THE PRINCIPLE OF THE RELATIVE EFFECT OF CONTRACTS AND THE THEORY OF GROUPS OF CONTRACTS: TOWARDS A NEW READING OF ARTICLE 1165 OF THE FRENCH CIVIL CODE?

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French law has always had a rather flexible understanding of the relative effect of contracts.

The exception provided by article 1165, which sets forth the principle, has been broadly interpreted and the very important role played by the third party provision of that law is well known.

Still further attenuations have been recognized with regard both to obligations of broader scope (such as the so-called *propter rem* obligations) and to the persons who may be considered within the contractual circle. This latter category includes, particularly, "assigns under particular title," (*ayants-cause à titre particulier*) that is, those who have benefitted from the transmission of property. It is already more than fifty years ago that certain commentators went so far as to mention the "supposed" principle of relativity.[1] This position is, however, quite exaggerated and a long line of work has attempted, even until today, to refine the analysis of this relative effect.[2]

Within the last several years court decisions have given the principle a new direction, adopting a more overall view of certain complex situations in accordance with a recent doctrine: the notion of group of contracts,[3] to which the Court of Cassation referred for the

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1. R. Savatier, *Le pretendu principe de l'effet relatif des contrats*, Rev.trim.dr.civil 1934.526.

2. Notably in a series of doctoral theses. The description of that evolution as well as the main references can be found, for example, in two recent texts: PH. MALAURIE AND L. AYNES, DROIT CIVIL, LES OBLIGATIONS, 2nd ed. 1990, no. 650 and ff.; J. FLOUR AND J.L. AUBERT, LES OBLIGATIONS, L'ACTE JURIDIQUE, 4th ed. by J.L. Aubert, 1990, no. 419 and ff. Also informative are the ever subtle remarks of J. CARBONNIER, DROIT CIVIL, LES OBLIGATIONS, 52 to 60, Themis, 14th ed. 1990.

3. Two doctoral theses have traced this movement: R. Teyssie, Les groupes de contrats, University of Montpellier, 1975; J. Neret, Le sous-contrat, University of Paris II, 1979. To these could be added J.L. Goutal, Essai sur le principe de l'effet relatif du contrat, University of Paris II, 1981.

first time in the resounding decision of June 21, 1988 of its 1st Civil Chamber[4] (the *Soderep* decision).[5]

Of course, the caselaw is not yet firmly established in this domain, and, as is not altogether rare in French law, an opposition exists between the decisions of certain Chambers of the Court of Cassation. It appears however that the tendency is toward a broadening of the field of contracts.

The stakes in such a development may be considerable, as the systems of delictual remedies and of contractual remedies in French law are quite different in several respects. Firstly, the prescriptive period in delictual matters is ten years (art. 2270-1, C.civ.), but in contractual matters it can vary from a brief delay (for the action in guarantee against hidden defects available to a buyer by art. 1648 C.civ.) to 30 years (art. 2262 C.civ.) the prescriptive period under general law. Damages are limited in contract matters to those foreseeable at the formation of the contract, except in case of intentional or serious fault--art. 1150 C.civ.--whereas delictual harms are subject to complete reparation. Exculpatory clauses, generally valid in contractual matters except in case of intentional or serious fault, are null in delictual matters.

In addition, French law recognizes the principle which is called (and infelicitously called) the *noncumul* of contractual and delictual responsibilities:[6] from the moment that a party has available a contractual action, that person can no longer use a delictual action. By broadening the contractual limits through the notion of groups of contracts then, French law thereby restricts the field of delictual remedies.

Indeed, this evolution is not over and this broadening could be but a temporary phenomenon. Nevertheless, the juridical construct of groups of contracts is launched and is emerging progressively (I), and, being openly recognized by the 1st Civil Chamber of the Court of Cassation in the *Soderep* decision, the notion opens new possibilities with regard to the relative effect of contracts (II).

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4. Cass. Civ. 1ère, June 21 1988, D. 1989, 5, note C. Larroumet, comments of P. Jourdain, Rev. trim. dr. civil 1988, 762 and Ph. Remy, eod.loc. 1989, 107.

5. It is to be remembered that in France only very important decisions are cited by the name of one of the parties involved.

6. PH. MALAURIE AND L. AYNES, O.cit., OBLIGATIONS, nos. 870-882.

I. The progressive emergence of the notion of group of contracts

The notion of group of contracts is a "recent and heterogeneous" concept denoting "various situations in which two or more contracts are linked to one another."[7] It is therefore necessary to set forth the situations which have come to be seen as the most significant for the application of the relative effect of contracts (A) and to describe the evolution of the caselaw in this area (B).

(A) There is certainly nothing surprising about the idea that contractual situations have become very diversified since the example of "Pothier's cow."[8] Complex contractual schemes have been developed which draw in a number of more or less interwoven contracts whose classification is still relatively uncertain. One could hardly help making the comparison with the concept of the relational contract (as opposed to the discrete contract) originating in American doctrine and with which the name McNeil is generally associated.[9] However, the relational contract is rather a sociological category while the group of contracts is more a legal notion. The relational contract does not imply a series of contracts, but rather long term contractual relations. The group of contracts by definition joins several mutually linked contracts. One of the best known forms is the subcontract which brings about the performance of the principal contract: similarly the sublease or the construction subcontract (which will be examined infra).

Other contractual schemes are of less interest here. This is the case for instance of the *contrat-cadre*, in which the master contract (*contrat de base*), which defines the permanent rules governing the relationship between the parties, such as an exclusive concession agreement or a franchise contract, is put into effect and applied by

7. PH. MALAURIE AND L. AYNES, op. cit., OBLIGATIONS, no. 691; *see also* G. Viney, *L'action en responsabilité entre participants à une chaine de contrats*, in MÉLANGES DÉDIÉS A D. HOLLEAUX, Paris, 1990, pp.399-424; C. Larroumet, *L'action de nature nécessairement contractuelle et la responsabilité civile dans les ensembles contractuels*, J.C.P. 1988.I.3357

8. In his TREATISE ON OBLIGATIONS (1761), Pothier gave as an example of causality the sale of a diseased cow which contaminates the herd of the buyer with all of the unfortunate consequences which ensue. The example has been repeated in numerous texts and is as pervasive as that of the Brooklyn Bridge in the United States.

9. McNeil, *Contracts: Adjustment of Long-term Economic Relations*, 72 NW.U.L.R. 854 (1978); *see also* J. Bell, in D. HARRIS AND D. TALLON, CONTRACT LAW

subsequent contracts (*contrats d'application*) between the parties.[10] This is also the case of contractual groups in which several contracts work concurrently toward the realization of a single operation, such as the loan and the acquisition which that loan is intended to finance.

However, "chains of contracts" are one type of operation which most directly concerns the relative effect of contracts, as these comprise a series of contracts formed one after the other and pertaining to the same object, such as the fabrication, the sale, then the resale of a thing. In addition, one can denote homogeneous chains, in which successive contracts are of the same nature, such as a series of sales, as distinguished from nonhomogeneous chains in which subsequent contracts are different in nature, where for instance a developer orders the construction of a building by a constructor, sells the building to a buyer, who in turn leases the building to yet another person. In such case a construction contract, a sale contract and a lease contract are formed one after the other with respect to the same property. It is here that the legal problem begins to appear: what effect does one contract in the chain have on the legal situation of a person who is not a party to *the* contract, but to a subsequent contract? What remedy is available, for instance, to the lessee against the contractor responsible for a defect in construction which disturbs the lessee's quiet enjoyment?

Another arrangement which could also bring into play the relative effect of contracts is the subcontract,[11] by which a contracting party attempts to perform the principal contract through the intermediary of a third person with whom he enters into a "subcontract" of the same type. This is the case, for instance, of the manufacturer who "subcontracts" the production of certain parts to another manufacturer. Such arrangements differ from chains of contracts in that rather than contracts succeeding one another, the contracts coexist.

(B) The evolution of the caselaw.[12]

The traditional solution, drawing upon a narrow conception of the relative effect, consisted in recognizing a delictual action only when no direct contractual relationship existed between the plaintiff and the defendant. The subcontracting party (the subcontractor or sublessee for example) can only bring a delictual action against the principal

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TODAY, ANGLO-FRENCH COMPARISON, Clarendon, 1989, P. 197; *cf.* p. 219-220; French edition: LE CONTRAT AUJOUD'HUI, L.G.D.J., Paris, 1987.

10. This notion appears to be unknown in English and American doctrine.
11. *See* the Neret thesis, cited *supra* in note 3.
12. This description follows the article of G. Viney, cited *supra*, note 7.

contractor or the owner. The buyer of a building, to take another example, could proceed only on delictual grounds against the seller of defective materials used in the building by a contractor engaged by the original owner of the building. An exception has long been recognized however, in homogeneous chains of sales: the jurisprudence allowed a subsequent buyer to assert directly against the original seller (often the manufacturer) the guarantee against hidden defects[13] created by the first sale. This was a strange solution in that the jurisprudence also admitted a delictual action in such circumstances, thus departing from the principle of *noncumul*. The justification given for the direct action grounded in contract has given rise to numerous doctrinal discussions. The Court of Cassation has appeared to favor the so-called accessory theory: the contractual action is the accessory of the thing sold and is transmitted with it.[14] Another step was taken (first by the 1st Civil Chamber, and finally by the Plenary Assembly when the 3rd Civil Chamber (competent notably in matters relating to sales of buildings) refused to follow[15]), in stating that the direct action was "necessarily contractual." This ruled a delictual action out of the question. The *noncumul* of remedies was respected, but at the expense of the relative effect of the contract. The subsequent buyer at the end of the chain invokes the contract which began the chain, to which he was not party.

Similarly, the solution originally limited to the guarantee against hidden defects in a chain of homogeneous sales contracts has been extended, being applied in other actions: the action for nonconformity,[16] the action against contractors and architects (art. 1792 and 2270 C.civ.), and this solution is also applied to nonhomogeneous chains, particularly where a construction contract is part of the chain. Thus in the case where the seller ordered work to be

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13. An action in guarantee against hidden defects is a specific remedy, originating in Roman law, and permitting the buyer to act against the seller of a good having a defect undetectable under normal conditions, to obtain either a price reduction or damages, or even the resolution of the contract: PH. MALAURIE AND L. AYNES, DROIT CIVIL, CONTRATS SPECIAUX, 4th ed., 1990, no. 380-423.

14. PH. MALAURIE AND L. AYNES, CONTRATS SPECIAUX, op.cited, no. 413: the subsequent buyer enjoys all the rights "attached to the thing", according to the expression employed in certain decisions.

15. Ass. Plen., February 7, 1986 (2 decisions) JCP 1986-II-20616 note by P. Malinvaud, D.1986.293, note by A. Benabent. It should be recalled here that the Court of Cassation sits in "Plenary Assembly" (that is with the representatives of the different Chambers concerned) particularly when a matter involves a question of principle, which is obviously the case when there is conflict in the rulings of two Chambers.

16. That is, where the good delivered does not conform to the good promised; this action overlaps broadly with the action against hidden defects. On the relationship between the two actions, see the note by P. Malinvaud, cited *supra*, note 14.

carried out by a contractor and that work turns out to be defective, the buyer can invoke the contract against the contractor. The action born of that contract is even available to a lessee. It should be noted however that this extension is the result of decisions of only the 1st Civil Chamber, and is still rejected by the 3rd Civil Chamber,[17] which has chosen to follow the 1986 decision of the Plenary Assembly to the letter. A new phase was entered with the March 8, 1988 decision of the 1st Civil Chamber,[18] which imposed the direct action in cases involving subcontracts: a party having given photographs to be developed to a photographer had available an action grounded in contract against the subcontractor to whom the photographer had given the work. The decision uses very general language:

> where the debtor of a contractual obligation has charged another person with carrying out that obligation, the creditor only has available to him an action necessarily contractual in nature which he can bring directly within the double limits of the creditor's rights and the extent of the obligation undertaken by the substitute debtor.

This formulation is interesting in that it sketches the basic outline of the action; but the sword is double-edged: the "double limit", which can include, for instance, an exculpatory clause in the original contract, can make a direct action ineffective. This is precisely what occurred in the *Soderep* case.

II. The *Soderep* decision and the perspectives opened by it

The *Soderep* decision of the 1st Civil Chamber, dated June 21, 1988, and the subject of abundant commentary,[19] opens new perspectives as it was rendered in a situation different from those which had given rise to the preceding caselaw and in new, somewhat surprising terms. It is therefore fitting to analyze that decision thoroughly before attempting to foresee its possible progeny.

(A) The facts of the case are as follows. An airline company had entered into an airport assistance agreement with the Paris airport,

17. For example, the 3rd Civil Chamber considers an action of a lessee against a contractor hired by the lessor as being only delictual in nature: Civ. 3, April 8, 1987, D.1987.I.R.108.

18. J.C.P. 1988.II.21070, note by P. Jourdain.

19. *See supra*, note 4

which contained an exculpatory clause in favor of the latter. However, an airplane was later damaged during a towing operation due to a defect in the tractor hitch system. Any action against the Paris airport grounded in contract would thus have faced the bar of the exculpatory clause.[20] The airline therefore based its action on delictual responsibility (art. 1382 C.civ.), requesting reparation by the company which furnished the defective towbar and by the company which furnished the tractor equipped with the towbar. The decision of the Paris Court of Appeals, which had allowed that action, was quashed for a legal reason which has the appearance of a decision of principle and which is worth citing here in full:[21]

> In a *group of contracts*, contractual responsibility necessarily governs the demands for reparations of all those who have suffered damages only because they had *a tie with the original contract*; indeed, in such case, as the debtor should have foreseen the consequences of his breach in accordance with the applicable rules of contract, the victim can only bring against him [the debtor] an action grounded in contract, *even in the absence of a contract between them.*

However, in the present case, the contractual approach forecloses any reparation due to the exculpatory clause. The delictual approach is unavailable. The loss must therefore be borne by the airline--or rather by its insurer. An initial comment: this was the first use, to our knowledge, by the Court of Cassation of the expression "group of contracts." In addition, the group of contracts in this case was somewhat particular in nature. Here the chain of contracts was entirely heterogeneous and the "tie with the original contract" was much more loose than in the matters dealt with up to this point. Finally, the decision affirms the existence of an action grounded in contract between the debtor and the victim (the manufacturer and the seller on one side, and the airline on the other) even in the absence of a contract between them. There lies the most surprising aspect of the decision, seemingly the most overt breach of the principle of the relative effect of contracts. Abundant discussion continues in an effort to determine what might be the exact meaning and scope of this decision.

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20. It is unfortunately impossible to summarize here the rules, essentially judge-made and rather complex, governing exculpatory clauses where the special provisions relating to the protection of owners are not applicable. On the actionability of the clause in a chain of contracts, see the comments of J. Jourdain, Rev.trim.dr. civil 1989.553.

21. Emphasis ours.

(B) A first caveat should be made: the decision was handed down from the 1st Civil Chamber and it is more than likely that the 3rd Civil Chamber will not follow that lead, particularly if one examines the positions taken by that Chamber in cases involving subcontracts or nonhomogeneous chains of contracts. The intervention of the Plenary Assembly of the Court of Cassation will therefore be needed to put an end to an unfortunate conflict in the caselaw.

In which direction? The doctrinal controversy is lively. It begins with the very scope of the *Soderep* decision. Those opposed to the solution of the court wish to construe the decision restrictively--limiting it to the particular facts of the case. The suit brought by the airline could be viewed as bordering on fraud. Its purpose was to bypass the exculpatory clause contained in the airport assistance contract. And after all, would it not be more natural for the airline's insurer to bear the cost of reparation?

For others, on the other hand, the decision represents a new reading of article 1165. Where there is a group of contracts, the relative effect of the contract must be thought of globally; it touches the entire set of contracts and the entire group of parties. The distinction of being a third person with respect to an individual contract loses significance in light of his role as a party to a group of contracts. The decision goes in the direction of those who consider that the rules of contractual responsibility should be applied where a prejudice is linked to contractual obligations, independent of whether the victim himself qualifies as a party.[22]

The conditions for operation of the relative effect of contracts would then remain to be defined in accordance with this broad conception, for the limits of the contract cannot be extended to the extreme so as to include in the group of contracts those having only a distant relation to the final contract, for example, the supplier of parts comprising the towbar mechanism, itself a part of the tractor. The contractual limits also could not envelop all those who have some kind of "a tie with the initial contract," more or less close. The decision itself supplies a criterion: the foreseeability of the consequences of breach by the party on whom responsibility is to be placed. Admittedly this criterion is rather vague. And if the principle is to be retained, it

22. *See* for example J.Huet, Responsabilité contractuelle et responsabilité delictuelle, thesis at the University of Paris II, 1978; G. Durry, La distinction de la responsabilité contractuelle et de la responsabilite delictuelle, McGill University course, Montreal, 1988.

would behoove the courts to refine it so as to allow a fairly ready determination of whether a contractual or a delictual action is proper.

The decision affords the victim of a breach of contract to which he was not party an action in reparation nevertheless grounded on that contract. But could this victim demand, for his own benefit, specific performance or the resolution of the contract? Does the third party victim have all the rights of a party in this regard? It would seem that what has been created here is rather a new intermediate category: not a true third party, but not a true party to the contract.

Much remains to be done in the way of harmonizing the theory of groups of contracts and the principle of the relative effect. As the possibilities open, it is yet unclear upon whom they will eventually settle.

A further observation could be made in relation to this question, concerning the manner in which French courts proceed. Whether or not jurisprudence is a full source of law in France,[23] its creative role is carried out in a slow, unsure and imperfect manner--at least in comparison to the principle of *stare decisis*. Indeed, at least with respect to the relative effect of contracts, it unhesitatingly follows the dictum "*quieta movere.*"

23. *See* P. Jestaz, *La jurisprudence: reflexions sur un malentendu*, D.1987.Chron.11, which insists on the need for a "common recognition" of jurisprudential rules.