Essays

The Constitutional Impact of the *Exceptio Inadimpleti Contractus*

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Abstract

This article deals with the proposition that the exception of non-performance – suspending the execution of a given performance – engages the enjoyment of constitutionally-protected rights. Using inspiration from interesting Colombian jurisprudence, the author believes that, in such cases, the control over the use of the *exceptio inadimpleti contractus* can no longer be entrusted to a judgment of good faith. It should therefore take into account the constitutional interest of the debtor to the continuity in the enjoyment of a given performance. This is on the basis that this interest may, on balance and under certain conditions, prevail over that of the creditor to the performance of the contract.

I. The Exception of Non-Performance in Contracts of 'Constitutional Importance'

In cooperation agreements,[1] in particular those in which one of the parties has to provide the other with a service for consideration, the exception of non-performance[2] can effectively help to manage the crisis of the contractual relationship without ignoring the interests (the creditor, the debtor) that the contract is intended to satisfy.

In the specialised sectors, in particular in the field of energy and gas, the exception of non-performance has been subject to articulated and special regulation issued by the sectoral *Authorities*. In particular, with regard to the 'processification' of suspension and interruption, this regulation has the purpose

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[1] Remedies, in cooperation agreements, work in a peculiar manner, because here the element of trust (persistence/cessation) between the parties plays a vital role in the survival or termination of the contractual relationship, beyond use or non-use of law remedies: in this perspective, see V. Roppo, 'Giudizialità e stragiudizialità della risoluzione per inadempimento: la forza del fatto' *I Contratti*, 441, 445 (2017), (on the use of solving remedies in cooperation agreements).

[2] On the exception of non-performance, in its general profile, can be seen among many: A.M. Benedetti, *Le autodifese contrattuali* (Milano: Giuffrè, 2011); L. Bigliazzi Geri, 'Art. 1460', in Id, *La risoluzione per inadempimento*, II, in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli-Foro italiano, 1988); B. Grasso, *Eccezione d'inadempimento e risoluzione del contratto (Profili generali)* (Napoli: Edizioni Scientifiche Italiane, 1973); F. Addis, 'Le eccezioni dilatorie', in V. Roppo ed, *Trattato dei contratti* (Milano: Giuffrè, 2006), V, 2, 413; A. Dalmartello, 'Eccezione di inadempimento' *Novissimo Digesto italiano* (Torino: UTET, 1960), VI, 354.

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of compiling different interests; a purpose that this discipline seems to perform efficiently.[3] In these areas, Art 1460 Civil Code alone would be insufficient to solve technical problems linked to the interruption of very complex services, often involving different operators. The discipline of the sector authorities offers this system absolutely necessary detailed rules, while protecting weak users that the market can afford to offer (eg in relation to the individuation of the so-called 'non-disabling users').

The argument, however, is both broad and high-level: there is an interference between values and rights of constitutional rank and contractual self-defence, at least in a twofold sense:

- the interest of the creditor who demands fulfilment, suspending his own right, may have constitutional relevance;
- the interest of the debtor, against which he pleads default and who sees the performance due to him suspended, may also have a constitutional rank.

A couple of examples can better clarify the practical meaning of what has been stated above:

- the user of the water supply service suspends the fulfilment because the supply is qualitatively or quantitatively unsuitable (he, here, is the creditor, unsatisfied, of a performance intended to satisfy a constitutionally significant interest);
- the user of the water supply service who has the supply of water suspended directly by the company because of his failure to pay the fee for the administration (he, here, is the debtor, defaulted, who sees suspended a performance to satisfy his interest of constitutional importance).

This could extend to all credit/debit positions deriving from contracts whose object may be considered constitutional because they are relevant, for example, to health protection, freedom of thought, to the realization or protection of the person, to the protection of the right to justice, to the care of weak subjects (children, the elderly, employees), to access to the media, just to list a few examples which are clearly susceptible to extensions.

The enormous versatility of these interests is likely to include a large number of relationships, including those of great economic importance, in the area of contracts for constitutional relevance, where those who use the service do so in order to fulfil a primary right or interest.

If the contract creates solidarity between the parties (of which good faith has become an operational tool, in its engagement with Art 2, para 2, Constitution), it may also constitute an instrument for the implementation of the principle of subsidiarity, in so far as it may serve to satisfy many of the rights and interests

[3] On this theme, see the analysis by A. D'Adda, 'L'autotutela del creditore nel mercato dell'energia e del gas: i limiti all'eccezione di inadempimento', in Id et al, *Studi in onore di Giorgio De Nova* (Milano: Giuffrè, 2015), II, 845.

the Constitution recognizes to the citizen.[4] Private individuals – in the exercise of their economic and professional activities – rather than the State, may be able to offer, for remuneration, (and hence in a synallagmatic context) those essential services to the implementation of constitutional rights. Private individuals may also do so in conjunction with the State. From this perspective, the market is not a place of egoism but of opportunity.

If, and to the extent that, these interests (which, after all, find full acceptance in the bond model identified in those three preliminary provisions introducing Book IV: Arts 1173 to 1175) may be considered constitutionally relevant, it is difficult to prevent their nature from interfering from the exercise of remedies – such as those laid down by the legislature in the event of maladministration in the contractual relationship – whose effects directly or indirectly affect the performance necessary to meet those interests. If the water supply contract is terminated or if the execution is suspended, the crediting party will no longer benefit from a good (water) essential to survival. This situation cannot be completely ignored by the interpreter, who has been called to evaluate the correctness/proportionality/reasonableness[5] of the remedy the creditor has undertaken.

The question can then move on to other land, with which the civil lawyer has long been familiar: attitudes of self-consciousness may be affected if one of the parties (whether it is self-reliant or affected) belongs to one of the many categories and sub-categories of weak contractors (consumers, medium-sized entrepreneurs, savers, customers) who populate the endless galaxy of asymmetric bargaining. It is the problem of self-protection *of and against* the weaker party.

The idea that suspensive exceptions work differently because of the nature of the parties' interests (creditor/debtor) is not unusual, but in some ways, it already derives from the need for these remedies to be exercised in a manner consistent with good faith/fairness. Even in the analysis of the best doctrine, the judgment of good faith ought to have essentially resulted in an assessment of proportionality between the legitimated and the legitimating default. However, it could entail a series of warning (not written) charges which, for example, they would allow the defaulting debtor to cover the failure to comply with the exception set out in Art 1460 Civil Code.[6] In short, a non-aseptic or neutral assessment, but dropped in the concrete context of the set of interests that a

[4] On this, it is worth sharing the opinion by G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 104, that, with reference to the application of the subsidiarity constitutional principle at Art 118 Costitution, says: '(…) the negotiating autonomy becomes functional also for the realization of general interests'. On the principle of subsidiarity in private law, and on its application potential, see volumes by M. Nuzzo, *Il principio di sussidiarietà nel diritto privato* (Torino: Giappichelli, 2014), I-II.

[5] 'Proportionality control is therefore intrinsically linked to that of reasonableness, which is not merely a quantitative assessment': P. Perlingieri, '«Controllo» e «conformazione» degli atti di autonomia negoziale' *Rassegna di diritto civile*, 204, 219 (2017).

[6] L. Bigliazzi Geri, n 2 above, 30, 33.

particular contract is intended to meet.

The point here is, however, more ambitious: the interests involved are hierarchically higher. It highlights the balance that exists between the creditor's interest in fulfilling to the debtor's (though failing) obligation to continue to enjoy the performance. Because if these interests are placed on different hierarchical levels, the self-giving granted to the loyal contractor can, or must, be affected in some way by having to reconcile it with the interests on which the exercise of contractual self-defence inevitably impinges. If this were not the case, the omission of default could be abused.

II. The Defaulting Debtor Who Has a Constitutionally-Protected Interest in the Use of the Service (with a Digression on Colombian Experience)

We need to move from a bottom line: the weak parts of contractual relationships can find self-help instrument a particularly effective tool (especially in terms of speed, informality, costs) to ensure their right to full and actual implementation of the contractual program.

But it is, of course, a double-edged sword that, in theory, could be used against the same weak parts: if water is not good, payment could be suspended. However, if I do not pay, the supplier does not provide me with water, which is a requirement for human existence.

In the perspective of asymmetrical bargaining, the strong part might have an interest in neutralizing or strongly restricting the access of the weak part to contractual self-employment, by using its power to contract. This could perhaps be through a clause that limits, or strongly excludes, the possibility of proposing the exception of non-performance by the consumer. Such a clause would fall into the list of allegedly negligent (Art 33, para 2, letters b and c of the Consumer Code) and would be affected, save the evidence of the negotiation, by a relative nullity.

However, if the weak party can count on this imperative protection when some contractual clauses obstruct or prevent his exercise of the exception of non-performance,[7] there is nothing in the positive law that protects him should the strong party decides to exercise the same exception against him. This because the strong party may legitimately use self-defence when the user or the consumer does not fulfil his contractual obligations.

Thus, enters the Constitution. Ultimately, a great number of interests of constitutional relevance emerges, which can be used as an adequate means of protection and satisfaction in the contract.

[7] And in these cases, of course, the derogation allowed by Art 1462 Civil Code for common law is totally out of play when access to the exception is prevented to a weak part: on this, see A.M. Benedetti, *Le autodifese* n 2 above, 113, 118-119, 123.

The exercise of self-protection, in particular the exception of non-performance, can deprive the debtor-creditor (as for non-performance and, as such, is contractually undeserving of being protected by the law) of constitutional status and of property necessary for the exercise of an unavailable right. This is when the service is made by a private person (such as, for example, telecommunications, justice and health sector) and, more specifically, when it comes to a public service offered under special conditions (privileged and subtracted, in part, to normal market mechanisms). It could also be from persons who, albeit totally or partially private, are subject to the control of the public body within the scope of which the service is provided.

In either case, the suspension of the service may cause the user an injury likely to be disproportionate to the reason that justifies it (its customary nature.) This happens because the service may be necessary to provide the user with primary goods, or to meet constitutionally protected interests, whether of economic or non-economic nature (the list of which, as mentioned above, is potentially very rich: health, water, gas, electricity, telecommunications, etc).

To resolve this conflict between positions of the same order protection, a first way can be that of good faith control, referred to by Art 1460, para 2, Civil Code. From this perspective, good faith limits the exercise of the exception because if the service offered to the defaulting debtor satisfies a person's essential need or is functional in the exercise of his constitutional right, the suspension is not necessarily prevented. Instead, it can only be arranged as *extrema ratio* or in a so-called procedural manner so as to reduce the loss to the debtor. In cases where any other remedy has proved to be unsuccessful, and the (serious and protracted) failure of the user remains (but to the point where it becomes irreversible, because then it will no longer find the exception of non-performance, but it will be necessary to activate the relevant destructive remedies of the contract, as a result of which the user will surely suffer the consequences of his default, but he may also be free to contact other service providers).

There is also a second scenario. If the contractual benefit reverses its effects directly on the debtor's person and on its physical integrity – such as, for example, hospital care contracts at private structures or elderly or children care facilities – the suspension of the total or partial benefit cannot be activated where, as conceivable, it results in a threat to the physical integrity of the subject. This is a value to which the law can only give protection, obviously stronger than the one recognized to the interest of the creditor to the full implementation of the adequacy of the contractual benefits. In these situations, it is not so much good faith to exclude suspended self-defence, as the same constitutional dimension of the interest that would be irreparably damaged by its exercise. In such cases, the exception, if activated, would be as ineffective as it would be abusive (with the obvious consequence that the creditor who availed it should be considered, in any case, in default). In any case, it would give rise to compensation for the

damage caused to the party who suffered from its application.

Another scenario was also suggested, known primarily to labour law. The debtor justifies his default (relying on the exception under Art 1460 Civil Code) because the performance would, for its part, lead to injury to his own rights or to constitutionally significant assets. Here the insufficiency of the *exceptio* to provide protection to values that cannot be exposed to a judgment of economic proportionality has been found, as suggested in the doctrine, in terms of the ability/inability to perform.[8]

The Colombian experience is interesting to demonstrate the application of the above reasoning, since useful ideas can be drawn from it.

The Constitutional Court of that country, on four occasions,[9] held that the exception of non-performance cannot be invoked by the creditor when its effect translates into the suspension of a functional benefit to the realization of a fundamental right of the person (the debtor). This creates immunity (constitutional) of the debtor in front of the self-protection put in place by the creditor. For example, if the parents do not pay for the private kindergarten where the child is enrolled, the kindergarten cannot refuse to accept the child nor can suspend accessory benefits since the consequences of the child's right to education would be more serious than those of a normal breach of contractual obligations. If a student does not pay the University's fees, the latter cannot exclude him from accessing the courses, but must make an agreement that, taking into account the student's economic situation, allows him to pay the due without excluding him from access to university courses.[10]

However, the same Court has suggested that immunity only exists if the debtor against whom the exception is invoked has no possibility to perform and if there is evidence of his will to perform in the future.

It is correct to say that, in these situations, it is not good faith to operate as a limit to the use of the exception of non-performance, nor it is possible to hierarchically superordinate values and goods subject to proportionality judgments that are based on a purely economic logic or which are entirely within the

[8] On this aspect, see the considerations by O. Clarizia, 'Eccezione di inadempimento e adeguatezza dei rimedi' *Rivista giuridica del Molise e del Sannio*, 210 (2013).

[9] These are the decisions Corte Constitucional de Colombia 25 August 1999 no 624, Corte Constitucional de Colombia 8 February 2012 no 793, Corte Constitucional de Colombia 16 August 2011 no 616, all available at www.corteconstitucional.gov.co, on which it is worth seeing P. Moreno Cruz, 'Los limites a la exceptio inadimpleti contractus: la "buena" e la "mala" y la "fea" excepción de contrato no cumplido' *Revista de derecho privado*, 133-150 (2013). To these sentences, decision Corte Constitucional de Colombia 17 February 2017 no 102 (also available at www.corteconstitucional.gov.co) might be added. Even in a historical-comparative perspective, it is worth mentioning the forthcoming publication by C. Chinchilla Imbett, *La excepción de incumplimiento en el Código Civil colombiano. Un planteamiento de su estructura a partir de la plena consideracón de su función sinalagmática (*Bogotà, 2017): in this volume, a more in-depth analysis of the Colombian decisions here mentioned can be found.

[10] See the recent decision Corte Constitucional de Colombia 17 February 2017 no 102 n 9 above.

specific contractual relationship.[11] There is a need for a new axiological balance.[12] This is where the operation of the exception of non-performance is shaped by the higher need to protect rights and assets whose relevance goes far beyond the one assigned to the preservation of the contractual reciprocity.

This may, however, interfere with the so-called need of non-performance, insofar as the debtor is admitted that he may prove to be temporarily in default because of a disorder due to objective and external factors. It is even possible that subjective, but insurmountable, factors would be sufficient, as long as the interpretation was deemed compatible with framework, the non-imputability of non-performance *ex* Art 1218 Civil Code (and, consequently, the non-suspensiveness of the benefit under Art 1460 Civil Code, which, of course, necessitates the default in law to be attributable).[13]

This view would, of course, solve the problem of the (non) performing debtor, who would be liable to remain linked to the uncertainty connected to the evidence of the nature of its non-performance (and in the pecuniary obligations it is notoriously difficult to demonstrate the impossibility of performing *ex* Art 1218 of the Civil Code, even though the debtor has been overwhelmed by situations that are greater than any of his possible diligence and certainly outside his immediate sphere of control). This would create substantial subversion on the application of Art 1218 Civil Code, to the creditor's principle of reliance, and, if so, on the same power of law awarded to the contract by Art 1372 Civil Code (the debtor is legitimate to expect such efforts to overcome difficulties attributable to the economic context in which he operates, so as not to fall into a justificationism whose disadvantages, in terms of system efficiency, would far outweigh the benefits).

However, it may be that we reason that the comparison between the values and the protection of the non-performing debtor (but holder of rights and primary interests) seems less random and more compatible with the principles governing a state of law.

It should be noted that the Constitution and its values, in the cases where the contract is the instrument of their realization or protection, may interfere

[11] In this sense, the opinion by P. Moreno Cruz, 'La «brutta», la «buona» e la «cattiva» eccezione di inadempimento. A proposito dei limiti dell'*exceptio inadimpleti contractus*' *Nuova giurisprudenza civile commentata*, II, 215 (2014).

[12] Perspective suggested by O. Clarizia, n 8 above, 210.

[13] Among the supporters of this theory, see G. Grisi, 'L'inadempimento di necessità' *Jus Civile*, 215 (2014), who – at the conclusion of an articulated reasoning on the link between Art 1218 and Art 1256, para 2, Civil Code – concludes (237-238): 'Pulling the sums – and assuming that the one who shields the impossibility is the debtor, intending to provide the so-called release test – it is plausible to believe that the economic disaster linked to the effects of the crisis, where it finds support in objectively relevant and recordable data with certainty and obstructs the timely fulfilment of the obligation, may be brought by the debtor as a reason for temporary fulfilment impossibility and therefore justify the delay in the performance. Such conclusion is allowed by Art 1256, para 2, Civil Code, which excludes, as long as the impossibility persists, the debtor's liability as to the delay in the performance of the benefit'.

with contractual self-defence in a twofold sense. It may paralyze it altogether (when the suspension of the service to the non-performing debtor directly and irreparably impinges on his primary right or constitutional interest). On the other hand, it may introduce into it a series of procedural and/or substantial limitations, imposing, for its own exercise, the adoption of certain modalities in the interest of the weak counterparty (warnings, partial suspensions of the performance and so on).

Since we are speaking of essential services and fundamental rights, the suspension must be carried out in such a way as to enable the user to minimize the damaging consequences that result from the interruption of the service (for example, giving a proper notice before suspension, during which the user still has the opportunity to regularize his position; avoiding the use of the total suspension, preferring the partial one, etc). Otherwise, recourse to *exceptio* cannot be considered legitimate (with the consequence that the behaviour of the excipient creditor deserves to be treated as a normal failure). In a different and more convincing example, the use of the exception, in cases in which it engenders a primary right, may be contrary to 'reasonableness'[14] if, in the present case, the debtor, even if non-performing, has lost an asset necessary to the fulfilment of a constitutional position.

Positive law, in this sense, provides some specific indications, if, for example, the contract can be included in the administration type, Art 1565 Civil Code can be used, establishing a specific exception of non-performance: the administering party who wishes to suspend the execution must give reasonable notice in case of minor non-performance. For more serious non-performance, however, the test of good faith is necessary, paying heed to the above discussion on the protection of the impact on the user of the suspension of the asset-service supplied.

If we would accept the readings that bestow to good faith a perhaps improper parameter role for a validity judgment of the contractual clauses, a contractual clause that would allow the service provider a too large possibility of suspending it, might be affected by nullity. It may also be because it is likely to cause a significant regulatory imbalance for the user, which would surely be contrary to good faith (Art 33, para 1, decreto legislativo 6 September 2005 no 206). But in any case, such a clause seems to be axially incompatible with fundamental values of the law, legitimizing the creditor to dispose of unavailable and primary goods

[14] Here we should recall the analysis by G. Perlingieri, n 4 above, in terms of content identification and parameters of reasoned judgment. In summary, if it also consists in 'an axially-oriented interpretation of any provision or of a legally relevant matter in such a way as to make it compliant with the legal system of reference and its principles' (137) and if it is distinct from the judgment of proportionality (because 'a proportionate remedy, similar to a prohibition or restriction, may be unreasonable and incongruous to the interests involved in the concrete case' (138-140)), it seems to me that the exception of non-performance, if used against a debtor whose interest to qualify for a suspended performance may qualify as constitutional, may be economically proportionate but constitutionally unreasonable.

and interests belonging to the debtor through the exception of non-performance.

Not being worth the opposite, because the consumer-user, as already mentioned, must be able to exercise the exception of non-performance without suffering excessive restrictions imposed by contract general terms and conditions or by individual contractual clauses, which may be affected by nullity according to Art 33, para 2, letter r), decreto legislativo 6 September 2005 no 206. Being operative also for the exception opposed by the consumer or the user, of course, the necessary compliance with the good faith/proportionality imposed by Art 1460, para 2, Civil Code which prevents the consumer-user from abusing, in his turn, this remedy against the strong part of the contract.

In short, in order to draw some concise conclusion, good faith alone does not control the exercise of the exception of non-performance.[15] It must take into account all the possible effects which the suspension of the benefit has on the debtor, since it is inconceivable that the protection of the mere patrimonial interest in the performance of the benefit may result in the infringement of the interest and of hierarchically superior rights to the law of contractual constraint (which would lead to some sort of abuse of credit law).

This opens up, of course, a far more complex perspective than this brief sketch could offer. A calibrated assessment of concrete cases can indicate the right way to set conflicting interests, with a balancing judgment built on appropriate parameters. Where there is a primary interest of the debtor to the benefit of the service, it may be suspended and, in cases where the suspension cannot be made *tout court*, it can only be carried out in such a manner as to exclude an unreasonable sacrifice of the debtor's interest in his enjoyment.[16] It is, moreover, a complex judgment which must follow from the appraisal of the 'primary' nature of the interest that the goods or services to which the contract relates are intended to satisfy. As is further demonstrated by the Colombian case-law mentioned above, it must pass through the investigation of the economic capacity of the defaulted person, the seriousness of his negligence, the possible alternatives of obtaining the same good, the nature of the activity exercised by the non-personally-defaulting person,[17] and so on.

[15] On the insufficiency of good faith to solve the problems of implementation of contracts of social significance deserves to be shared the observations by S. Mazzamuto, 'Libertà contrattuale e utilità sociale', in C. Salvi ed, *Diritto civile e principi costituzionali europei e italiani* (Torino: Giappichelli, 2012), 200-201.

[16] In these cases, the excipient, in addition to the provisions of the contracts governing its service, must take the necessary precautions in the silence of the law to prevent the suspension of its performance from causing an irreversible injury to a right of the debtor's primary rank. In the event of a dispute, the judge may examine whether the conduct of the excipient has been proportionate to the principal interest of the debtor, having to recognize otherwise that the exception was raised in a way, so to speak, constitutionally illegitimate.

[17] In the fields of gas and electricity, users, so-called not negligible were identified with AEEG resolution; lacking, in the state, analogous identification in the case of water.

III. Final Considerations

Good faith can no longer be sufficient to guide the application of the exception of non-performance when, as stated in this article, the suspension of the performance of a contract may determine prejudicial effects on a higher right of the defaulting debtor in comparison to the one of the creditor. Regulators in the special areas certainly help to make it clear, in order to prevent the weak from using the tools of protection in an unlawful way to cover his unjustified late payments thus ending with excessively penalizing suppliers.[18] Beyond these interventions, however, the problem of the exercise of the exception of non-performance remains open when the debtor has a constitutionally significant interest in the continuity of the enjoyment of a given performance. And, in the absence of a special discipline or of a private self-regulation[19] compatible with the framework of values in the field, the interpreter[20] (and Colombian experience shows that this can be done) has to compose the interests involved. It must be borne in mind that it it is possible to rely on the Constitution 'as protection of our rights, as a limit to the exaggeration of any power, whether public or private (...)'.[21] The exception of non-performance is also a power:[22] judges,[23] in the

[18] On the point see A. D'Adda, n 3 above, 845, 871 (with particular reference to the so-called compensation system for the end user's morosity); useful also G. Bellantuono, 'Contratti dell'energia: mercato al dettaglio, fonti rinnovabili', in V. Roppo and A.M. Benedetti eds, *Trattato dei Contratti*, V, *Mercati regolati* (Milano: Giuffrè, 2014), 1321. On the problems posed by legislation produced by independent authorities (including those referring to constitutionality control) see M. Angelone, *Autorità indipendenti e eteroregolamentazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 2012), 158, 202.

[19] When, for example, the essential service is provided by a public entity, entirely or partially, or by a person who is also a private custodian of a public service, the suspension regulation in the event of non-performance may be identified in particular self-regulatory sources such as, for example, service cards or service contracts. On the nature of these acts and their regulatory potential see G. Carapezza Figlia, 'I rapporti di utenza dei servizi pubblici tra autonomia negoziale e sussidiarietà orizzontale' *Rassegna di diritto civile*, 440 (2017).

[20] For example, the suspension of water supply in the event of non-performance by the user, in the absence of a specific discipline, may be made compatible with the right to continuity in the enjoyment of the good-water. On the point, see A.M. Benedetti, 'I contratti dell'acqua', in V. Roppo and A.M. Benedetti eds, *Trattato dei Contratti*, V, *Mercati regolati* n 18 above, 1429-1430.

[21] Words by M. Fioravanti, *Pubblico e privato. I principi fondamentali della Costituzione* (Napoli: Editoriale Scientifica, 2014), 51. But see also P. Perlingieri, 'Il principio di legalità nel diritto civile', in Id, *Interpretazione e legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2012), 183 (especially in the part where he highlights the need that constitutional legality uniforms to any act of private autonomy, and, by dropping this statement into our problem, also the acts of concrete exercise of a remedy/power intended to safeguard the contractual reciprocity).

[22] According to I. Pagni, 'Contratto e processo', in V. Roppo ed, *Trattato del Contratto*, VI, *Interferenze* (Milano: Giuffrè, 2006), 821, 886, the exception of non-performance is 'an expression of a substantial power which does not need to have a prior judicial assessment in order to manifest its effects (...)'. See also S. Romano, 'Vendita – Contratto estimatorio', in G. Grosso and F. Santoro-Passarelli eds, *Trattato di diritto civile* (Milano: Vallardi, 1960), V-I, 253-254 (according to which self-defence expresses itself in the power to rely on the functions of defence of the contractual relationship, both under judicial control and in direct form).

[23] But also independent authorities which should control some sectors of the market: see

absence of specific disciplines, are arbiters not only of the correct exercise of such power, but also its fair and reasonable use.[24]

the decision held by Autorità Garante della Concorrenza e del Mercato 12 March 2000 no 19618 (which sanctioned a regulator of water services for interrupting the supply to defaulting users without prior information and consequent term to remedy the situation of arrears).

[24] In France, the issue has been raised with reference to public service contracts and to the limitations here faced by the exception of non-performance opposed to the user: see C. Chabas, *L'inexécution licite du contrat* (Paris: LCDJ, 2002), 333-334.