

Foreign Currency Obligations: Indexation Clauses in Case of Depreciation of the Value of the Currency



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ABSTRACT: In the periods of crisis, money obligations become a continuing issue, mainly in currency depreciation or high inflation. Recently, the money obligations have been defined as an obligation to transfer small ownership of a certain amount of money by jurisdictions. However, these obligations are flawed in terms of the value inequity of one of the two contracting parties. Therefore, the French, German and Anglo-Saxon jurisdictions have proposed to incorporate an indexation clause called the "monetary valuation principle." This means that the sum of returned money must be reevaluated on the return day accordingly to indices previous stipulated in the contract between the two signatory parties. In this article, we are discussing this issue from the perception of Kuwaiti law.

KEYWORDS: Law of obligations, economic crises, Inflation, Indexation clauses, franco-german, Anglo Saxon & Kuwaiti jurisdictions.

INTRODUCTION

This essay focuses on Articles 173 and 174 of the Kuwaiti Civil Code promulgated in 1980 by Legislative Decree number 67. These articles deal with the execution phase of the obligation to pay a sum of money.

The study of these articles requires above all a return to the basic notions of the law governing obligations and contracts, in particular the notion of "subject matter". This is one of the essential conditions of validity of all obligations and contracts. We will proceed in this way and finally move on to the performance part of the obligation to pay a sum of money, provided for in the above-mentioned articles, in the case of the depreciation of the value of the money used.

By definition, a legal obligation is a legal relationship between two or more persons by virtue of which one of them is obliged to do something in relation to another. In other words, the obligation puts in place a person called the creditor who can require another person called the debtor to perform a certain service. Thus, the creditor is the active subject, the debtor is the passive subject and the performance is the object of the obligation owed.

The obligation is divided into three types: to do, not to do and to give. There is an obligation to do when the debtor is obliged to perform a certain service, a certain positive act. For example, the obligation of a painter to draw a portrait. On the other hand, an obligation is not to do when the debtor refrains from doing something negative. This is the case, for example, with the obligation of non-competition imposed on an employee vis-à-vis his employer. As for the obligation to give, it is that which consists in transferring a real right or a right of ownership. This is the case, for example, of the seller who must transfer ownership of the thing purchased

Articles 173 and 174 of the Kuwaiti Civil Code set out a particular type of obligation, indeed the most common one, which is the obligation to pay a sum of money. This obligation is, in principle, part of the obligations to do, shown above.

In addition, an obligation may have different sources, including, among others, a contract. The latter is an agreement of will that generates obligations and creates legal effects. But for a contract to produce such effects, it must meet certain basic conditions. If any one of these conditions is violated, the contract becomes irregular and sanctioned as such.

A contract that meets all the conditions of validity is a legally formed contract. These conditions are commonly known to be three in number:

- Consent: this is the externalized will to commit oneself. It is the direct declaration of a party to be willing to perform a specific service. Consent must be free of violence, error or fraud. Therefore, to be valid, it must be free of "defects of consent";
- The cause: this is the combination of two aspects: the determining aim of the person who undertakes the obligation and the economic reason for the obligation. It is the intended equivalent, the sought-after equivalent;

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- The object: this is the condition which interests us most in our present study.

The Notion of the Object

The notion of object is a polysemous term, i.e., it is capable of having several meanings, several acceptances, all of which help to better define its existence. A distinction is traditionally made between the subject-matter of the obligation, the subject-matter of the contract, and the subjectmatter of the performance.

First, the subject-matter of the obligation is the answer to the question: to what have we committed ourselves? It is what the debtor is obliged to do. It is either to do, or not to do, or to give. Then there is the object of the contract: this is what the contract is about. Finally, there is the object of the performance, which is the thing itself that is the support of the performance. For example, in the case of a sale, it is the thing sold.

Beyond these terminological clarifications, the object must have certain characteristics. First, it must be determined and must have a real existence. Indeed, article 171 paragraph 1 of the Kuwaiti Civil Code provides as follows: "The object of the obligation must be determined in a way that denies gross ignorance, otherwise the contract will be void".

This first paragraph establishes the general rule as to the determination of the subject matter. Moreover, it provides that the subject-matter of the obligation must be precisely specified, thus avoiding any scandalous ignorance. Otherwise, the contract will be void. The way in which the subject-matter of the obligation is to be determined will necessarily differ according to its nature and the different circumstances surrounding the contract. It is ultimately a matter for the court seized to decide, since it depends on the facts of the case, although it is not, of course, imperative that the determination of the subject-matter of the obligation be made directly. It is sufficient that the contract contains a basis for its determination, as long as that basis is sound.

The basic rule behind this is the idea that, on the day the contract is concluded, or even on the day the consent is exchanged, all the elements of the contract must be precisely known. If there is still an uncertain point, it means that the parties have not agreed on it, and the contract is not validly formed. As a result, the contract will certainly be void.

In other words, a contract cannot be enforced when it is not known what each party has undertaken to do. In principle, if the offer is precise, the object is determined. However, there may be situations where it is impossible to determine the subject matter. This is why Kuwaiti law has found a solution by stipulating that the subject-matter must be determined or at least determinable, i.e. that there must be sufficient information in the contract to know precisely what the subject-matter is on the day when the contract is to be performed.

Paragraph 2 of article 171 goes on to explain that, if the obligation concerns a thing, it must be fungible or non-fungible, that is, it must be determined according to its type, amount and degree of quality. However, failure to specify the degree of quality does not render the contract between the parties null and void, but the debtor will be obliged to provide a thing of average quality.

This means that, if the obligation relates to a thing, the determination of the object necessarily requires that the thing be sufficiently specified. This specificity varies here according to whether the contract concerns a specific thing or a thing characterized by its belonging to a certain type. In the first case, the thing must be certain, unique, and must show an individuality that prevents it from being confused with others. In the second case, the thing must be determined by its type, amount and degree, provided that the legislator has preferred not to make the non-determination of the degree of quality the same penalty as the non-determination of the type or amount, which is the nullity of the contract. In fact, paragraph 2 provides that, where the degree of quality is not mentioned in the contract, and it was not possible for the judge to deduce it from the circumstances of the case, the contract is not annulled but the debtor is obliged to present something of average quality. Through this decision, the legislator demonstrates its willingness not to waste a contract on a matter that can be settled by reconciling the interests of both parties, especially as this is likely to be in accordance with their common intention.

The rule in Article 171 is in line with most modern thinking, as well as paralleling Islamic thinking. It is based on the text of Article 127 of the Kuwaiti Commercial Law and the text of Article 133 of the Egyptian Code, but adds substantial modifications to ensure accuracy and discipline.

The second major characteristic concerns the lawfulness of the object. Indeed, the latter is mainly used to check whether the contract is lawful. Indeed, Article 172 of the Civil Code specifies that the object must not be in violation of the law, public order or morality set by the State. This ruling is apparent and is derived from Article 129 of the Kuwaiti Commercial Code, which in turn is derived from Article 135 of the Egyptian Code.

Public policy and good morals are considered to be limits to contractual freedom. Public policy is what a society considers to be essential at a given time. There are several types of public policy. One sometimes speaks of traditional, political public order (defense of the state, the family, morality). It is also often called the public order of direction through which the society expresses its fundamental values. In addition, an economic and social public order has appeared more gradually. In general, this constitutes

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a protection of persons and is then assimilated to a public order of protection (this is the case, for example, of persons who are victims of a defect in consent). There is also a social public order in the sense of labor law, which can be circumvented provided that this is done in a way that is favorable to the employees. However, it is important to mention that the term "public policy" is not to be taken literally, since even in the absence of texts, a contract may be considered contrary to public policy.

A contract may be illegal or immoral. Good morals mainly concern matters related to morals, social traditions and religious rules of a society. In contract law, it is true that fewer clauses are voided on the basis of morality. Indeed, there are a number of contracts that are immoral but rarely go to court because the parties are often aware of this immorality and therefore will not contest their validity. The classic example concerns gifts made by a person to his adulterous partner.

The enforcement of the obligation to pay money under sections 173 and 174:

What the will has made, only the common will can undo. A contract legally formed must be performed by the parties in accordance with the principle of the binding force of the contract, subject to the terms of performance to which the contract may be subject. Referring to the explanatory memorandum of the civil law, we find that the legislator has referred to articles 173 and 174 of the Kuwaiti Civil Code to emphasize the performance of a particular type of obligation and the most common among them in practice: the obligation to pay a sum of money.

On the one hand, Article 174 states in its first paragraph that "In obligations to pay money, performance must be in Kuwaiti currency". It then continues by adding in its second paragraph. "However, if payment is agreed to be made in a foreign currency, performance must be made in the currency provided.

The text of article 174 came in its first paragraph to establish the principle of the execution of the obligation to pay a sum of money in Kuwaiti currency. The second paragraph of this article then allows the parties to agree that payment is to be made in foreign currency. Therefore, if the contract came without specifying the currency in which the obligation is to be performed, it would be necessary to pay in Kuwaiti currency.

Thus, whether in internal or external transactions, when the contract includes an explicit condition that the performance of a certain obligation must be in foreign currency, the obligation must be fulfilled in this way. Moreover, the Kuwaiti legislator has allowed the agreement to pay with foreign currencies even in internal transactions, as he is aware of the extreme strength of the national currency. It considers that if a party undertakes in a contract to pay a sum of money, provided that the payment is made through a currency other than the Kuwaiti currency, this will not diminish the position of the latter and will not weaken confidence in it. Many jurists affirm this, including Professor Bader Jasim Mohammad AlYaqoub.

Indeed, the setting of such a condition in a contract is considered to be totally legitimate as it complies with the content of article 175 of the Kuwaiti Civil Code. This article deals with the question of the conditions that can be validly included in a contract. Moreover, it states that "1- The contract may contain any condition agreed upon by both contracting parties, if it is not prohibited by law or contrary to public order or morality. 2- If the condition contained in the contract is unlawful, it shall be void, while the contract shall remain valid, unless one of the contracting parties proves that he would not have consented to the contract without such condition. In that case, the contract is annulled.

Article 175, in its first paragraph, deals with the notion of conditions that a contract may contain, and thus establishes a general principle according to which the contract may provide for any condition imposed by the contracting parties, provided that it is not prohibited by law or contrary to public policy or morality. This principle applies whether the condition is one of the requirements of the contract, or even of its convenience, or whether it is provided for the benefit of one of the contracting parties, or of a third party.

The legislator refers to such a provision, following the example of the Kuwaiti Commercial Code in its article 132, and before that the Iraqi Civil Code in its article 131, and then in the Jordanian Civil Code in its article 164, although this may seem closer to the obvious in contemporary legal thinking. In drafting the above-mentioned article 175, the legislator was driven by his desire, on the one hand, to settle an issue around which the dispute in Islamic jurisprudence was raging, and on the other hand, to rule out any suspicion regarding the notion of conditions inserted in a contract.

Moreover, in its second paragraph, Article 175 penalizes the illegality of the condition, either because it is prohibited by law, or because it is contrary to public order or morality. This penalty, in principle, consists in the occurrence of the condition in the literal sense, without its nullity affecting the contract itself. It does not therefore affect the validity of the contract concluded. The condition is here corrupted but not corrupting and will thus be cancelled, without leading to the nullity of the contract.

However, we can imagine a contrary scenario. The fate of an illicit condition can be projected onto the contract and lead to its annulment. This is the case when the contracting party proves that he consented only because the contract included this condition, and that he would not have consented to it if it were not stipulated in the contract. In such a case, the condition is corrupting and

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corrupting at the same time. This is nothing more than a legislative application of the theory of cause explained earlier, since this condition was a necessary pillar for the establishment of the contract.

Therefore, we can deduce that the condition to pay a certain amount of money in foreign currency is a valid condition. Moreover, it is legitimately provided for by the law in article 174 and does not violate public order and morality.

On the other hand, article 173 provides that: "If the object of the obligation is the payment of a sum of money, the debtor is bound by the amount fixed in the contract, without the change in its value having any effect, even if it is agreed otherwise.

In other words, article 173 provides that the debtor's obligation must be performed by the same amount set out in the contract, without the change in the value of the money having any effect. Thus, the legislator was keen to declare the nullity of any agreement contrary to this provision, in order to remove any suspicion that the quality of the national currency, which is at the heart of public order in the State, is being undermined.

This was also confirmed by Professor Bader Jassim Mohammad Al-Yaqoub in his book on Principles of Obligation in Kuwaiti Law, in its sixth edition, year 2003 and 2004, page 269. He considers that the obligation stipulated in article 173 of the civil code means that the principle in obligations that have the purpose of paying a sum of money is its nominal value, regardless of the circumstances that may affect it (positively or negatively). For example, in the case where a person undertakes to pay another the amount of 2000 Kuwaiti Dinars, one year after the conclusion of the contract, he is obliged to pay the amount specified in the contract at the agreed term, regardless of the actual value of the dinar at the time of payment, whether it is higher or lower.

Thus, if the parties stipulate in their contract that the sum of money due to the creditor will be calculated on the basis of the value of the Dinar at the time of payment, this agreement is considered void.

Depreciation of the currency value according to the provisions Articles 173 and 174:

With all that we have mentioned above, it is worth noting the need to take into account the upheaval of the economic situation, the fluctuation it has been witnessing recently and its effects on the depreciation of the currency. The best example we can give is the economic crisis in the Lebanese Republic and the Syrian Arab Republic, currently in terms of obscene changes in the value of their national currency.

There is no doubt that the problem of the currency value variation is added today to the economic problems at the local level of the countries as well as at the global level. Moreover, we find that the national currency of small and developing countries has been linked to the currency of large developed countries. As a result, the latter gain the ability to exercise significant control over the economy of developing countries through the strength of their national currency. The strongest and most influential currency in the world economy today is the U.S. dollar.

Money bills can lose some of their value with the decrease of their purchasing power. The currency thus becomes weak and this is the majority of cases perceived in reality. However, it is possible that the value of the currency rises and its purchasing power increases. We thus say that it has become strong. One of these two situations may occur after the debtor is found to be responsible for paying the value of a loan, the price of a deferred sale, and before the term or repayment date of the debt has come due. In other words, the problem arises from the following pattern: after the contract has been properly concluded, unforeseen national economic circumstances arise before performance and make such performance too burdensome for one of the parties.

The question that arises here is whether the debt to be paid or the deferred sale will be repaid in view of the depreciation/increase in the value of the currency, or on the contrary, there will be no consideration for such a particular situation?

Let's take for example the situation in Lebanon which is perfectly exposed by Maitre Charbel Tanios Cherfan. Since the end of the Lebanese war in the early 90's of the last centuries, the national currency as well as the entire Lebanese economy has been closely linked to the American dollar, insofar as all goods and services, even food, are valued in green currency. This has also been applied in contracts between people. Perhaps what pushed the Lebanese to define their monetary obligations in contracts in US dollars is the fear of the devaluation of the "Lebanese lira", especially since they already survived such a crisis in the 1980s. This crisis put the national economy in difficulty (as it is the case now), which pushed them to resort to foreign currency at the time because it is more stable and thus, they continued in this way. Moreover, for almost thirty years, the Banque du Liban has been interfering in the financial and monetary market through its policy of buying and selling the US dollar (and other foreign currencies) in order to stabilize the exchange rate of one dollar at L.L. 1,500 and to keep it constant at that point. However, this balance was broken at the end of 2019 and the Central Bank could no longer do so for many reasons, including economic and political, which we will not detail in this discussion because it is not related to our topic. As a result, the Lebanese pound started to gradually lose its value against the dollar since then, reaching what Lebanon is witnessing today.

The depreciation of the national currency and the decrease in its purchasing power have also directly affected the legal balance of obligations specified in contracts, especially in the area of deferred sales or "successive performance contracts", i.e. contracts

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whose performance extends over time, as opposed to contracts whose immediate performance takes place upon conclusion of the contract.

Faced with the disastrous Lebanese situation, the parties who concluded their contracts in US dollars were faced with a great dilemma in terms of payment of the sums of money due: should they be paid in Lebanese pounds or in US dollars that are not available on the markets because of the crisis?

The Lebanese problem is even more complex because it is not limited to this question. It would also be necessary to determine, if in case of payment in Lebanese pounds, the exchange rate that should be accepted. Moreover, today, there are several: 1,507 L.L. agreed in the relations between the Bank of Lebanon and commercial banks, 3,900 L.L. determined in the official electronic platform for foreign exchange operations, and there is the price of the black market (or parallel market) which currently touches about 20,000 L.L.

As we know, the contract is the law of the parties, "pacta sunt servanda" in Latin. In other words, it obliges the contracting parties to respect and implement its provisions, so that no party to the contractual relationship can exceed or violate the provisions of the contract concluded between them. This definition is from a narrow legal point of view, but from a broad point of view, the contract can be defined as a legal tool aimed at regulating the different aspects of economic and social life by bringing together two wills and achieving a balance between obligations. The contract is therefore a framework for this contractual relationship, which can be complex and contain many details.

Consequently, the depreciation of the currency leads to the destabilization of the foundations adopted by the two parties to the contract at the time of its constitution and strongly affects its balance. Moreover, a Lebanese person who committed himself in 2018 to pay a sum of money (in dollars) in 2020 would not have agreed to do so if he was aware of the occurrence of the crisis. He would not have consented at all if he knew that the Lebanese currency will lose a massive part of its value. We can thus say that this contradicts his will given at the time of the conclusion of the contract when the dollar was worth 1500 L.L.

In response to the above, we point out the opinions of legal scholars on the extent of the impact of the change in the value of the currency on the debt and the deferred sale. Indeed, there are two senses in the doctrines.

The first manner of the doctrine

The first doctrine considers that the debtor is obliged to pay the same amount previously agreed upon for the benefit of the creditor, without any consideration for the rise or fall in the value of the currency. This is the opinion of the majority of the Maliki, Shafi'i and Hanbali jurists, and also of Abu Hanifah.

Al-Khalil said this, and Al-Zarqani explains it as follows: If the money incurred by one person to another becomes void due to the fact that the latter has stopped using it completely, or still uses it but with an increase or decrease in its value, the former remains liable for his same debt before the suspension of the use of the money, or change in its value, and even if at the time of the contract it was one hundred for one dirham, while it has become one thousand for one dirham, this is because money is part of the non-fungible goods.

In his turn, Al-Suqi said: If money was lent to a person through a loan, sale or marriage, or through a deposit, the same amount is obligatory as to what is due, even if the money at the time of the contract was one for one hundred dirhams, while it has become one for one thousand dirhams.

Al-Jaleel, according to him, explains that if you lend money in dirhams, and at that time one hundred pennies was worth one dirham, then it became two hundred pennies for one dirham, what is returned to you is the same as what was taken, and nothing else.

Also, among the Shafi'is, they consider money as belonging to the category of non-fungible goods. A loan, for example, must be repaid with the same amount, whether it is gold, silver or currency, regardless of whether the value increases or decreases. Ibn Hajar said: It is obligatory, because there is no substitute in non-fungible goods.

Finally, article 750 of the Journal of Legal Rulings states that if the object of the loan is money, broken dirhams or banknotes, and the value of these has increased or decreased, but its use has not been prohibited, the same object must be returned.

The second manner of the doctrine

This is what Abu Yusuf said, on which the fatwa is based, so he went to the obligation of paying the sum of money, taking into account the rise or fall in the value of the currency. If what is owed is a loan, then the amount is assessed according to the value of the currency on the day of receiving the money, and if it is a sale, then the amount is assessed according to the day of the completion of the contract. As for Abu Hanifa, we withdraw his doctrine thanks to the statement of opinion of Abu Yusuf, detailed below.

Ibn Abidin explains that if the value of the money has increased or decreased before the day of receiving the payment, Abu Yusuf said that his words and what Abu Hanifah said about it are the same: "And he will not receive anything else". However, Abu Yusuf

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came back and said: he is responsible for paying its value in dirhams on the day of the sale or even the day of the completion of the sale contract, and on the day of the completion of the loan or even the day of the receipt of the money.

Thus, Ibn Abidin distinguishes that there are two opinions regarding the variation of the value of money: the first one according to which the person is obliged to return nothing other than what he has received, and the second one which considers that the value of money must be appreciated on the day of the realization of the sale, and it is the latter one that the fatwa adopts. Moreover, he notices that the famous book "Al-O'qoud Al-Duriya", in Arabic "الدرية العقود", goes in the same direction of the second doctrine, even the second opinion of Abu Yusuf.

Therefore, Ibn Abidin concludes by affirming Abu Yusuf's opinion, quoting al-Ghazi who in turn said, "I have followed many references from the books of our sheikhs, but I have not seen any of them make a fatwa according to what Abu Hanifah said. On the other hand, I noticed that they based the fatwa in many references on the opinion of Abu Yusuf. Al-Ghazi's words ended like this.

He ends based on the opinion of his Sheikh Saeed Al-Halabi, by the necessity of confirming and adopting the doctrine of Abu Yusuf in the fatwa and in the judgments. Moreover, he considers that the mufti and the judge are obliged to incline towards the most correct doctrine of their leader and the religious person they are imitating, and that they are forbidden to admit the contrary. This is also the case in the fatwas of Qadi Khan.

Proposed solutions in case of depreciation of the value of the currency

Through all the above, we see that, in order to remedy the imbalance of contracts due to exceptional circumstances and their impact on the value of the currency, it is necessary to preserve the economic equilibrium of the contract and to take into account the decline in the value of the currency in relation to the contractual obligations.

In order to show the appropriate solutions to this problem, we say that when the value of money depreciates and the contractual equilibrium is disrupted or broken, the contractual relationship must be rebalanced to a reasonable extent and the obligations must be maintained in the spirit of justice, equity, equality and good faith. Thus, it is necessary to turn to the modification of the contract because it allows to achieve stability between the two parties. First of all, the parties must renegotiate the clauses with their agreement to reconsider and modify the contract, especially with regard to the amount of money due to the creditor.

If amicable negotiations fail, recourse must be made to the courts, which must affirm the need to modify the contract in order to restore the lost balance and remove the injustice suffered by the party heavily affected by the devaluation.

It is also possible to terminate the contract, especially since this goes beyond the normal risks, and the discrepancy in the obligations between the two parties has become significant and unusual and would destabilize the foundations of the contract that they established at its creation. This is also a possible solution because in every contract there is an implicit clause that is supposed to allow the modification (or termination) of the contract in case of an abnormal change of circumstances.

Finally, we can also propose to the parties to take an interim measure that will possibly allow them to avoid this problem from the beginning. Indeed, in order to avoid the rigor of such a crisis solution, the parties are advised to insert in their contract adaptation, renegotiation, safeguard (Hardship) or indexation (also called sliding scale) clauses.

Adaptation, renegotiation or safeguard clauses are contractual provisions which provide for and organize the readjustment of the obligations of the parties in specific circumstances. In contracts whose performance extends over a period of several years or an indefinite period, these clauses inserted in an agreement allow either of the signatory parties to demand that new negotiations be opened when the occurrence of an economic event seriously upsets the balance of services provided for in the contract

The indexation clause is the one by which the parties to a large contract make the amount of the sum to be paid depend on an index that they have freely chosen. However, this index must be related to the object of the contract or to the activity of one of the parties. The introduction of an indexation clause in a contract makes it possible to protect oneself against a sudden increase or decrease of an economic data which changes the environment of the contract.

These solutions are based on the binding force of the contract, which is not supposed to be set aside despite the occurrence of unforeseen economic circumstances affecting the value of the money.

Indexation clauses: A solution in case of depreciation of the value of the currency

In France, as in all countries, Act No. 2018-287 of April 20, 2018 ratifying Ordinance No. 2016131 of February 10, 2016 reforming the law of contracts, the general regime and the proof of obligations modifies Article 1343-3 of the Civil Code relating to the currency of payment, this text provides that payment of an obligation to pay a sum of money in France shall be made in euros². However, it states that payment in a currency other than the euro is valid if the obligation thus expressed arises from an international contract or a foreign judgment (Cass. 1re civ., June 11, 2002, No. 99-10.044; Cass. 1re civ., Sept. 19, 2007, No. 06-17.096), thus confirming a solution established by case law before the reform.

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As it stands, the wording of the exception to the principle of payment in euros is open to criticism in both form and substance: should it be inferred that payment in a currency other than the euro is only authorized in international contracts, whereas it is customary in certain sectors, such as aeronautics and wood pulp, to pay in a foreign currency, in particular in dollars? In order to correct this imprecision and excessive rigidity, which are not very appropriate in practice, the Senate has taken the initiative of proposing an amendment to article 1343-3 of the Civil Code.

Thus, increased by a second paragraph, the new article 1343-3, which will be applicable to legal acts concluded or drawn up as from 1 October 2018, provides that the parties may agree that payment will take place in a foreign currency if it occurs between professionals, when the use of a foreign currency is commonly accepted for the transaction concerned. Two conditions are therefore set out in the text, one relating to the status of the parties (payment between two professionals) and the other relating to the existence of a usage.

The principle of monetary nominalism is established (art. 1343, para. 1). According to this principle, 'the debtor must pay the sum corresponding to the nominal amount of his debt, even if the value of the money has varied'. Thus, a person who contracted a monetary obligation for 1,000 euros in 2005 will have to pay 1,000 euros, even if the debt is not due until 2016 and the value of money has fallen or risen in the meantime.

This rule is set out for loans of money in article 1895, paragraph 1, of the Civil Code and has been generalized by case law. The ordinance enshrines this generalization.

Indexation makes it possible to circumvent the harmful effects of monetary nominalism (article 1343, paragraph 2, and article 1167). Indexation causes the amount of the obligation to pay to evolve automatically according to an index. For example, it was common practice to index the¹ rent of lease contracts to the cost of construction index published quarterly by INSEE, an index which has since been replaced by others. Indexation allows the creditor to protect himself against the loss of value of money and the debtor to protect himself against an increase in its value.

Indexation is traditionally a contractual mechanism, which is why it is called "indexation clauses". The Order deals with indexation in general, without reference to the notion of a clause, which might suggest that the judge has the possibility of indexing obligations created by his judgments.

Indexation clauses were initially declared null and void by case law, until the Cour de cassation reversed its position in the 1950s, followed by legislative intervention. The possibility of indexing the amount of a monetary obligation was immediately firmly framed, because the risk is great. Some indices are indeed particularly volatile, such as the price of gold. The risk of generalized inflation is therefore real if contracting parties make massive use of certain indices. The principle today is therefore that indexation clauses are prohibited (art. L. 112-1 of the Monetary and Financial Code), but with one very important qualification in practice: indexation is possible on an index "directly related to the purpose [...] of the agreement or to the activity of one of the parties" (art. L. 112-2 of the Monetary and Financial Code). There are in fact other limitations that apply and exceptions, but we will not deal with them here and will therefore refer to articles L. 112-1 et seq.

Finally, article 1167 of the Civil Code provides that "where the price or any other element of the contract is to be determined by reference to an index which does not exist or has ceased to exist or to be available, it shall be replaced by the index which comes closest to it. The ordinance simply enshrines the case law that gave trial judges broad leeway to determine the reference index when the indexation clause does not refer to a specific index, or to substitute a new index for the one provided for by the clause when it has disappeared. The trial judges were then required to seek the common intention of the parties in determining the reference index or in substituting a new one. The new article 1167, by providing that the judge must determine the index which is "closest" to that provided by the parties, retains this requirement.

Another means of avoiding the harmful effects of monetary nominalism is the value debt (art. 1343, para. 3). The value debt is a doctrinal concept strongly inspired by German law. Its contours are not very clear-cut, since its definition may vary from one author to another. In essence, the debt of value borrows from both the debt in kind and the debt of money. As its name suggests, a money debt, or pecuniary debt, requires the debtor to remit a sum of money to the creditor. The debt in kind may have any object other than the delivery of a sum of money: painting a picture, delivering a certain body, delivering a fungible thing other

¹In a decision of April 7, 1998, it ruled in this sense that "resolution has the effect of retroactively annulling the contract and restoring the parties to the state in which they were previously situated; that if, in the event of resolution of a contract of sale, the seller must return the price, this price can only be understood to be the sum he has received, possibly increased by interest, and without prejudice to the judge on the merits of the case awarding damages ; that, consequently, it is without contradicting itself and by making an exact application of the aforementioned principle, that the Court of Appeal, which did not set aside the rule of integral reparation, and which, for a money claim, did not have to refer to the concept of debt of value, ruled as it did" (Cass. 7 Apr. 1998, n°96-18790).

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than money, etc. The debt in kind is not subject to monetary depreciation, but its forced execution in kind may prove complicated, and is sometimes even purely and simply impossible, and is then resolved in damages, which only allows the creditor to obtain satisfaction by equivalent. In contrast, the creditor can more easily obtain satisfaction in kind when the debt is pecuniary, the only obstacle being the insolvency of the debtor. The disadvantage of a pecuniary obligation, for the creditor, is that the principle of monetary nominalism subjects him to the risk of a depreciation of the currency. The debt of value makes it possible to combine the advantages of the two types of obligation: the obligation is performed by the payment of a sum of money, which makes it easier to enforce in kind, but its amount is determined on the day of its liquidation (which may, for example, be the day of payment) by reference to a "value", to the needs of a person or to the care of a thing, which removes the creditor from the risk of monetary depreciation. For example, the reward owed by a spouse to the community when he or she has built a house on his or her own land with common funds is a debt of value: the amount of the reward is calculated on the day of the liquidation of the community by reference to the increase in value that the house has brought to the land (the reward being equal to the "subsisting profit", art. 1469 Civil Code). The maintenance obligation is also a debt of value: the amount to be paid by the debtor depends on the needs of the creditor. A final example: the debt of reparation owed by the person responsible to the victim is a debt of value where the harm is assessed on the day of the judgment.

The ordinance generally enshrines this view of a debt of value by classifying it as an obligation to pay a sum of money and by giving a restrictive definition of it: the debtor "is discharged by the payment of a sum of money". In so doing, it departs from the solution advocated by the Catala Proposals, which distinguished between two types of debts of value: "An obligation of value is monetary where its object is to provide a sum of money which is determinable at the time when it is due; it is in kind where its object is to provide for the needs of a person or for the care of a thing, except, in these two cases, where it may be converted, by agreement or by judicial decision, into a revisable monetary obligation. (art. 1148, para. 2, of the Catala Proposals). The obligation of monetary value is the one enshrined in the Ordinance (art. 1343, para. 3); the obligation of value in kind, on the other hand, seems to be excluded by the Ordinance. The issue is really only one of terminology, since the Ordinance does not attach any particular regime to the debt of value.

Where the obligation to pay money bears interest, the debtor is not free to choose how his partial payment is to be set off against the interest (article 1343-1, paragraph 1). This is a derogation from article 1342-10 of the Civil Code which favours the creditor. The Ordinance does not innovate on this point since this solution was already provided for by the former article 1254. The new text no longer provides for the possibility of a contractual derogation from this principle, but since the provisions of the Ordinance are suppletive unless otherwise indicated [7] it must be considered that a derogation from this rule is always possible with the agreement of the creditor.

Interest may be legal or contractual, must be fixed in writing if it is contractual, and is deemed to be annual by default (art. 1343-1, para. 2). The Ordinance here simply generalizes article 1907, which is specific to interest-bearing loan contracts, by adding a clarification: interest is deemed to be annual in the absence of any indication to the contrary.

Anatocism is possible, but remains restricted (article 1343-2). Anatocism is the capitalization of interest: interest is added to the capital to produce interest in its turn, until it is paid. As the risk for the debtor of seeing his debt increase exponentially is important, anatocism does not occur by right: it must be provided for by a special agreement or must be requested in court. Moreover, it is regulated: only interest due for at least one full year can be capitalized (it is therefore not possible to capitalize interest, for example, every month, one must wait at least one year).

The Court of Cassation interpreted the former article 1154 very liberally: the capitalization of interest was to be granted automatically by the trial judge if the request had been made judicially and if the interest was due for at least a full year. [8] The capitalization of contractual interest was therefore automatically granted by the courts, even though the contract did not provide for the capitalization of such interest. The solution was harsh for the debtor, who had to think, at the time of the conclusion of the contract, of a clause expressly excluding anatocism in order to avoid the operation of the former article 1154. The wording of the new article 1343-2 seems more restrictive: interest which has fallen due may accrue if the contract so provides 'or if a court decision so specifies'. The use of the word 'specify' seems to indicate that the court can only decide on the capitalization of interest on obligations which it creates in its judgment. Thus, in the absence of an agreement providing for anatocism, the judge could no longer order the capitalization of interest on a contractual debt.

Internal payments are always made in euros (art. 1343-3). Clauses to the contrary have long been held by case law to be invalid,[10] and the Ordinance simply enshrines this case law. While it is prohibited to use a foreign currency as a unit of payment, it is possible, under certain conditions, to use it as a unit of account. 11] For example, it is possible to stipulate a monetary obligation in the amount of 100 dollars, but the obligation must be paid in euros and its amount must therefore be converted. The conditions of articles L. 112-1 et seq. of the French Monetary and Financial Code must however be respected, as jurisprudence analyzes these currency clauses as indexation clauses (the amount of the bond is considered to be indexed on the exchange rate between the

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euro and the chosen foreign currency). This means that there must be a link between the chosen currency and the subject matter of the obligation or the activity of one of the parties (see above the discussion of art. 1343, para. 2).

By way of exception, payment may be made in a foreign currency if it is stipulated in that currency and if it arises from an international contract or a foreign judgment (article 1343-3). Previous case law allowed payments made in a foreign currency when the payment was "international". 12] The Ordinance replaces the criterion of "international payment" with that of "international contract" or foreign judgment.

By way of derogation from the principle of article 1342-6, payment of an obligation to pay a sum of money takes place at the creditor's domicile, and is therefore portable and not transferable (article 1343-4). This is a new feature, since it followed from the former article 1247 that obligations to pay sums of money had to be paid at the domicile of the debtor, with the exception of maintenance claims ordered by a court. This new provision is justified "by technical reasons, linked to the widespread use of cashless money (cheques, transfers, payment by bank card)"[13]. 13] However, the law, the judge or the contract may derogate from this new rule.

Grace periods and other measures enabling the debtor to overcome his financial difficulties (art. 1343-5). The Ordinance merges the former articles 1244-1 to 1244-3 into a single provision. The content of these articles is taken up in their entirety, subject to some minor formal changes. It should only be recalled that these provisions allow the judge to grant a period of grace to the debtor (postponement or deferment of the payment of the sums due) within a limit of two years. The judge must take into consideration the situation of the debtor, but also the needs of the creditor, and may condition these measures on the debtor performing acts that will facilitate or guarantee payment of the debt. Beyond the grace periods, the judge may also reduce the contractual interest rate of the deferred instalments (up to the legal rate) and may provide that the payments are to be charged in priority to the capital and not to the interest, by way of derogation from article 1343-1, paragraph 1.

Price indexation and indexation clauses

Indexation allows to protect against monetary erosion for money claims when the obligation is deferred in time. The price varies according to an index chosen by the parties. Indexation is the fact of attaching the sum provided to a factor finished that varies in time. It can be done either on the price of a product or on a service

The price of the products and services can be used in the choice of the index: their variation will be reflected on the fixed price. The reference index can only concern one product or service. These indices (consumer prices, construction prices, building prices, commercial rents) will make it possible to see the movements that affect such or such economic sector and will be able to be used as a basis for indexation.

There is a distinction between international contracts and domestic contracts. In international contracts (between two countries), the currency clauses are valid, this validity either that the foreign currency is taken as a currency of payment or that it is used as a currency of account.

In the domestic contract, the problem is not the same because of the intervention of the legislator by an ordinance of December 30, 1958. The parties who wish to add an indexation clause must comply with this text because these clauses are considered as a factor of price increase, the public authorities wished to restrict the freedom of the parties.

We speak of indexation or sliding scale clause, the latter term is more specific because the indexation must concern a set of products or services whose prices vary jointly and uniformly according to the same index. This mechanism implies a chain reaction that will have inflationary effects; this reaction explains why this mechanism is the least used to vary prices.

Indexation resulting from general legislative or regulatory provisions.

Within the framework of the 1958 ordinance, various price variation regimes have been provided for: Example, commercial leases, labour and special security annuities, minimum growth wage.

- a. Indexation resulting from statutes or agreements. Article 79(3) of the Ordinance prohibits or regulates indexation clauses in contractual or statutory provisions (statutory provisions: this covers collective agreements, general agreements on personnel in the public service and in private companies). Conventional provisions concern specific contracts.
- b. Prohibited indexation. Indexation on the SMIC cannot be used as an index. It is forbidden to choose general prices and wages, however indexation on a particular professional category is possible. Indexation based on the interprofessional minimum wage is globally prohibited.
- c. Permitted indexations
 - I. Indexation of maintenance debts: This concerns debts owed according to legal obligations provided for by the civil code (child towards parents in ascending order). The obligation of assistance of the spouses between them for the alimony due in the framework of a separation of corp or in the occasion of a procedure of divorce.

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- II. The life annuities: these annuities constituted between private individuals are assimilated to debts of maintenance, so it benefits from the same rules as previous.
- III. Indexation on the good or services in direct relation with the Object of the contract or the activity of the parties.
- IV. Revenue clauses: some commercial rents can be based on a price according to the tenant's revenue.
- V. Clauses referring to the costs of construction.

DISCUSSION

In this article, we have tried to project onto the contractual problem of currency depreciation. Some principles apply:

- The principle of monetary nominalism, this means that the debtor must return to the creditor the nominal amount of the money received
- The principle of monetary valorization, which means, on the contrary, that the sum of money returned must have been discounted on the day of the return so that the phenomena of monetary inflation and depreciation are taken into account.

The question that arises here is whether this restitution is subject to the principle of monetary nominalism or whether it obeys the rule of valorization. The analysis of the previous case law reveals that in some cases, indexation is a formidable tool in the case of the depreciation of the currency in a contract at maturity.

REFERENCES

- 1) Rapport remis au Président de la République.
- 2) « L'obligation qui résulte d'un prêt en argent, n'est toujours que de la somme énoncée au contrat. »
- 3) Indice de référence des loyers pour les baux à usage d'habitation, indice des loyers commerciaux pour les baux commerciaux et indice des loyers des activités tertiaires pour les baux professionnels autres que commerciaux.
- 4) V. par exemple Cass. civ. 3^e, 12 janv. 2005, 03-17.260.
- 5) V. J. Flour, J.-L. Aubert et E. Savaux, Droit civil, Les obligations, t. 1, L'acte juridique, Sirey, 16^e éd., 2014, n° 48, qui parlent de « catégorie intermédiaire », « hybride ».
- 6) On suppose dans cet exemple que l'immeuble se trouve toujours dans le patrimoine de l'époux au jour de la liquidation de la communauté.
- 7) V. Rapport remis au Président de la République.
- 8) Cass. civ. 1^{re}, 6 oct. 2011, n° 10-23.742.
- 9) Cass. civ. 1^{re}, 21 mai 1997, n° 95-13.175.
- 10) Cass. req., 17 févr. 1937, DH 1937, p. 234 : « il est de principe, en effet, que tout paiement fait en France, quelle qu'en soit la cause, doit être effectué en monnaie française et que le solde d'un marché fixé en dollars doit être évalué selon le cours du dollar au jour où le débiteur devait payer ».
- 11) V. arrêt de 1937 précité.
- 12) Rép. civ. Dalloz, v° « Paiement » par M.-L. Mathieu-Izorche et S. Benilsj, mai 2009.
- 13) Rapport remis au Président de la République.



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