclude that all civil law systems or even the French Civil Code itself have adopted a consistent policy against all remedies aimed at coercing the defendant to perform his obligations. First, other civil law systems did not follow the precedent established by article 1142 of the French Civil Code. For example article 888 of the German Code of Civil Procedure states that when performance can be rendered only by the defendant himself he may be threatened with imprisonment for up to six month and fines of unlimited amount[63]. Secondly, articles 2059 to 2070 of the French Civil Code regulated imprisonment for debts (*contrainte par corps*) in civil matters, while another French statute[63a] allowed imprisonment for debts of over 200 francs in commercial matters. These provisions were in force for over sixty years until imprisonment for debt in non-penal matters was abolished by a law passed in 1867[64]. It seems reasonably clear that imprisonment for debt was used in France to coerce debtors to pay and not merely to punish them for their failure to do so. A French textbook states that imprisonment for debt was an efficacious method of forcing recalcitrant debtors to perform, of forcing hidden assets to appear, or of encouraging the

62. Articles 1143 and 1144 of the French Civil Code clearly dealt with methods of achieving the indirect enforcement of contracts; they state as follows:

    1143. Néanmoins le créancier a le droit de demander que ce qui aurait été fait par contravention à l'engagement, soit détruit; et il peut se faire autoriser à le détruire aux dépens du débiteur, sans préjudice des dommages et intérêts, s'il y a lieu.

    1144. Le créancier peut aussi, en cas d'inexécution, être autorisé à faire exécuter lui-même l'obligation aux dépens du débiteur.

    See especially BAUDRY-LACANTINERIE, *supra*, footnote 57, p. 468–479, n°s 429 to 444, and authors cited therein. After an exhaustive analysis of article 1142 Baudry-Lacantinerie reaches the following conclusion: "On voit qu'en définitive le législateur eut mieux fait de ne pas écrire la disposition de l'article 1142." *Ibid.*, p. 473, para. 433. The *Québec Civil Code* did not adopt article 1142 but it simply stated in article 1065: "The creditor may *in cases which admit of it*, demand also a specific performance of the obligation [...]" (italics added). See *supra*, footnote 13.

63. See ZWEIGERT, K. and KOTZ, H., *An Introduction to Comparative Law*, North Holland, 1977, vol. I, p. 144.

64. For a discussion of imprisonment for debts in France before and after the adoption of the Napoleonic Code, see BRISSAUD, *supra*, footnote 49, p. 523–525.

family of the debtor perform his obligation [65]. Thirdly, French courts have developed a remedy called *astreinte* which puts financial pressure on defendants to perform their obligation by the imposition of punitive damages which will continue to accumulate for as long as the defendant refuses to obey the court's order [66]. Finally Quebec and Louisiana have adopted prohibitory and mandatory injunctions, two remedies developed by common law systems, and use them to enforce contractual obligations [67].

Conclusion

The preceding analysis allows us to contrast the approaches of the common law and civil law to the enforcement of contractual obligations. First, in common law systems damages were historically treated as the *prima facie* remedy for breach of contract unless a case fell into one of the recognized exceptions. Only when the plaintiff could not be fully compensated for his loss did the courts of equity order the defendant to perform contractual obligations under threat of contempt proceedings and imprisonment. By way of contrast, civil law's historical preference for *exécution en nature* over damages emphasized the importance of respect for promises. However, this initial preference was modified by the absence in Roman and ancient law of remedies and methods of enforcement which coerced debtors to perform obligations to do or not to do. Even though each system starts from a different premise, the combined effect of initial rules and exceptions thereto may have brought the two into close alignment.

Secondly, both systems show a tendency to greater availability of *exécution en nature* and specific performance. In Quebec law this trend is manifested by the availability of prohibitory injunctions [68] and of mandatory injunctions [69] for the enforcement of contractual obligations. It is also shown

65. COLIN, A. et CAPITANT, H., *Traité de droit civil*, Paris, Dalloz, 1959, tome II, p. 758, para. 758 ; BRISSAUD, *supra*, footnote 49, states at p. 523 : "l'emprisonnement pour dette fut envisagé surtout comme un moyen d'amener le débiteur à payer son créancier à l'aide de ressources qu'on supposait cachées [...] Il servit aussi à obliger le débiteur à aliéner ses immeubles, tant que l'exécution forcée ne put pas porter sur cette catégorie des biens [...]" But see LITVINOFF, *supra*, footnote 1, p. 313 who states that imprisonment for debts "is a sanction for nonperforming instead of an actual forcing to perform which is the true substance of *nemo praecise* [...]" It is interesting to note that in England imprisonment for debt was used because of the impossibility of seizing in execution choses in action belonging to the judgment debtors, while in France it was used because of difficulties encountered in execution against land: see *supra*, footnote 42.
66. See MASSÉ, *supra*, footnote 12 and bibliography cited therein.
67. *Ibid.* See also PRUJINER, A., "Origines historiques de l'injonction en droit québécois", (1974) 20 C. de D. 249.
68. See *supra*, text accompanying footnote 18.
69. See *supra*, text accompanying footnote 19.

by the recent willingness of Quebec courts to use mandatory injunctions to enforce contractual obligations "to do"[70]. In the Canadian common law provinces and other common law jurisdictions the trend towards greater availability of specific performance has been associated with an increased realisation by courts and legal scholars of the failure of damages awards to fully compensate plaintiffs for their losses[71].

Thirdly, the greater availability of specific performance in common law jurisdictions has led a number of authors to wonder whether it is still true to say that common law systems show a policy preference for damages over specific performance. Lawson F.H. states:

> English law not only approaches in practice the civilian position, in which a general availability of specific performance is subject to exceptions admitted on practical grounds, but is substantially identical in principle also. It is indeed doubtful whether one ought not to regard the cases where damages are an adequate remedy as exceptions to a general availability of specific performance and as exceptions justifiable, though not originally introduced, on practical grounds.[72]

René David has also stated:

> As a matter of fact the difference between the two systems, English and French, is much less in practice than one might be led to think. It may have been quite great in earlier times, but nowadays it may be doubted whether it has not been reduced to a matter of pure theory [...] It may well be doubted that English law in its present state is less liberal than French law concerning this matter of specific performance.[73]

As a reaction to this development, a number of common law authors have advocated the adoption of a "non-hierarchical" approach to the availability of remedies, depending on their relative advantages and disadvantages in each particular case, rather than changing the old rule to say that specific performance is the primary remedy except when it is inappropriate to grant it[74].

Fourthly, recent amendments to procedural legislation in common law jurisdictions which allow the enforcement of equitable remedies by a person

70. Quebec courts have in recent years issued interlocutory mandatory injunctions ordering the Royal Bank to continue providing banking services at a certain location, and ordering Chrysler to continue a franchise agreement. See *Les Propriétés Cité Concordia Ltd.* c. *La Banque Royale du Canada*, [1983] R.D.J. 524; *Chrysler Canada Ltée* c. *LaSalle Automobile Inc.*, C.A.M., n° 09-000336-72, conf. [1974] C.S. 642.
71. See especially, KRONMAN, A.T., "Specific Performance", (1978) 45 *Univ. Chic. L. Rev.* 352; SCHWARTZ, A., "The Case for Specific Performance", (1979) 89 *Yale L.J.* 271.
72. LAWSON, *supra*, footnote 1, p. 213.
73. DAVID, R., *English Law and French Law*, London, Stevens & Sons, 1980, p. 126-127.
74. See SHARPE, *supra*, footnote 41, p. 6, para. 8.

other than the defendants[75] bring specific performance closer to *exécution en nature*. It is true that, technically speaking, those legislative changes do not expand the scope of the remedy but only the methods available for its enforcement; however their practical effect is the same as the performance by a third party at the defendant's expense referred to in article 1065 of the *Québec Civil Code*[76].

Fifthly, because of the wide scope of *exécution en nature*, civil law writers discuss together all the different modes of giving the plaintiff the contractual performance *in specie* rather than damages. By contrast, common law books and articles on specific performance deal almost exclusively with the equitable remedy, ignoring other means of giving the plaintiffs performance in kind which are available in common law systems, such as vesting orders[77], actions for the price[78], actions in replevin[79], etc. I would suggest that the civil law approach is preferable because those other ways of giving plaintiffs specific relief[80] perform the same economic function as specific performance[81] and they may still be available to plaintiffs when specific performance is not[82].

75. See *supra*, text accompanying footnotes 45 to 48.
76. See *supra*, footnote 13.
77. See *supra*, footnote 47.
78. In an action for the price or for an agreed sum a plaintiff seeks specific relief and these types of actions are considered to be forms of *exécution en nature* in civil law: see TANCELIN, *supra*, footnote 1, p. 365, para. 687; see also ONTARIO LAW REFORM COMMISSION, *Report on Sale of Goods*, Toronto, Department of Justice, 1979, p. 415.
79. In an action in replevin at common law, a plaintiff may recover possession of goods wrongfully taken from him. Under special legislation in British Columbia, Manitoba and Ontario a plaintiff may obtain possession of chattels when they have been wrongfully "detained" i.e. when he has been deprived of their possession, even if he has never been in actual possession of them. See *Recovery of Goods Act*, R.S.B.C. 1979, c. 357; The *Replevin Act*, C.C.S.M., c. R. 100; The *Replevin Act*, R.S.O. 1980, c. 449; see generally, LAW REFORM COMMISSION OF BRITISH COLUMBIA, *Report on the Replevin Act*, Report nº 38, May 1978; BRAID and BALKARAN, "The Special Nature of the Common Law Action of Replevin in Manitoba", (1961) 33 *Man. Bar News*, 125.
80. See *supra*, footnote 7.
81. Most of the advantages and disadvantages of specific performance contained in recent articles apply to all forms of specific relief. See *supra*, articles cited in footnote 71. See also MURIS, "The Cost of Freely Granting Specific Performance", [1982] *Duke L.J.* 1053; YORIO, "In Defence of Money Damages for Breach of Contract", (1982) 82 *Col. L. Rev.* 1365.
82. For example in common law systems buyers of ordinary goods available in a market are not entitled to specific performance ordering sellers to deliver them, as in such cases an award of damages is considered to constitute an adequate remedy: see *supra*, text accompanying footnotes 40 and 41. However buyers in British Columbia, Manitoba and Ontario may be able to obtain possession of those same goods in an action in repleving under special legislation which expands the scope of the common law action: see *supra*, footnote 79. It is

Finally, an analysis of the historical evolution of the approaches of civil law and common law systems to the enforcement of contracts show that both systems share the same policy concerns, namely, protection of the plaintiff's interest in receiving actual performance of the contractual promise[83] and the unwillingness to use imprisonment or other methods of coercion to force the defendant to perform personally his contractual promise[84]. At the same time the point of balance between those two conflicting policies has changed over the history of both systems. As a civil law author has stated:

> [L]es idées reçues aujourd'hui sont l'aboutissement du conflit des doctrines sur le concept, le fondement et les buts du droit, de l'évolution des idées dans le passé et des tendances actuelles. L'étude du droit ne peut en aucune façon consister à n'apprendre que les règles de technique juridiques en vigueur. Cela est particulièrement vrai en matière de droit des obligations, qui est intimement lié aux conceptions philosophiques et politiques de la société.[85]

---

not enough to state merely that specific performance is not available to buyers who desire to obtain possession of ordinary goods when they can do so in a repleving action. See ONTARIO LAW REFORM COMMISSION, *supra*, footnote 78, p. 440.

83. See *supra*, footnote 54.
84. Many authors and judges have stated this policy as a concern with the defendant's liberty rather than with the use of certain means of coercion, such as imprisonment, for the enforcement of civil obligations. However, as a Quebec judge has stated, "the [injunction] order does not seek to restrain or interfere with the personal liberty of the respondent. He is merely told he must respect his contract, and if he respects his contract, no harm comes to him. If he does not, he acts at his peril; he violates his contract, disobeys the order of the court and he takes the consequences. *Lombard v. Varennes et Théâtre National*, (1922) 32 B.R. 164, p. 170, per Martin J. (dissenting); a compromise between the policy of giving the plaintiff what he was promised and the policy of avoiding imprisonment in civil matters is achieved in French law by the *astreinte* which puts financial pressure on the defendant to perform his contractual obligation : see *supra*, text accompanying footnote 66. The use of financial pressure to motivate defendants to perform their contractual obligations is available to the courts of Quebec and the Canadian common law provinces. Under section 761 of the *Québec Code of Civil Procedure* a court may impose consecutive fines of up to $50,000 until the defendant obeys the injunction. In common law jurisdictions courts have the power to fine those who disobey injunctions or orders of specific performance: see generally, SPRY, I.C.F., *The Principles of Equitable Remedies*, 3rd ed., London, Sweet and Maxwell, 1984, p. 355 s.
85. TANCELIN, *supra*, footnote 1, p. 4, para. 7.